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Enacted Legislative Findings and the Deference Problem

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Enacted Legislative Findings and the Deference Problem

DANIEL A. CRANE*

The constitutionality of federal legislation sometimes turns on the presence and sufficiency of congressional findings of predicate facts, such as the effects of conduct on interstate commerce, state discrimination justifying the abrogation of sovereign immunity, or market failures justifying intrusions on free speech. Sometimes a congressional committee makes these findings in legislative history. Other times, Congress recites its findings in a statutory preamble, thus enacting its findings as law. Surprisingly, the Supreme Court has not distinguished between enacted and unenacted findings in deciding how much deference to accord congressional findings. This is striking because the difference between enactedness and unenactedness is so vigorously contested on questions of statutory interpretation, with textualists objecting to any reliance on legislative history and even purposivists conceding some risks. Both formal and functional considerations suggest that the enactedness line should be significant for constitutional questions as well. This is not because Congress has some comparative advantage in finding legislative facts more reliably than other governmental institutions, which is pervasively assumed but unrealistic. Rather, Congress's strongest claim for judicial deference is that legislative findings are highly normative and hence squarely within the legislative power. Recognizing this characteristic of modern fact-finding clarifies and strengthens the claim for deference—but only as to findings satisfying the constitutional requirements of bicameralism and presentment.

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* Associate Dean for Faculty and Research, Frederick Paul Furth, Sr. Professor of Law, University of Michigan Law School. © 2014, Daniel A. Crane. I benefited greatly from presentations of earlier drafts at the University of Michigan and Vanderbilt University and from conversations with Nicholas Bagley, Lisa Bressman, Joan Larsen, Julian Mortenson, and Kevin Stack.
Theorists of statutory interpretation fiercely contest whether judges may legitimately rely on legislative history when interpreting statutes. Textualists argue that resort to legislative history distorts the role of Congress in enacting law, subverts rule-of-law values, and may even be unconstitutional. Purposiv-
ists\(^3\) deny that the Constitution prohibits resort to legislative history\(^4\) and assert that such inquiry sometimes improves interpretation of ambiguous statutes by better honoring Congress's purposes.\(^5\) These debates are heated. Justice Scalia and Judge Posner recently came to proverbial blows over Posner's assertion that Scalia violated his textualist ideology in relying on the Second Amendment's legislative history in \textit{District of Columbia v. Heller}.\(^6\)

Given the ferocity of this debate over the use of legislative history, it is notable that the federal judiciary raises virtually no issue over the use of legislative history in another context. Increasingly in recent years, the Supreme Court has held that the constitutionality of a federal statute sometimes depends on whether Congress has made findings of fact sufficient to provide a basis for the statutory enactment.\(^7\) Responding to the increasing importance of factual findings to constitutional validity, Congress increasingly makes such findings in the course of enacting statutes. But it does not uniformly do so in the statutory text. Often, the relevant findings are contained only in legislative history—usually in a House or Senate committee report. As such, the factual findings fail to satisfy the constitutional bicameralism and presentment criteria—the requirements that to become law a bill must pass both houses of Congress and be presented to the President for signature—thought to be so important in the statutory-interpretation context.\(^8\) Nonetheless, in deciding on constitutionality, as opposed to interpretation, the courts seem to pay little, if any, attention to whether the relevant congressional findings are enacted or unenacted. Congressional findings seem to carry equal weight when they appear in a statute and when they appear in legislative history.

\(^{1833, 1896\text{ (1998)}}\) ("The extreme volume and heterogeneity of legislative history interact with structural constraints of the adjudicative process in ways that make courts systematically prone to mishandle legislative history and that accordingly create distinctive risks of adjudicative error.").

\(^3\) On the "textualist" and "purposivist" terminology, see Michael C. Dorf. \textit{Foreword: The Limits of Socratic Deliberation.} 112 \textit{Harv. L. Rev.} 4, 4 (1998) ("The Court's textualists aim to discover the original public meaning of federal statutes and the Constitution, while purposivists treat authoritative text as a starting point for the inference of legislative purposes that can be applied to concrete questions not expressly addressed by the text.").


\(^7\) See infra text accompanying notes 16, 18–22.

\(^8\) See Manning, \textit{supra} note 2, at 738–39 (examining the importance of bicameralism and presentment requirements in the context of legislative history).
The curious phenomenon of judicial indifference to the enactedness or unenactedness of legislative factual findings has not passed entirely unnoticed, but it has never been fully explored, explained, critiqued, and confronted. This Article seeks to provide a comprehensive and critical analysis of this phenomenon. To that end, it begins with a tentative claim that the significance of the line between enactedness and unenactedness should presumptively extend to questions of constitutionality. After all, if the views of some members of Congress, not ratified by both houses of Congress or presented to the President, are entitled to no or relatively little weight for purposes of statutory interpretation because they are not the law, then factual assertions by merely some members of Congress also should be entitled to no or relatively little weight for purposes of constitutional review.

There are many possible answers to this tentative claim. This Article seeks to muster the most plausible ones and evaluate their strength. For heuristic purposes, it classifies possible objections into two baskets—formal and functional.

The formal objections are mostly derivations of the familiar fact–law distinction that is so fundamental to jurisprudence and adjudication. In a nutshell, the objections in this category reflect a view that facts and law necessarily exist in separate domains—that facts are things objectively true in the world, whereas law is an artificial human creation. Consequently, Congress cannot legislate facts into existence. Facts undergo no mystical transubstantiation when they pass the twin gauntlets of bicameralism and presentment; therefore, those gauntlets should have no relevance when evaluating judges' reliance on legislative findings.

These formal objections are insufficient to justify erasure of the enactedness–unenactedness line when determining the weight courts should accord congressional findings. Even if Congress cannot transform facts into law, conventional appellate norms require reviewing courts to give greater deference to facts found through more elaborate procedural mechanisms than to those found through less elaborate mechanisms. More fundamentally, it is far from clear why facts enacted in a statute should not be accorded the formal dignity of law. Although Congress cannot transform untruth into truth by legislation, the

9. See William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 STAN. L. REV. 87, 158 (2001) (arguing that if the courts want to review the legislative record, they should confine such review to enacted findings); John F. Manning, Putting Legislative History to a Vote: A Response to Professor Siegel, 53 VAND. L. REV. 1529, 1541 (2000) (suggesting that legislative history should be enacted as part of statutory texts if courts are to rely on it); Note, Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation, 116 HARV. L. REV. 1798, 1808 n.70 (2003) ("Perhaps if Congress enacted findings regarding the constitutional basis for its decisions, bicameralism and presentment would suffice to support the decisions' majoritarian legitimacy. However, Congress rarely, if ever, enacts findings of this sort.").


11. See infra text accompanying notes 71–76.
claim that certain facts have passed into law is not ontological or epistemological but rather is grounded in comparative institutional advantage and democratic legitimacy. Nor would recognizing enacted facts as law deprive courts of the power to invalidate statutes because courts could continue to override factual assertions by Congress under their ordinary powers of judicial review. If the formal objections to the tentative claim are weak, three functional objections are somewhat stronger, although ultimately unsatisfying. First, one might object that the processes through which factual findings pass from legislative history into statutory enactment—essentially, reconciliation in conference between the houses of Congress, floor vote, presentment to the President, and potential veto override—do not increase the reliability of factual findings. Probabilistically, it is not the case that a finding of $X$ is more likely to be true when it passes the gauntlets of bicameralism and presentment than when it is merely asserted in a committee report. This reliability claim is largely correct, but its force depends on the assumption that courts should defer to congressional fact-finding because of its comparative reliability. As argued later in this Article, that assumption is widely held but unrealistic.

The second functional objection is that courts review congressional findings of fact not so much to discover whether a state of the world supports the exercise of congressional power but to determine whether Congress has acted for an impermissible reason. But although this may be a realistic description of some instances of judicial review, it is far from sufficient to explain the entire practice of judicial reliance on congressional findings of fact. Nor does it erase the importance of the enactedness–unenactedness line. A motivation expressed through a vote by both houses of Congress and ratified by the President more authentically represents legislative motivation than a statement reflected in mere legislative history.

A third functional claim is that the Supreme Court’s insistence on factual findings is not grounded in a belief that Congress is a better fact-finder than courts but in an increased willingness to defer to Congress in close constitutional cases when Congress has engaged in intensive deliberation on a question. In this view, the presence of legislative fact-finding is positively correlated with instances where Congress has seriously engaged a question and negatively correlated with instances where Congress has legislated on the fly. One might conclude from this premise that courts should defer to congressional findings that evidence meaningful legislative deliberation regardless of the form (enacted or unenacted) in which those findings are presented. But legislative-process considerations militate in favor of observing the enactedness line on questions of constitutionality and on questions of interpretation. Privileging stray factual assertions in committee reports encourages the same sort of legislative gamesmanship that has triggered the backlash against reliance on legislative history for interpretation.

This brings us back full circle to the provisional assumption, which can now be asserted with greater force. The core reason for observing the enactedness—
unenactedness line in constitutional review is that—particularly with regard to what Kenneth Culp Davis styled legislative facts,\textsuperscript{12} in contrast to adjudicative facts—there is often a commingling of falsifiable propositions about the world and nonfalsifiable normative assertions. Thus, for example, when Congress asserts that violence against women has a substantial effect on interstate commerce, it means not merely to make the sort of empirical assertion that could be falsified through contradictory evidence but also a normative claim about how women should be able to participate in national economic life. Precisely because legislative facts are interwoven with normative, evaluative, or moral content, they deserve to be treated as propositions of law for purposes of judicial deference—but only when they are enacted as law. Conversely, legislative factual findings that do not satisfy bicameralism and presentment deserve the same weight on questions of constitutional validity as they do on those of statutory interpretation.

A final question is what overall effect judicial observation of the enactedness-unenactedness line on constitutional questions would have on the legislative process and judicial review. Would it provide a justification for yet more muscular judicial review because the Court could disregard any findings of fact not enacted in the statute? Or would it lead to greater judicial acquiescence in the congressional will because Congress would learn to pack its factual predicates into statutes more consistently? There are too many uncertain variables to predict an overall effect on judicial activism or acquiescence. Nonetheless, stressing the enactedness line could improve interactions between Congress and the courts by incentivizing Congress to stake the constitutionality of controversial statutes on concise and coherent factual assertions and inducing the courts to accord such assertions a respectful degree of deference.

The balance of this Article proceeds as follows. Part I situates legislative fact-finding and constitutional review, briefly examining the contexts in which such fact-finding is relevant and presenting evidence that courts and congressional draftsmen have largely failed to place weight on the enactedness-unenactedness line. Part II considers the formal arguments that might support erasure of the line in the constitutional-review context and rejects them as inadequate. Part III considers the functional arguments and finds that they have more purchase but are also insufficient. Part IV presents the affirmative case, grounded in the normativity of legislative facts, for according congressional fact-finding a greater degree of deference when findings are enacted than when they are not. Finally, Part V ponders the effects of a new judicial emphasis on the enactedness line in constitutional cases for outcomes in Congress and the courts, the tidiness of the U.S. Code, and feedback effects on statutory interpretation.

I. JUDICIAL AND LEGISLATIVE INDIFFERENCE TO THE DISTINCTION BETWEEN ENACTED AND UNENACTED CONGRESSIONAL FINDINGS

A. THE DOMAIN OF CONGRESSIONAL FINDINGS

Congressional findings of fact occupy an uncertain position in constitutional analysis. Under current doctrine, the constitutionality of a statute rarely depends formally on Congress having made findings sufficient to support it. The Supreme Court has repeatedly asserted that it does not require Congress to make findings of fact in order to sustain the constitutionality of a federal statute, at least “absent a special concern such as the protection of free speech.”\(^{13}\) This is true not only in the obvious contexts, such as classifications calling for rational basis review where statutes are upheld if “there is any reasonably conceivable state of facts that could provide a rational basis for the classification,”\(^{14}\) but also in areas like the Commerce Clause, where in recent decades, the Court has viewed congressional assertions of power with increasing suspicion.\(^{15}\)

On the other hand, in the last several decades, the Court has increasingly held that the presence of congressional findings is often helpful in ascertaining the constitutionality of a statute.\(^{16}\) The unadmitted corollary is that if the presence of findings can sometimes bump a statute of doubtful constitutionality over the line, the absence of findings can sometimes be damning. This has led some Justices to complain that the Court is forcing Congress to play a fact-finding role better left to the judiciary.\(^{17}\)

The Court has purported to conclude that congressional findings were important in sustaining the constitutionality of statutes in such contexts as the exercise of Congress’s powers under the Commerce Clause\(^{18}\) and Section 5 of the Fourteenth Amendment,\(^{19}\) regulations of speech trenching on First Amend-

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15. See, e.g., United States v. Lopez, 514 U.S. 549, 562–63 (1995) (“Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.”).
16. See, e.g., Raich, 545 U.S. at 21 (“While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress’ authority to legislate.”).
17. For example, Justice Powell argued in concurrence in Fullilove v. Klutznick that requiring Congress to make specific factual findings in support of every statute would “treat Congress as if it were a lower federal court” and “mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government.” 448 U.S. 448, 502–03 (1980) (Powell, J., concurring).
ment values,\textsuperscript{20} the funding of religious organizations,\textsuperscript{21} and authorizing searches that raise Fourth Amendment questions.\textsuperscript{22} Conversely, when invalidating statutes, the Court has sometimes pointed to congressional failure to make any or sufficient findings of fact. The case that brought to the fore the Court's sporadic affinity for findings was \textit{United States v. Lopez,} in which the Court invalidated the Gun-Free School Zones Act of 1990 as outside the federal commerce power, citing the lack of congressional findings on the effect of gun violence on interstate commerce.\textsuperscript{23} The Court has since made similar holdings in other Commerce Clause cases\textsuperscript{24} as well as cases that raise Eleventh and Fourteenth Amendment questions.\textsuperscript{25} In a number of cases, the Court has invalidated a statute on constitutional grounds and rejected congressional findings as insufficient, perhaps because congressional findings would never be sufficient to sustain such a statute\textsuperscript{26} or because the findings addressed the wrong questions or failed to provide sufficient detail.\textsuperscript{27} In \textit{Gonzales v. Carhart,} the Court rejected certain congressional findings in the Partial-Birth Abortion Ban Act because the findings were incorrect or had been superseded by subsequent events\textsuperscript{28} but nonetheless upheld the statute on other grounds.

Thus, findings of fact are double-edged swords for Congress. Their presence can support a statute's constitutionality (because Congress found X, the statute

\begin{itemize}
  \item \textsuperscript{21} \textit{Bowen v. Kendrick,} 487 U.S. 589, 617–18 (1988).
  \item \textsuperscript{22} \textit{Donovan v. Dewey,} 452 U.S. 594, 602–03 (1981).
  \item \textsuperscript{24} \textit{See, e.g., United States v. Morrison,} 529 U.S. 598, 614 (2000) (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” (quoting \textit{Lopez,} 514 U.S. at 557)).
  \item \textsuperscript{26} \textit{Cf. Citizens United v. FEC,} 558 U.S. 310, 433 (2010) (Stevens, J., concurring in part and dissenting in part) (pointing to findings in legislative history supporting restrictions on corporate political contributions pursuant to the Bipartisan Campaign Reform Act of 2002).
  \item \textsuperscript{27} \textit{Coleman v. Court of Appeals,} 132 S. Ct. 1327, 1335–38 (2012) (reviewing statutory findings under the Family Medical Leave Act and holding that Congress had not made findings about gender-discriminatory impact that would justify upholding the statute's self-care provisions under Section 5 of the Fourteenth Amendment); \textit{Bd. of Trs. of the Univ. of Ala. v. Garrett,} 531 U.S. 356, 369–72 (2001) (declining to permit abrogation of Eleventh Amendment immunity because Congress failed to make findings of irrational discrimination against the disabled by states).
  \item \textsuperscript{28} 550 U.S. 124, 165–66 (2007) (holding that congressional findings made in congressional findings but not included in the statute were insufficient to sustain the constitutionality of the Partial-Birth Abortion Ban Act, where some of the findings were incorrect and some had been superseded).
\end{itemize}
is constitutional),

their absence can be cited in invalidating a statute (because Congress did not find \( X \), the statute is unconstitutional), and their presence can even be cited as affirmative evidence for the unconstitutionality of a statute (because Congress found \( X \), the statute is unconstitutional). A recent example of these tensions appears in the Supreme Court’s landmark decision narrowly upholding the individual mandate requirement of the Affordable Care Act (ACA). Chief Justice Roberts’s tie-breaking opinion—finding the individual mandate outside of Congress’s Commerce Clause power but within its taxing power and thus ultimately constitutional—does not rely at all on congressional findings. Justice Ginsburg’s concurring opinion—arguing that the individual mandate was within the commerce power—relied extensively on Congress’s findings regarding the economic effects of uninsured patients. Dissenting from the holding that the individual mandate could be upheld as a tax, Justice Scalia also pointed to the congressional findings, noting that “several of Congress’ legislative ‘findings’ with regard to § 5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power.” Thus, for some Justices the findings supported constitutionality, for others they pointed to unconstitutionality, and for one, the tiebreaker, they apparently did not matter at all.

It may be that all of this rhetoric about the significance of congressional findings is just that—rhetoric—and that neither the presence nor the absence of findings has dispositive weight in constitutional adjudication. The Court’s increased focus on the presence, absence, and sufficiency of congressional findings may have little weight in the decision of cases and may be merely an evolving rhetorical element that, like other doctrines and forms of justification, masks the true basis of decision. Some critics view the Court’s recent emphasis on findings as something approaching a cynical ploy, noting, for example, that the conservative majority chided Congress for the absence of findings in striking down the Gun-Free School Zones Act in Lopez but then, when Congress obliged with elaborate findings supporting the Violence Against Women

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29. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) (deferring to congressional finding regarding women in the military); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31–34 (1976) (deferring to a congressional finding that X-ray evidence was not reliable for disability claims); Marshall v. United States, 414 U.S. 417, 425–30 (1974) (deferring to a congressional determination that drug addicts with two prior felony convictions were less likely to be rehabilitated).


31. Id.

32. Id. at 2611–12 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (placing weight on Congress’s numerous findings in the statute’s preamble).

33. Id. at 2652 (Scalia, J., dissenting) (placing weight on Congress’s numerous findings in the statute’s preamble).

34. See Matthew C. Stephenson, The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs, 118 Yale L.J. 2, 48 (2008) ("After the Supreme Court’s decisions in Lopez and Morrison, it is not clear whether congressional findings have any significant effect on the probability that a purported congressional exercise of the Commerce Clause power will be upheld.")
Act, dismissed the findings as insufficient in *Morrison.*\(^3^5\)

It would be a mistake, however, to characterize the Supreme Court’s recent interest in legislative findings solely based on clearly patterned conservative–liberal divides over the scope of congressional power under the Commerce Clause and Section 5 of the Fourteenth Amendment. Assertions about congressional findings have not been solely the province of conservative Justices seeking to narrow the scope of Congress’s regulatory powers. Congressional findings have played a role in decisions upholding statutes that more closely track the political preferences of the Court’s more liberal Justices (such as civil rights statutes, political-donation bans, and cable-company regulation),\(^3^6\) upholding statutes that track the political preferences of the conservatives (such as antiterrorism statutes and funding for religious organizations),\(^3^7\) and in a variety of cases (such as those involving homegrown marijuana and child pornography) with ambiguous ideological identification.\(^3^8\) In an abortion case in which the Court narrowly upheld a federal statute, Justice Kennedy’s majority opinion and Justice Ginsburg’s dissenting opinion both discredited Congress’s findings of fact.\(^3^9\) Further, unlike on other methodological issues, such as the relevance of legislative history in interpreting statutes,\(^4^0\) the Framers’ intent on the

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38. E.g., Gonzales v. Raich, 545 U.S. 1, 32-33 (2005) (finding a California statute authorizing use of medical marijuana constitutionally preempted by the Federal Controlled Substances Act).


40. See supra text accompanying notes 1-6.
meaning of the Constitution,\textsuperscript{41} or the consultation of foreign law in interpreting the Constitution,\textsuperscript{42} there is no clear line of ideological demarcation over the relevance of congressional findings. Justices on both sides of the political spectrum freely invoke the presence or absence of congressional findings without engaging in methodological contestation over the propriety of considering such findings.

Congressional findings thus occupy an uncertain position in modern constitutional jurisprudence. They are seldom required, sometimes helpful, and sometimes hurtful to the constitutionality of a statute. Justices on both sides of the political spectrum cite the presence, sufficiency, and absence of legislative findings in explaining their votes. Legislative findings are thus ubiquitous and ideologically unidentifiable properties in modern constitutional litigation.

\textbf{B. CONGRESSIONAL AND JUDICIAL INDIFFERENCE TO THE ENACTEDNESS–UNENACTEDNESS LINE}

If congressional findings are sometimes relevant to constitutional analysis, then it is important to know what counts as a congressional finding. Apart from those rare impeachment cases where Congress sits as an adjudicatory body,\textsuperscript{43} Congress has no obvious mechanisms for expressing findings of fact. Congress has extensive investigatory powers—such as issuing subpoenas and holding hearings—and these functions can result in the preparation of documents containing assertions of fact.\textsuperscript{44} But does every assertion of fact contained in a document prepared by a member of Congress constitute a finding of Congress for purposes of constitutional analysis? Or has Congress only found a fact when it has expressed that finding in a bill that has received a majority vote in both houses and has been signed by the President, or if the President vetoes the bill, that has been overridden by the requisite two-thirds supermajority?

This question has obvious resonance with contemporary debates over the role of legislative history in statutory interpretation. Textualists insist that courts should rarely, if ever, consider congressional findings or other statements in legislative history—including in official documents like committee reports—when interpreting statutes.\textsuperscript{45} They insist that courts limit their inquiry to the texts Congress has actually enacted. Purposivists would admit some use of legislative history, although continuing to recognize the primacy of the statutory


\textsuperscript{45} See supra note 2 and accompanying text.
Given that, on interpretation, the range of disagreement within the mainstream of contemporary American legal discourse falls somewhere between a flat prohibition on consulting unenacted congressional findings and a willingness to consider congressional findings sometimes, one might expect a similar range of perspectives on the consultation of congressional findings on questions of constitutionality. We thus might expect textualists to assert that only enacted congressional findings—that satisfy bicameralism and presentation—can count toward or against constitutionality and purposivists to argue that under some circumstances unenacted findings (that is, those appearing only in legislative history) could be considered. In fact, the line between enacted and unenacted legislative findings seems to be almost completely unimportant in contemporary constitutional litigation. Neither Congress nor the Supreme Court seems to consider the line significant. The practice in Congress—at least at the level of the legislative counsels’ offices—seems to be to avoid enacting findings on the theory that enacted findings just clutter statutes, and findings in committee reports are just as effective at establishing predicate facts. The House Legislative Counsel’s Manual on Drafting Style discourages legislative drafters from including findings and purposes in the text of the Act, opining that “[b]oth are matters that are more appropriately and safely dealt with in the committee report than in the bill.” Similarly, the Senate Office of the Legislative Counsel’s Legislative Drafting Manual suggests that a “section of findings may contain statements that would be more appropriate to include in a committee report” but also notes that “findings are often important to a client and may be used by a client to convey policy.”

Of course, when constitutionality is on the line, Congress will draft statutes with an eye to mustering votes on the Court, and should it perceive that enacting findings matters to the Justices, it might consider enacting more of its findings. But the Court has given Congress little incentive to care about whether factual findings are enacted or simply appear in committee reports. Justices on both sides of the ideological spectrum—both in a raw political sense and in the more contextually relevant sense of textualism and purposivism—freely discuss congressional findings without distinguishing between those that are enacted and those that are not.

In order to examine this phenomenon, imagine a two-by-two grid classifying the cases in which the Court purports to consider legislative findings in deciding

46. See supra notes 4–5 and accompanying text.
47. It is hard to even find proponents of legislative history who express their support without qualification. For example, during her confirmation hearings, Justice Ginsburg referred to her approach to legislative history as “hopeful skepticism.” Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 224 (1993).
the constitutionality of a federal statute. In each case, the Court could sustain or invalidate the statute, and in each case, the relevant legislative findings could be enacted or unenacted. A number of recent Supreme Court decisions populate each box in the grid. The Court sometimes upholds statutes based on enacted legislative findings, sometimes upholds statutes based on unenacted legislative findings, sometimes invalidates statutes holding enacted findings insufficient, and sometimes invalidates statutes holding unenacted findings

50. In some cases, there may be a question as to whether the findings are enacted or not. For example, in the Child Online Protection Act and the Child Pornography Prevention Act, Congress embedded factual findings in the public law but not in the text of the statute that appears in the U.S. Code. Instead, the findings were embedded in the Code's statutory notes, as though the findings were merely legislative history. See Ashcroft v. ACLU, 542 U.S. 656, 668, 673 (2004) (affirming a preliminary injunction against application of the Child Online Protection Act, where Congress made findings in public law but not in the statute); Ashcroft v. Free Speech Coal., 535 U.S. 234, 240, 244-45, 257-58 (2002) (invalidating portions of the Child Pornography Prevention Act, which criminalized sexual depictions of children created by computer imaging and included congressional findings in public law). Because the version of a statute appearing in the Statutes at Large and not the authoritative version of the bill, public law). Because the version of a statute appearing in the Statutes at Large and not the


53. Coleman v. Court of Appeals, 132 S. Ct. 1327, 1335-38 (2012) (reviewing statutory findings under the Family Medical Leave Act and holding that Congress had not made findings about gender-discriminatory impact that would justify upholding the statute's self-care provisions under Section 5 of the Fourteenth Amendment); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356,
insufficient. It seems to have no greater propensity to uphold a statute based on an enacted finding than an unenacted one, nor does it dismiss unenacted findings more lightly than enacted ones. Most significantly, the textualists on the Court, who otherwise pour such effort into deriding consultation of legislative history, have not made an issue of a congressional finding’s unenactedness. It is therefore unsurprising that purposivist judges, who do not have the same aversion to legislative history, have not raised the issue either.

Consider, for example, Justice O’Connor’s plurality opinion in Board of Education v. Mergens, joined in relevant part by Justices Rehnquist, White, and Blackmun. The issue was whether the Federal Equal Access Act could constitutionally require secondary schools to allow religious student groups to meet on campus like other clubs. Plaintiffs claimed that secondary students could easily be led into believing that the school itself was endorsing religious speech. The Senate Report on the Equal Access Act contained an assertion that “students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other.” The plurality relied on this finding in affirming the statute’s constitutionality, observing that given “the deference due ‘the duly enacted and carefully considered decision of a coequal and representative branch of our Government,’ we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations.”

Even the usually textualist judges have generally seemed to assume that

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369-71, 374 (2001) (declining to permit abrogation of Eleventh Amendment immunity because Congress failed to make findings of irrational discrimination by states against the disabled).
56. Id. at 231.
57. Id. at 249.
58. Id. at 250–51 (quoting S. REP. NO. 98-357, at 35 (1984)).
59. Id. at 251 (citations omitted) (quoting Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 319 (1985)).
congressional findings play the same role in constitutional analysis whether they are enacted or unenacted. Take, for example, Justice Rehnquist’s majority opinion in Board of Trustees of the University of Alabama v. Garrett, holding that Title I of the Americans with Disabilities Act could not constitutionally be applied against the states. Congress had enacted a series of statutory findings about employer discrimination against the disabled, but none of them explicitly mentioned state employers. Evidence of discrimination by states had been submitted to the Task Force on the Rights and Empowerment of Americans with Disabilities, but the task force itself made no findings with respect to state employers. Justice Rehnquist’s opinion found it significant that Congress did not incorporate any of the evidence concerning state discrimination in its legislative findings, but the opinion did not seem to find it important that the relevant findings were missing from the statute as opposed to the House and Senate reports. To the contrary, the majority cited language from the House and Senate reports concerning discrimination by private employers and concluded from those sources that Congress affirmatively rejected the assertion that states were guilty of disability-based employment discrimination. Thus, the absence of findings in legislative history was ostensibly important in finding application of the statute to the states unconstitutional.

An even more poignant example of indifference to the enactedness–unenactedness line by the Court’s textualists appears in Bartnicki v. Vopper, where the Court invalidated application of the federal wiretap act to prohibit intentional disclosure of illegally obtained communication of public importance. Justice Rehnquist filed a dissenting opinion, joined by Justices Scalia and Thomas, scolding the majority for disregarding congressional findings that disclosure of the illegally obtained information was necessary to deter illegal wiretapping. The dissenters advocated giving deference to Congress’s institutional advantage in evaluating “the vast amounts of data bearing upon complex issues” and argued against “reweigh[ing] . . . de novo” congressional findings. Significantly, all of the relevant findings of fact appeared in House and Senate reports—in mere legislative history, of which Justice Scalia has said on other occasions, “The more you use legislative history, the phonier it will become.”

63. Id.
64. Id.
65. Id. at 372 (finding House and Senate reports to be “strong evidence that Congress’ failure to mention States in its legislative findings addressing discrimination in employment reflects that body’s judgment that no pattern of unconstitutional state action had been documented”).
67. Id. at 549–50 (Rehnquist, C.J., dissenting).
68. Id. at 550.
The textualists did not stop to explain why they would find unenacted congressional findings important to sustaining the constitutionality of the statute when those findings could not be used to explain the meaning of the statute.

To point out that textualists refuse reliance on legislative history in one context and admit it in another is not to prove that textualists are inconsistent. There may be valid reasons—such as the functional considerations discussed in Part III—that relying on legislative history to interpret a statute raises different issues than relying on it to sustain the constitutionality of a statute. Of course, it could also be that the textualists are inconsistent and also wrong in two ways: first, in refusing to entertain helpful information to decipher congressional intent in cases of statutory ambiguity; and second, in demanding extensive findings from Congress in constitutional cases. But before reaching any conclusions, it is necessary to consider the kinds of justifications that explain the phenomenon of judicial indifference to the enactedness–unenactedness line in constitutional cases.

II. FORMAL CONSIDERATIONS

In examining why the enactedness–unenactedness line is observed on questions of interpretation but not on questions of constitutional validity, the obvious place to begin is with the pervasive and slippery distinction between fact and law, a distinction that has important consequences for such matters as the allocation of decision making between judges and juries and between trial judges and appellate judges.\(^7\) It may be that the line between enactedness and unenactedness matters for interpretation because congressional mandates can only become law by virtue of bicameralism and presentment but factual assertions cannot become law even if they pass bicameralism and presentment. In that case, their failure to pass those hurdles is irrelevant to questions of constitutional validity where the question is the existence of certain factual predicates.

It is doubtful that these kinds of formal considerations drive the distinction, but if they do, they should not. First, even if congressional findings forever occupy the domain of fact—whether enacted or unenacted—this is not a sufficient reason to hold enacted and unenacted facts equal. Courts routinely accord greater weight to facts found through more elaborate processes than facts found through less elaborate ones because they are more likely to be true. Second, there is no sound reason that facts enacted by Congress should not take on the formal character of law, which would then justify according greater deference to enacted facts than to unenacted ones.

A. THE FACT–LAW DISTINCTION: FACTS AS FACTS

The idea that the enactedness of statutory findings should matter in constitu-

\(^7\) On the fact–law distinction, see generally Allen & Pardo, supra note 10.
tional adjudication does not depend on a view that enacted findings—those that satisfy bicameralism and presentment—are somehow law, whereas unenacted findings are not. Enacted findings, could still be “facts” and yet be entitled to greater deference than unenacted findings because more stringent processes produced the enacted findings, and the full Congress and the President, instead of just a committee, found them to be true.

In ordinary litigation, reviewing courts purport to give greater or lesser deference to facts found by others based on the stringency and character of the processes that produced them. Courts reviewing facts found by administrative agencies in informal adjudication apply an “arbitrary and capricious” standard, unless the agency’s organic statute requires a different measure of review. The court’s “inquiry into the facts is to be searching and careful.” Courts apply a “substantial evidence” standard when reviewing factual findings by administrative agencies in formal adjudication, which requires “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” When reviewing factual findings by judges or juries, appellate courts apply a “clearly erroneous” standard. The clearly erroneous standard is, in principle at least, more deferential to the fact-finder.

73. Administrative Procedure Act, 5 U.S.C. § 706 (2012) (stating that a “reviewing court shall... hold unlawful and set aside agency... findings... found to be... unsupported by substantial evidence”); see also NLRB v. Brown, 380 U.S. 278, 292 (1965) (“[D]ue deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole.”); O’Leary v. Brown-Pacific-Maxon, Inc. 340 U.S. 504, 508 (1951) (“[F]indings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.”); NLRB v. Crompton-Highland Mills, Inc. 337 U.S. 217, 220 (1949) (“[F]indings [of fact] are binding upon [reviewing courts] to the extent that they are sustained by substantial evidence.”); 73A C.J.S. Public Administrative Law and Procedure §§ 444–48 (2013).
75. Fed. R. Civ. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”).
76. In Dickinson v. Zurko, the Supreme Court stated:

This Court has described the APA court/agency “substantial evidence” standard as requiring a court to ask whether a “reasonable mind might accept” a particular evidentiary record as “adequate to support a conclusion.” It has described the court/court “clearly erroneous” standard in terms of whether a reviewing judge has a “definite and firm conviction” that an error has been committed. And it has suggested that the former is somewhat less strict than the latter.

527 U.S. 150, 162 (1999) (citations omitted) (quoting Consol. Edison Co. of N.Y., 305 U.S. at 229; U.S. Gypsum Co., 333 U.S. at 395); see also Noriega-Perez v. United States, 179 F.3d 1166, 1176 (9th Cir. 1999) (stating that substantial evidence review “is less deferential than the ‘clearly erroneous’ standard”).
In practice, the difference between these standards of review may be more semantic than real, although in some cases, the specification of the standard of review will make a difference. The important point for present purposes is that the degree of formal judicial deference to fact-finding depends on the nature of the fact-finding. Facts that have passed more stringent procedural gauntlets, such as the notice and opportunity to be heard required in formal adjudication in administrative procedures or cross-examination and the rules of evidence in civil litigation, are accorded formally greater weight. Enacted factual assertions by Congress that have passed formal gauntlets—bicameralism and presentment—might also be accorded greater weight in judicial analysis than unenacted findings that have not passed those gauntlets.

Indeed, from a formal perspective, factual assertions in committee reports or other legislative history arguably should not count as findings of Congress at all. Because Congress can only act in a legislative capacity through the constitutionally specified means of bicameralism and presentment, Congress itself has not found anything when a House or Senate report contains an assertion of fact, just as Congress itself has not acted legislatively when merely one house disapproves executive action. It is odd to hear the textualist dissenters in Bartnicki complain that the majority has improperly “reweighed” the findings of Congress.

77. See Cataj v. Gonzales, 140 F. App’x 600, 605 (6th Cir. 2005) (“The outcome would be the same whether the evidence was reviewed under the clearly erroneous or the substantial evidence standard.”); Menendez-Donis v. Ashcroft, 360 F.3d 915, 918 (8th Cir. 2004) (“Under the clearly erroneous standard, we can overturn factual findings that we conclude are clearly wrong even though they are not unreasonable. In contrast, under the substantial evidence standard we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is clearly wrong.”); J.N. Moser Trucking, Inc. v. U.S. Dep’t of Labor, 306 F. Supp. 2d 774, 782 n.10 (N.D. Ill. 2004) (noting that the clearly erroneous standard demands closer judicial scrutiny than the substantial evidence standard); Roberson v. Principi, 17 Vet. App. 135, 146 (2003) (“While conventional wisdom says that an agency is to receive less deference under the ‘clearly erroneous’ formula, the distinction may be more theoretical than practical.”); Pierce, supra note 71, at 84–86 (summarizing literature suggesting that the formal standard of review is not a significant factor in judicial deference in the review of fact-finding); Peter L. Strauss, Overseers or “The Deciders”—The Courts in Administrative Law, 75 U. Chi. L. Rev. 815, 822–23 (2008) (discussing the difficulty of finding practical differences between clearly erroneous review and substantial evidence review); Paul R. Verkuil, An Outcomes Analysis of Scope of Review Standards, 44 WM. & MARY L. REV. 679, 688 (2002) (showing that clearly erroneous and substantial evidence review are both “middle standards” and result in similar outcomes).

78. In Zurko, the Supreme Court, discussing the distinction between the substantial evidence and clearly erroneous standards of review, noted that it had “failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.” 527 U.S. at 162–63. The Sixth Circuit has also stated:

All cases that require reversal under the “compelled to conclude to the contrary” substantial evidence standard also require reversal under the clearly erroneous standard. Most cases that require affirmation under the substantial evidence standard also require affirmation under the clearly erroneous standard. In a small subset of cases, however, a case that requires reversal under the clearly erroneous standard might still require affirmation under the “compelled to conclude to the contrary” substantial evidence standard.

Sarr v. Gonzales, 127 F. App’x 815. 819 n.2 (6th Cir. 2005).


when the relevant findings were merely those of congressional committees and not those of the legislature itself.\textsuperscript{81} When speaking of interpretation, Justice Scalia has complained that it is "naïve" and incorrect to refer to statements in a committee report as the expressions of Congress itself.\textsuperscript{82} If a committee report is not the "view of Congress" when it comes to the interpretation of a statute, how can it become the view of Congress for purposes of examining the constitutionality of a statute?

\textbf{B. THE FACT–LAW DISTINCTION: FACTS AS LAWS}

When Congress embeds enumerated factual findings in a statute, it makes them formally part of the statute. The act begins with a title, which is itself part of the statute, followed by an enacting clause and any findings of fact.\textsuperscript{84} The Supreme Court has recognized that enacted congressional findings "are a part of the statute."\textsuperscript{85}

Nonetheless, it is uncertain whether enacted findings have the force of law. In a Fourth Circuit decision upholding the Violence Against Women Act (VAWA), which was ultimately reversed by an en banc court and the Supreme Court in \textit{Morrison}, the two-judge majority noted that the original text of the bill contained even more elaborate findings of fact than those ultimately embedded in the statute.\textsuperscript{86} The panel explained that these findings "were removed to the conference report only to avoid cluttering the \textit{U.S. Code} with 'congressional findings that had no force of law.'"\textsuperscript{87}

Why should part of an enacted statute have "no force of law"? One could

\textsuperscript{82} Zedner v. United States, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in part and concurring in the judgment). In \textit{Zedner}, Justice Scalia stated:

\begin{quote}
To begin with, it accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole—so that we sometimes even will say (when referring to a floor statement and committee report) that "Congress has expressed" thus-and-so. There is no basis either in law or in reality for this naïve belief.
\end{quote}

\textit{Id.} (citation omitted) (quoting Conroy v. Aniskoff, 507 U.S. 511, 516–17 (1993)).

\textsuperscript{83} Early decisions stating that a title is "no part of a statute," Patterson v. Eudora, 190 U.S. 169, 172 (1903), have been superseded by statements to the effect that the title is part of the statute but cannot override the operative portions of the statute. United States v. Spears, 697 F.3d 592, 597 (7th Cir. 2012),


\textsuperscript{87} \textit{Id.} (citing David Frazee, Ann M. Neal & Andrea Brunner, \textit{Violence Against Women: Law and Litigation} § 5:40 (1997)). The panel added:

\begin{quote}
VAWA, of course, was enacted before \textit{Lopez}, when the necessity of expressly finding that regulated activity had a "substantial effect" upon commerce (rather than just an "effect") was not altogether clear. Thus, it is particularly telling that in passing VAWA Congress found that gender-based violence against women does "substantially affect" interstate commerce.
\end{quote}

\textit{Id.}
give a number of answers, all hearkening back to the fact–law distinction. None of them are satisfying.

First, one might lodge an essentialist objection to the effect that the categories of fact and law are necessarily and logically distinct and, hence, that an assertion in the domain of fact is inherently incapable of becoming law. In this view, law is the artificial creation of human institutions, whereas facts are things that are true in the world. Congress has no power to change the truth of fact through enactment. If the sky is blue, it does not become green no matter how many times Congress may find in a statute that it is.

Although assertions do not become true just because Congress says they are true, it makes little sense to think of the line between fact and law as epistemological or ontological. No process of fact determination in the political or legal sphere makes facts true in the world. At most, judicial and political processes can make assertions of fact conclusive for purposes of a particular legal or political function. When a jury finds the defendant guilty of a crime and the highest reviewing court finds the jury’s determination not clearly erroneous, the fact of the defendant’s guilt is conclusively established for purposes of the litigation. But of course, the defendant may not have committed the crime.

By the same token, Congress could enact facts as law, thus making the facts conclusive for litigation purposes without entailing any epistemological claim that the facts are necessarily true in the world. Indeed, legislatures commonly enact conclusive or irrebuttable presumptions that have the effect of establishing facts in litigation beyond disputation. It would not violate any established legal convention to hold that facts enacted in a statute are conclusive because they have passed into the domain of law and thus achieved an impregnability from challenge, regardless of whether they are in fact true in the world.


Propositions of law are not true in virtue of criteria specified by the rule of recognition. The forms of argument—the grammar of legal justification—are the means by which the truth of legal propositions is shown. There are no legal truths—no true propositions of law—outside these forms of argument. This is why the positivist’s criterial test of legal truth misses the mark. Propositions of law are not true in virtue of anything; not social facts, legislative facts, nor facts of past institutional decisions (e.g., prior judicial decisions).

Id. (quoting Patterson, supra, at 67–68).

89. See Allen & Pardo, supra note 10, at 1770–71 (arguing that the line between fact and law is not ontological or epistemological but rather functional).

90. See Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 234 (1985) (arguing that the distinction between fact and law depends not on a “properly affixed characterization” but rather on “other factors, such as the nature of the substantive issue and the character of the decisionmakers”).

This raises a second potential objection to thinking of enacted legislative findings as law—that such a principle would permit Congress to circumvent judicial review by embedding questionable assertions of fact into a statute.\(^9\)

The Supreme Court has long asserted that it "retains an independent constitutional duty to review factual findings where constitutional rights are at stake."\(^9\)

If thinking of factual findings in a statute as law meant that those factual assertions would become impervious to judicial review, even in constitutional cases, that would effectuate a dramatic power shift from the courts to Congress.

But treating enacted findings as law and hence "conclusive" need not preclude judicial review. The courts routinely strike down statutes as unconstitutional and could similarly strike down facts in the course of reviewing statutes. Indeed, they already do. Courts strike down conclusive statutory presumptions of fact when they violate constitutional principles, for example, by classifying people based on impermissible considerations.\(^9\)

And the courts sometimes hold that facts found by Congress are unfounded or erroneous.\(^9\)

To say that a fact has the dignity of law is not to say that it is immune from judicial review, although it might be entitled to greater deference from courts than other kinds of assertions by Congress, such as legislative history or assertions made in litigation briefs.

A final formal objection to enacted findings having the force of law might be that finding facts is not within "the legislative power," as granted to Congress by Article I of the Constitution or the Fourteenth Amendment.\(^9\)

Such an argument would have to rely heavily on an unworkable ontological conception of the fact–law divide,\(^9\) one not likely shared by the Framers of the Constitution. In at least one conspicuous place, the Second Amendment, the Framers embedded an assertion of fact in a legislative document, presumably intending it to have some effect in law. The Amendment's preamble states: "A well regulated Militia, being necessary to the security of a free State."\(^9\)

That statement is, unavoidably in an ontological sense, an assertion of fact—a claim about something that could be, or not be, true in the world. One might believe that the assertion was true in 1789 but no longer true today, that it was not true in 1789 but is true today, that it was never true, or that it was and remains true.

\(^9\) See Devins, supra note 44, at 1169 ("Supreme Court decisionmaking treats the line separating law from fact as consequential, often outcome-determinative.").

\(^9\) Gonzales v. Carhart, 550 U.S. 124, 165 (2007); Crowell v. Benson, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").


\(^9\) E.g., Carhart, 550 U.S. at 165–66.

\(^9\) See, e.g., Saikrishna Prakash, A Comment on Congressional Enforcement, 32 IND. L. REV. 193, 207 (1998) (arguing that the Fourteenth Amendment grants Congress the power to make laws, "not an exceptional ability to find facts").

\(^9\) See supra text accompanying notes 89–90.

\(^9\) U.S. Const. amend. II.
That the statement may not be scientifically falsifiable does not deprive it of an essentially factual character any more than that any number of contemporary congressional findings may not be subject to empirical demonstration and yet remain assertions of fact. 99

To show that the Framers embedded an assertion of fact in a legislative instrument falls short of showing that the Framers intended the assertion to have legal effect. But in debating the role of the Second Amendment's preamble in *Heller*, all nine Justices agreed that the preamble should be given *some* legal effect, which undermines any claim that factual assertions are incapable of being enacted into law. Relying on an eighteenth-century English precedent, Justice Scalia's majority opinion argued that the preamble should play a confirmatory or ambiguity-breaking role but that it should not be permitted to alter the scope of the operative provision. 100 This holding relegates the prologue's finding of fact to an inferior status compared to the operative section but squarely includes the factual assertion as a working part of the constitutional provision. The Justices in the majority in *Heller* surely would not join an opinion that admitted that the Second Amendment granted an individual right to bear arms in 1789 but that the passage of years had eroded the validity of the factual predicate and hence the operation of the Amendment. Justice Stevens’s dissenting opinion accused the majority of violating the principle that every clause in a statute must be given effect, 101 which even more strongly accords the factual assertion the dignity of operative law. There is no originalist reason to exclude embedding factual assertions in law from a formal conception of the legislative power.

If enacted congressional findings become part of the statute and bear the force of law, the formal case for according enacted findings a higher level of deference than unenacted ones becomes clear. If a factual assertion in a statute would be sufficient to sustain the statute's constitutionality, then a reviewing court would need to invalidate the factual predicate itself in order to invalidate the statute. That is not conceptually difficult as a formal matter. It simply requires specifying the level of deference owed to legally enacted facts—perhaps something akin to the presumption of constitutionality that attends every statute 102—and deciding whether a fact found by Congress is sufficiently

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99. See infra section IV.A. I distinguish here between facts that can be subjected to falsification in a Popperian sense, see generally KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959), and assertions that cannot be falsified and yet describe things that could be true or untrue in the world.


101. Id. at 643 (Stevens, J., dissenting) ("The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for '[i]t cannot be presumed that any clause in the constitution is intended to be without effect." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803))).

102. E.g., United States v. Morrison, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").
robust given contending sources of evidence. Unenacted findings, which clearly
do not have the force of law, merit no presumption of regularity or correctness.

III. FUNCTIONAL CONSIDERATIONS

The previous section examined the likely formalist reasons for disregarding
the enactedness–unenactedness distinction on questions of statutory constitution-
ality and found them lacking. But formalist conceptions probably do not drive
the status quo in Congress or the courts (which, as shown in section I.B, is to
place no greater weight on enacted findings than on unenacted ones). Although
objections to the use of legislative history on matters of statutory interpretation
are often styled as formalist,103 functional and pragmatic arguments arguably
play a more significant role.104 Textualists argue that legislative history fails to
reflect the true view of Congress as a whole,105 that it empowers judges to “pick
their friends out of the crowd,”106 that it increases costs of litigation and legal
counseling,107 and that it creates perverse incentives to paper the legislative
record with favored characterizations of the bill rather than fighting to enact
one’s views in the statute itself.108 By the same token, the absence of complaints
on either side of the ideological spectrum about reliance on unenacted findings
during constitutional review probably reflects shared functionalist assumptions
about the reasons that congressional findings matter for purposes of constitu-
tional review.

This Part examines three leading arguments about why congressional findings
of fact should matter to constitutional review: (1) Congress has a comparative

103. See, e.g., Mariano-Florentino Cuéllar, Earmarking Earmarking, 49 HARV. J. ON LEXIS 249, 283
(2012) (describing Justice Scalia’s objection to the interpretive use of legislative history as “formalist”);
Anita S. Krishnakumar, The Anti-messiness Principle in Statutory Interpretation, 87 NOTRE DAME L.
104. See John F. Manning, The New Purposivism, 2011 SUP. CT. REV. 113, 123–24 (observing that
“new textualists object to the use of legislative history as a source of meaning on pragmatic and
formalist grounds”).
court) (arguing that legislative history “does not necessarily say anything about what Congress as a
whole thought”).
106. Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme
Court Term, 68 IOWA L. REV. 195, 214 (1983) (attributing the quote “looking over a crowd and picking
out your friends” to Judge Harold Leventhal).
107. SCALIA, supra note 2, at 36–37; Kenneth W. Starr, Observations About the Use of Legislative
ing that legislative committees “generate legislative history strategically at the behest of client interest
groups”). The Supreme Court has stated:

Judicial reliance on legislative materials like committee reports, which are not themselves
subject to the requirements of Article I, may give unrepresentative committee members—or,
worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt
strategic manipulations of legislative history to secure results they were unable to achieve
through the statutory text.

advantage in finding facts; (2) Congress's findings of fact reveal whether Congress has an impermissible motive; and (3) findings of fact reveal that Congress has engaged in a robust, plenary, and democracy-enhancing deliberative process. Each of these functional perspectives on congressional findings has implications for the relevance of the enactedness line.

A. RELIABILITY

Why should a court ever defer to a factual finding of Congress when reviewing the constitutionality of a statute? The leading answer, asserted by judges on both sides of the ideological spectrum, is that Congress has fact-finding capabilities that exceed those of the courts. Thus, for example, Justice Souter asserted in *Morrison* that Congress's "institutional capacity for gathering evidence and taking testimony far exceeds" that of the Supreme Court.\(^\text{109}\) In *Garrett*, Justice Breyer argued that "[u]nlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy."\(^\text{110}\) In *Bartnicki*, it was the conservatives, led by Justice Rehnquist in dissent, arguing that "as an institution, Congress is far better equipped than the judiciary to evaluate the vast amounts of data bearing upon complex issues."\(^\text{111}\) That Congress has an institutional advantage on broad fact-finding is a point of pan-ideological consensus.

If Congress's findings of fact are to receive deference because of their comparative reliability, then the question of whether greater deference should be accorded to facts asserted in a statute than to those asserted only in legislative history should depend on whether enacted factual assertions are, on average, more reliable than unenacted factual assertions. The case for enhanced reliability depends on the presence of some screen in the legislative process that strains out less reliable factual assertions as they make their way from legislative history (that is, hearings and committee reports) to the text of an act. It is doubtful whether any such screen exists and hence doubtful whether enacted findings are on average more reliable than unenacted ones.

Set aside for the moment the question of whether Congress, as a body, actually enjoys a comparative advantage in the production of knowledge through fact-finding, a question considered in section IV.A below.\(^\text{112}\) If Congress does

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111. *Bartnicki v. Vopper*, 532 U.S. 514, 550 (2001) (Rehnquist, C.J., dissenting); see also *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.").
have such an advantage, it is achieved primarily at the investigatory stage of the legislative process when Congress holds hearings, subpoenas documents and witnesses, and otherwise collects information. Those investigatory processes produce the hearing transcripts and committee reports that form the basis for the unenacted findings of fact that show up in judicial decisions. The further legislative processes that produce the final text of an enacted statute, such as floor amendments and drafting in House–Senate conferences, are not principally fact-finding processes and are therefore unlikely to enhance the reliability of congressional assertions of fact.\textsuperscript{3} For example, Neal Devins has shown that Congress paid little attention to constitutional questions during the legislative process leading to the enactment of the ACA, but Department of Justice lawyers culled eight statutory findings of fact out of the legislative record in order to buttress the statute’s constitutionality.\textsuperscript{4} The culling of the eight findings by congressional or Justice Department lawyers with an eye to litigation adds little to the reliability of the findings.

This is not to say that the process of winnowing factual assertions from the many in the legislative record to the few in a statutory text has \textit{no} implication for the reliability of the statutory findings. During negotiations over the ultimate text of a statute, congressional players may raise doubts about the accuracy of factual assertions in the legislative record. For example, if there is conflicting evidence in the House and Senate records,\textsuperscript{115} the conference reconciliation process may result in the assertion of facts on which there is consensus in the records of both houses. Or the ultimate bill’s draftspersons may play some role in testing the robustness of assertions in the legislative record, for example, by selecting for inclusion in the statutory text evidence produced by sources considered most reliable by the legislative coalition in favor of the act.

Despite these qualifications, the principal point remains a high degree of skepticism that the transition from legislative history to statute produces, on average, significantly more reliable factual assertions. To the extent that arguments for deference depend on a view that Congress has a comparative advantage over courts in fact-finding, this observation explains the indifference to the enactedness line when it comes to questions of constitutionality.

But this assumes that comparative reliability is the only reason for deferring to congressional fact-finding. Part IV of this Article challenges the view that Congress’s comparative advantage in fact-finding should animate judicial defer-

provide generally reliable quality control on Congress’s scientific fact-finding”). See generally Devins, supra note 44, at 1178–79 (outlining traditional arguments that Congress has a comparative advantage in fact-finding).


\textsuperscript{114} See, \textit{e.g.}, Neal Devins, \textit{Party Polarization and Judicial Review: Lessons from the Affordable Care Act}, 106 Nw. U. L. Rev. 1821, 1837 & n.64 (2012).

\textsuperscript{115} See, \textit{e.g.}, Julius Cohen, \textit{Towards Realism in Legisprudence}, 59 Yale L.J. 886, 890–91 (1950) (reporting a large number of inconsistent assertions of fact in the legislative records of the Taft–Hartley Act).
ence to congressional assertions of fact and offers a different ground for deference—one that makes the enactedness–unenactedness line again important. And there are other reasons why courts might defer to congressional findings of fact, such as scrutinizing legislative motivation and promoting deliberative democracy, which have their own implications for the importance of the enactedness–unenactedness line.

B. MOTIVATION

Another reason that congressional findings of fact might count in constitutional review is that Congress’s findings reveal Congress’s motivations for adopting the statute in question. To the extent that congressional motivation or purpose plays an important role in constitutional analysis, factual findings by Congress may reveal Congress’s reasons for adopting the statute and hence facilitate judicial review. If the search for motives is an important reason for consulting congressional fact-finding, then the line between enacted and unenacted findings might be of little importance if enacted and unenacted facts are equally capable of evidencing congressional motivation. The success of such a position, however, depends upon the soundness of three contestable and non-generalizable assumptions: first, that congressional motivation is important to constitutional analysis; second, that findings contained in legislative history reliably reveal the motivations of Congress as a whole; and third, that what counts is Congress’s subjective motivations as opposed to its stated reasons.

For most of the United States’ constitutional history, judges strictly limited inquiry into legislative motivation. In the last several decades, they have begun to inquire considerably more into legislative motivation. Assuming that inquiry into legislative motivation is now a significant part of constitutional analysis—not just in obvious areas like gender or religious classifications where legislative motivation has long been at issue but also in areas like the Commerce Clause where the Supreme Court’s landmark opinions have denied the relevance of legislative motivation—then perhaps factual findings play an important role because of what they show about Congress’s motivation. Findings that suggest that Congress acted for permissible reasons support constitutionality, whereas those that suggest animus toward protected classes, stigmatizing stereotypes, viewpoint discrimination, or efforts to aggrandize Congress’s role

117. See, e.g., Seinfeld, supra note 35, at 1324–27.
118. Nelson, supra note 116, at 1879; see also David L. Franklin, Facial Challenges, Legislative Purpose, and the Commerce Clause, 92 IOWA L. REV. 41, 90–102 (2006) (arguing that a requirement of appropriate legislative purpose has crept into the Supreme Court’s Commerce Clause jurisprudence).
120. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (rejecting a claim that Congress’s true motivation in passing a civil rights statute was moral rather than commercial).
beyond its enumerated powers militate against constitutionality.

If this is all so, it raises the question of whether unenacted findings provide as much evidence of congressional motivation as enacted findings. Arguably, the enacting line should hold here as much as it does for purposes of statutory interpretation. If a stray characterization of a statutory provision in a committee report does not count—or counts only weakly—as evidence of congressional purpose during the course of statutory interpretation, then why should a stray finding of fact in a committee report count any more strongly as evidence of congressional purpose for purposes of constitutional analysis? If there is merit to the functionalist claims of textualists that legislative “losers” often sneak into legislative history positions they are unable forthrightly to secure in the bill, then a good portion of unenacted findings in committee reports or other legislative history will be nothing but efforts by political minorities not representing the dominant motivations in Congress to paper the record with their preferred characterizations of the bill. Giving weight to these stealth assertions as the purpose of Congress would erroneously attribute minority motivation to the majority.

This raises the frequently debated question of whether the “objective” or “subjective” purposes of Congress should predominate in constitutional review. As a matter of positive law, the answer is context specific; however, in many fields of law, the Supreme Court has stressed that to the extent that purposivists are relevant to constitutionality, it is the objective purpose—the vantage point of the ubiquitous “reasonable observer”—that counts. To the extent that courts stress objective rather than subjective purpose, enacted findings may be far more probative of congressional purpose than unenacted ones because findings enacted in a statute express the final and formal perspective of Congress as a whole. For example, in the Establishment Clause context, where motive is explicitly part of the legal test, at least one court has held that factual findings enacted by Congress in a public law carry significantly

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121. *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (asserting that legislative history is “losers’ history” because losers in legislative battles follow the motto, “[i]f you can’t get your proposal into the bill, at least write the legislative history to make it look as if you’d prevailed”).


123. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (holding that the purpose inquiry does not call for “any judicial psychoanalysis of a drafter’s heart of hearts” but that “[t]he eyes that look to purpose belong to an ‘objective observer,’ one who takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute.’ or comparable official act” (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000))).

greater weight in uncovering congressional purpose than do assertions of fact or purpose in legislative history.125 Assertions of fact contained in a statute more powerfully express the public motivations and purposes of Congress than those buried in legislative history.126

To sum up, in order to believe that the line between enacted and unenacted congressional findings is unimportant, one has to credit each of the following propositions: (1) the motivation of Congress is important to constitutional analysis; (2) findings contained in committee reports or other legislative history reliably reveal the motivations of a sufficient quorum of members of Congress and are not likely to be mere losers’ histories; and (3) Congress’s subjective motivations captured through glimpses into its thought processes count more than the objective explanations offered in findings of fact embedded in a statute. Each of these propositions is both contestable and nongeneralizable, which renders the ostensible conclusion—that the enactment line is unimportant—fragile as well.

C. LEGISLATIVE PROCESS REINFORCEMENT

A third functional argument about the role of legislative findings in constitutional analysis relates to the courts’ role in stimulating robust and democracy-enhancing legislative processes—what has been called “due process of lawmaking.”127 Findings of fact may be less important for their truth or reliability than as evidence that Congress has undergone a careful and searching inquiry into the relevant factual predicates to the statute.128 Philip Frickey has argued that “the approach taken in Lopez,” requiring Congress to make findings of fact in order to sustain expansive assertions of Commerce Clause power,

125. See Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 1207–10 (S.D. Cal. 2008), rev’d, 629 F.3d 1099 (9th Cir. 2011). In Trunk, the district court rejected an Establishment Clause challenge to a congressional acquisition of a veteran’s memorial with a conspicuous Latin cross. Id. Plaintiffs argued that the legislative history revealed a predominantly religious motivation for the acquisition. Id. The district court rejected this argument, largely on the grounds that Congress’s findings of fact in the public law evidenced a secular purpose. Id. In response to plaintiffs’ arguments that the findings of fact were pretextual, Judge Burns stressed that the “objective evidence” about the “motives or purposes of Congress as a whole” should be dispositive and rejected plaintiffs’ “cynical assumption that a commanding majority of the House of Representatives and the entire U.S. Senate didn’t mean what they said.” Id. at 1208–09. In reversing, the Court of Appeals agreed that Congress’s purpose was not impermissible but held that the primary effect of the cross was to advance religion. 629 F.3d at 1102.

126. Buzbee & Schapiro, supra note 9, at 158–59 (arguing that “findings also are themselves a form of legislative record that is perhaps more reliable than witnesses’ or legislators’ assertions about the state of the legislative record”).


128. Characterizing the famous footnote 4 in Carolene Products, Jack Balkin suggests that the test of the reasonableness of socioeconomic legislation “is whether Congress has held hearings, gathered evidence, made detailed findings of fact—in short, whether there are indica of a sound and considered judgment by the elected representatives of the people based upon reliable scientific information.” J. M. Balkin, The Footnote, 83 Nw. U. L. Rev. 275, 288 (1989).
"may be a plausible technique to encourage appropriate congressional procedures and consideration." 129

If congressional fact-finding supports constitutionality because it shows wholesome legislative process, then should it matter whether the findings make their way into the statute or only show up in legislative history? The answer tracks closely with the usual process-based concerns over the use of legislative history to interpret statutes. According significant weight to facts asserted in committee reports and other legislative history encourages legislative factions to focus their energies on embedding preferred factual assertions in legislative history instead of battling to build the coalitions necessary to enact their views into law. It may thus perpetuate the same culture of chicanery, evasion, and faux legislation that has animated the backlash against the use of legislative history for interpretation. 130

Consider, for example, an only partially hypothetical legislative backdrop to the ultimately dispositive issue on the individual mandate in the ACA—whether it could be fairly characterized as a tax. 131 Assume two principal factions within the Democratic Party, each favoring the individual mandate, but each anxious to characterize it in a particular way in order to play to favored constituencies. One faction is desperate to avoid any characterization of the mandate as a tax because of potential voter backlash and hence promotes the mandate solely as a regulatory measure to achieve universal coverage and improve healthcare. This faction would rather see the mandate invalidated as outside of the commerce power than wear the tax albatross ultimately hung by Chief Justice Roberts. 132 The other faction wants to secure a durable and constitutionally impervious statutory framework for an individual mandate and is not shy about characterizing the mandate as a tax penalty on shirkers and healthcare free riders. 133

Requiring that any findings used to assess constitutional validity be enacted into law prevents these two factions from playing a dubious game of asserting competing facts in legislative history, insisting to political constituencies that their version of the factual predicate is the true one, and then allowing Justice Department lawyers defending the statute to pick and choose factual predicates.


130. See Manning, supra note 108, at 1294.

131. See supra notes 30–33 and accompanying text.

132. See Devins, supra note 114, at 1829 (noting that "recognizing the political costs of raising taxes, Democratic lawmakers (and the Obama White House) ‘absolutely reject[ed]’ efforts to characterize the individual mandate as a tax" (quoting Robert Pear, Changing Stance, Administration Now Defends Insurance Mandate as a Tax, N.Y. TIMES, July 18, 2010, at A14).

133. In fact, the Obama Administration eventually came around to characterizing the individual mandate as a tax. See Pear, supra note 132.
to suit the prevailing winds in court—providing cover and plausible deniability for Members of Congress who voted for the bill. Insisting that only enacted facts count would disallow these shadow legislative games and force Congress to deliberate and decide on the factual predicates by which the statute stands or falls.

IV. CONGRESSIONAL FACT-FINDING RECONSIDERED

The preceding Part's exploration of leading functional explanations for reliance on congressional fact-finding in constitutional adjudication concluded indecisively. Reliability considerations suggest the relative unimportance of enactedness, whereas motivation and process considerations suggest some degree of importance. This Part proposes a somewhat different understanding of congressional fact-finding—one that understands assertions of fact as deeply normative. Congressional findings often commingle "is" and "ought" in ways that make it impossible to separate the positive from the normative. The normative content of legislative findings has implications for the line between enacted and unenacted. Because the enactment of norms lies at the heart of the legislative power, those norms deserve judicial respect only when they are duly enacted as law.

A. DOES CONGRESS REALLY FIND FACTS?

Two questions posed earlier in this Article but not squarely answered are (1) what it means for Congress to find facts and (2) whether Congress has any comparative advantage over other organs of government, such as courts, the Executive Branch, or administrative agencies, in finding facts. To put these questions in perspective, start with the distinction between adjudicative facts and legislative facts proposed by Kenneth Culp Davis in the middle of the twentieth century and since employed canonically to distinguish between two varieties of fact-finding. Adjudicative facts concern the specific circumstances of parties in an adversarial proceeding, whereas legislative facts involve more general and aggregate conclusions. Apart from impeachment, Congress does not engage in adjudicative fact-finding. Its comparative advantage, if any, lies in finding general, aggregate, or statistical facts.

As discussed in section II.B, there is a pan-ideological consensus on the Supreme Court that Congress has a comparative advantage over courts in

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134. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958); Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 365–66 (1942); Davis, supra note 12, at 549; see also Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting) ("To the extent 'legislative facts' are relevant to a judicial determination. Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."); Dean Alfange, Jr., The Relevance of Legislative Facts in Constitutional Law, 114 U. Pa. L. Rev. 637, 640 (1966).

135. Davis, supra note 12, at 549.
finding legislative facts because of the vastness of the data involved. But this sort of "wisdom of the crowds" assumption flies in the face of modern social science, which privileges expertise, peer-reviewed technique, and methodological rigor in validating statistical or empirical claims. Take, for example, one of the statutory findings in the ACA that the statute would shift $43 billion in uncompensated care to private health insurers. Suppose an economist asserted that claim in an expert report during an adjudicatory proceeding and the expert was asked on cross-examination to divulge the basis for her empirical claim. If the expert answered that she had relied on the $43 billion figure because it was believed to be true by a majority of the members of the House of Representative and the Senate, her testimony would surely fail the strictures of Daubert v. Merrell Dow Pharmaceuticals, which essentially require that an expert's "testimony is the product of reliable principles and methods." In order to admit the testimony, the court would demand evidence that the economist had performed her calculations using rigorous methods subject to testing, peer review, error rates, and acceptability in the relevant scientific community. Statistical and empirical training is not a necessary qualification to hold congressional office, nor are individual members of Congress likely to engage in any sort of empirical or statistical computations before asserting figures like $43 billion.

Congress does have institutional resources such as the Congressional Budget Office and the Congressional Research Service available to conduct statistical or empirical studies. But to the extent that these are the institutional capabilities thought to provide Congress its comparative advantage in finding legislative facts, there is a mismatch between perception and the reality of modern congressional fact-finding. Empirical facts found in modern statutes or legislative history usually come not from congressional research arms but from

136. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) ("We owe Congress' findings deference in part because the institution 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon' legislative questions." (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665–66 (1994))); Philip B. Kurland, Toward a Political Supreme Court, 37 U. Chi. L. Rev. 19, 38 (1969) ("[T]he Court ... lacks machinery for gathering the wide range of facts and opinions that should inform the judgment of a prime policymaker.").

137. See Daubert v. Merrell Dow Pharm., 509 U.S. 579, 593–94 (1993) (discussing four factors relevant to determining the reliability of a particular scientific theory or technique as evidence in litigation—testing, peer review, error rates, and acceptability in the relevant scientific community).


139. 509 U.S. at 593–94.

140. FED. R. EVID. 702(c).


142. Devins, supra note 44, at 1179–80 (describing institutional resources available to Congress to conduct fact-finding).

143. Id. at 1182 (arguing that Congress lacks the necessary incentives to take advantage of its fact-finding powers); see also Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 Harv. L. Rev. 1422, 1427–32 (2011) (arguing that political institutions often lack sufficient incentives to gather information).
Executive Branch agencies, independent agencies, nonprofit organizations, or academic researchers.

For example, most or all of the statistical findings in the ACA were derived from extracongressional research. Projections about future increases in healthcare spending were made by the Centers for Medicare and Medicaid Services, Office of the Actuary, National Health Expenditure Projections, an Executive Branch agency within the Department of Health and Human Services. The estimate that the national economy loses up to $207 billion a year because of the poorer health and shorter lifespan of the uninsured was drawn from a report by the New America Foundation. The estimate that $43 billion in uncompensated care is shifted to private health insurers was made by Families USA, a nonprofit, consumer healthcare-advocacy organization. The finding that 62% of all personal bankruptcies were caused by illness or medical bills originated in a study published in the American Journal of Medicine. When Congress "found" these facts, it found them fully formed in policy briefings or academic literature. Congress itself contributed nothing to their formation.

The ACA is characteristic of modern federal statutes. Findings asserted by Congress are generally not generated by Congress itself but appropriated from other sources. It is unsurprising that Congress routinely outsources its fact-finding function because Congress routinely outsources much of its bill-writing function to lobbyists. The frequently assumed vision of Congress generating social knowledge based on the expertise and experience of its diverse membership has little relation to reality. At most, Congress plays a validating role, accepting or rejecting the assertions of outside constituencies in order to advance a legislative agenda.

This does not have to be a criticism of Congress. There is nothing inherently wrong with a legislative body appropriating information created by interest groups. But recognizing that congressional findings of fact are not generally the product of independent congressional investigation changes the basis for the claim that courts should defer to congressional findings. There are glimmers of such a recognition in some Supreme Court decisions. In Turner Broadcasting System, Inc. v. FCC, the majority acknowledged—over a vigorous dissent—that

144. 156 CONG. REC. S1986 (daily ed. Mar. 24, 2010) (reporting that "[n]ational health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019" based on a report by the Centers for Medicare and Medicaid Services).
146. 155 CONG. REC. 30,918 (2009) (statement of Sen. Grassley) ("A Kaiser Family Foundation study dissected the Families USA numbers and estimated that the total amount of uncompensated care shifted to private insurers was closer to $11 billion, making the so-called hidden tax around $200 for a family, compared to the $1,100 that Families USA said.").
148. Nourse & Schacter, supra note 113, at 583–88 (describing the significant role that lobbyists play in drafting federal legislation).
149. But see McGinnis & Mulaney, supra note 112, at 94–95 (discussing public-choice implications of congressional fact-finding).
many of Congress's findings were simply endorsements of factual assertions presented by interested third parties.\textsuperscript{150} Congress itself had not produced the information embedded in the statutory- and legislative-history findings any more than a judge or jury in an adversarial system produces the factual information it ultimately finds. The Court nonetheless justified deference to Congress's findings, asserting that "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process."\textsuperscript{151}

This assertion marks a subtle shift from the conventional conception of Congress as a skilled and diversified production facility for social knowledge to a view of Congress as the branch of government constitutionally deputized to validate competing third-party assertions of social facts. It shifts the basis for deference from reliability to legitimacy. In so doing, it begs the question of why findings of social facts are more democratically legitimate when articulated by Congress than by the courts.

\section*{B. THE NORMATIVE COMPONENT OF CONGRESSIONAL FACT-FINDING}

To explain why Congress has the strongest claims to political legitimacy in finding social facts, it is necessary to return to the illusory divide between law and fact discussed earlier—to the observation that the line between fact and law is not ontological or epistemological but institutional and practical.\textsuperscript{152} If legislative facts could be validated or falsified through scientific methods and Congress had no comparative advantage in producing the most accurate assertions of fact, it would be difficult to understand why democratic theory would require deferring to Congress's factual assertions. Deference would be due to the institutions—legislative actors, executive departments, courts, administrative agencies, blue ribbon commissions, private foundations or nonprofit organizations, respected academics, supercomputers, etc.—that produced the most reliable social facts. On the other hand, if legislative facts of the kind found by Congress and contested on constitutional questions contain strongly normative and objectively unverifiable elements, then the claim for deference carries considerably more appeal. Congress's democratic function is to specify legal and political norms. Hence, Congress's findings of facts with embedded normative content represent a form of lawmaking that courts and other branches of government should not usurp.

As scholars have long recognized, congressional fact-finding entails a normative component.\textsuperscript{153} Even when making empirical or statistical assertions, factual

\textsuperscript{150} 520 U.S. 180, 199 (1997).

\textsuperscript{151} Id. The Court added that "much of the testimony, though offered by interested parties, was supported by verifiable information and citation to independent sources." Id.

\textsuperscript{152} See supra text accompanying notes 89–90.

findings by Congress often drip with normative content. "Ought" is almost invariably intertwined with "is." Consider some examples.

In the Violence Against Women Act, Congress found that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business[es] involved in interstate commerce."¹⁵⁴ In essence, Congress asserted that violence against women depresses interstate commerce and thus that Congress could validly prohibit such violence in order to stimulate interstate commerce. Is that assertion correct? One can certainly take that view, but it would be virtually impossible to prove that the net effect of violence on women is positive or negative in the sense of augmenting or diminishing interstate commerce. Trafficking of women for prostitution might create a flourishing interstate sex market, but it is prohibited by the Mann Act.¹⁵⁵ Women fleeing abusive relationships might cross state lines, patronizing hotels, restaurants, and gas stations, like Thelma and Louise in the eponymous 1991 movie.¹⁵⁶ Abuse victims might move to other states to distance themselves from abusive relationships. Violence against women might even create interstate markets for safe houses, abuse hotlines, and self-help publications for victims of abuse.

Of course, none of these possibilities provides a normatively appealing understanding of the effects of violence against women on interstate commerce. And Congress can hardly have meant to stake the constitutionality of the statute on an assertion that the gross domestic product would increase if men just stopped mistreating women. Rather, the claim that violence against women affects interstate commerce is best understood as a claim that women should be allowed to participate in national economic life without fear of violence or abuse. That is fundamentally a normative claim, one that represents an assertion of moral and social values relating to opportunity and participation.

Or take the Family and Medical Leave Act’s assertion that "it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions."¹⁵⁷ Is that a fact? The claim belongs at least as much to the world of normative assertion. Children with serious health conditions can

develop emotionally, cognitively, and physically without their parents staying home, for example, if enrolled in pediatric day-treatment centers or attended to by pediatric home-health aides or professional caretakers. Congress’s assertion is that parents who stay home to attend to sick children foster a socially desirable form of child development and family-unit cohesion. Although that claim may be normatively attractive, it cannot be falsified without specifying the content of the socially desirable qualities that Congress seeks to advance—an undertaking that relies on Congress’s creation of the social norm.

Or consider the Senate Judiciary Committee’s assertion in the Equal Access Act’s legislative history that “students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other.”158 It is surely true that some students can differentiate activities led by their teachers from those led by their peers, but equally clear that some number of students will believe that the presence of a Bible-study club at school reflects the school’s endorsement of religion. The Committee’s claim about students only makes sense as an assertion that a sufficiently large percentage of students will not be misled such that the presence of religious clubs will not impair constitutional values. The validity of this claim turns not merely on an objective assessment of secondary-student social cognition but on some implicit conclusion about what society’s tolerance level should be for students getting the wrong impression. The Committee’s claim is ultimately that the actual levels are tolerable.

Even congressional findings that make statistical or empirical claims often contain subsidiary normative or moral claims. Consider the ACA’s statutory finding that the individual mandate “is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.”159 Although one might attempt to validate or falsify this assertion using economic theory or empirical data, validation and falsification would depend critically on a robust understanding of “improved.” Would it be an improvement if insurance markets produced less dispersion in the variance of coverage for advantaged and disadvantaged insureds, even if the average quality of coverage decreased? What if the variance decreased, average quality rose, but some previously advantaged individuals received worse coverage than previously? Would that count as an improvement? Although this finding has implications for many subsidiary beliefs that could be tested using scientifically accepted methods, the overall assertion could not be validated or falsified without a specification by Congress of what counts as an improvement—a question that necessarily entails a normative, moral, or aesthetic judgment that would have to be supplied by the person making the assertion, here Congress.

The same point could be made for any number of congressional assertions of fact at issue in recent constitutional litigation: "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct";\textsuperscript{160} "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited";\textsuperscript{161} "[m]any of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people";\textsuperscript{162} and "the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."\textsuperscript{163} When Congress asserts such findings, it is making claims about what should be as much as about what is. Even if individual components of an assertion can be subjected to falsification or validation tests, the assertion as a whole usually cannot.

To be sure, there still are times when Congress makes raw statistical or empirical assertions—for example, the assertion that 176 million people had health insurance coverage in 2009.\textsuperscript{164} But deference should not be an important issue with respect to such assertions. The data often are not in dispute, and if they are, there is no reason to think that elected members of Congress are comparatively advantaged in the production of statistical data.\textsuperscript{165} The interesting deference questions arise when Congress asserts the kind of “facts” riddled with moral and normative judgment discussed above. When courts defer to these kinds of findings, they do so not merely because Congress is better at finding them than the courts, in the sense that Congress gets closer to some objective truth, but because the formulation of such facts involves the creation of moral and social norms and hence the exercise of legislative power.

C. IMPLICATIONS FOR ENACTEDNESS

The previous two sections have suggested a different understanding of Congress’s fact-finding role than that usually assumed in the academic literature and

\textsuperscript{162} 21 U.S.C. § 801(1) (2012). Dissenting in Raich, Justice Thomas asserted that the findings in the Controlled Substances Act were “not so much findings of fact as assertions of power.” 545 U.S. 1, 64 (2005) (Thomas, J., dissenting). To the extent that he meant that the findings were not falsifiable propositions, he was onto something. However, to the extent that Congress’s findings asserted moral facts about what is “useful and legitimate,” id. at 24 (majority opinion), it is unclear why this should be regarded as a power grab rather than a performance of the legislative function. This is not to say that the findings should necessarily have been sufficient to sustain the constitutionality of the Act.
judicial decisions. If deference is owed to Congress's findings, it is not because they are more reliable than others but because they make normative assertions of the kind that Congress has been elected to make. These findings are not law in the Austinian sense of effectuating a command, but neither are they falsifiable assertions whose predictive validity is a function of the reliability of the institution asserting them. To call them mixed questions of fact and law would confuse them with a different adjudicatory phenomenon, but they are characterized by such an inextricable intertwining of positive and normative assertions that efforts to disentangle the two would be futile.

What implications do these characteristics of modern congressional fact-finding hold for the significance of the enactedness-unenactedness line? In a formal sense, this understanding of congressional fact-finding bolsters a point previously made—that enacted facts properly belong to the domain of law and, as such, demand the full dignity accorded by the courts to acts of the legislature. Just as statutes are presumed valid, so too normative facts asserted by Congress should be accorded a presumption of validity. Courts should treat Congress's intertwined assertions of how the world is and should be with great seriousness, reserving rejection of the statutory predicate for circumstances where acceptance of the predicate would compromise constitutional values.

Correspondingly, unenacted findings should be entitled to no more weight in constitutional analysis than they are in interpretive analysis, where legislative history is nearly uniformly understood to have less importance in ascertaining the meaning of a statute than provisions enacted into law. For example, the views of a member of Congress who has been unable to advance her normative understanding on state treatment of the disabled from a committee report to the statutory text deserve no greater weight on constitutional analysis than they do on interpretation. If bicameralism and presentment guarantee that only norms with supermajoritarian acceptance make their way into law, then normatively laden findings should run those gauntlets just like any other statutory provision.

If all of this seems too formalistic, there is also an important functional reason to stress the enactedness line as to normative congressional fact-finding. By asserting the facts foundational to a statute, Congress narrows the range of possible bases upon which the statute might be constitutional and thus facilitates judicial review. According some measure of deference to the facts asserted incentivizes Congress to make findings in the first place. Deference to enacted

facts is the quid pro quo for Congress's help in narrowing the range of possibilities for judicial consideration.

To specify this claim more fully, observe that the constitutionality of a statute often turns on the interaction between different possible states of affairs in the world. A statute regulating violence against women, channels provided by cable-television companies, Internet pornography, or state accommodations for the disabled might be constitutional or unconstitutional depending on whether conditions X, Y, or Z occur or do not occur. For purposes of rational basis review, a reviewing court must uphold the statute if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." 170 For purposes of heightened modes of judicial review, there may still be a variety of different factual predicates that would support constitutionality and others that would not. Because the courts do not require Congress to affirmatively specify the factual predicate, 171 in order to invalidate a statute, courts have to rule out the existence of the factual predicates that would have supported the statute's constitutionality. Because the factual predicates are often normatively loaded—more moral or social characterizations of the world than objective facts—in order to strike down a statute, courts must rule out the possibility that Congress could validly have placed a number of different normative glosses on the world. This is awkward business for judges because it involves not only inquiring into empirical propositions (that is, do battered women forgo participation in interstate commerce?) but also normative ones (that is, could Congress validly conclude that violence against women has morally troubling implications for the way in which interstate commerce unfolds?) and doing so across the range of possible occurrences. 172

When Congress stakes the constitutionality of a statute on enacted findings, it facilitates the process of judicial review by narrowing the range of possible occurrences for consideration. It also exposes itself to a vulnerability. By focusing on the particular occurrences that it claims support constitutionality, Congress implicitly excludes other occurrences that might have supported constitutionality. This can be costly. Recall Justice Scalia's objection in National Federation of Independent Business v. Sebelius that Congress identified the regulation of interstate healthcare markets, not taxing healthcare shirkers, as the constitutional basis for the ACA. 173 If Congress points to X, the courts may forgo looking to Y, even though Y might have provided an arguable basis for constitutionality. Or even worse, the courts may conclude that the factual


171. See supra notes 13–15 and accompanying text.

172. See Peggy C. Davis, "There is a Book Out...": An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539, 1542 (1987) (arguing that "legal enshrinement [of legislative facts] is casual and unselfconscious, and their assessment often superficial and skewed by litigation imbalances").

173. See supra text accompanying note 33.
predicate offered by Congress demonstrates the statute's unconstitutionality if it reveals an inadmissible motivation for the statute. 174

If nothing else, deference to findings may be a mechanism for courts to incentivize Congress to facilitate judicial review by narrowing the range of possible occurrences supporting constitutionality. In that case, enactment of the factual predicates is important. The mechanism of occurrence-narrowing is commitment by Congress to a particular characterization of the world as the statutory predicate. If Congress creates a collage of competing factual characterizations in the legislative record and commits to none of them in the statute, thus preserving flexibility to pick and choose during litigation, it has not significantly narrowed the range of occurrences for judicial review and should not expect any reward from the courts. 175 Enacted findings have the potential of serving as congressional precommitment mechanisms that could facilitate, clarify, and sharpen the course of judicial review. 176 If so, Congress should expect a quid pro quo for making them—some degree of judicial deference.

V. IMPLICATIONS OF OBSERVING THE ENACTEDNESS LINE

This Article has presented a case for making the line between enacted and unenacted legislative findings of fact as important for constitutionality as it is for statutory interpretation. This final Part ponders what the introduction of such a principle would mean along three vectors: first, what it would mean, on net, for Congress's writing of statutes and the courts' overall willingness to strike them down as unconstitutional; second, what it would mean for the tidiness of the U.S. Code; and third, what it would mean for the counterpoint of judicial review, statutory interpretation.

A. CONGRESSIONAL AND JUDICIAL OUTCOMES

At present, it is difficult to find a coherent pattern in the Court's willingness to defer to congressional findings. 177 Suppose that tomorrow the U.S. Supreme Court issued the following unanimous statement in a constitutional case: "In the

174. See supra section III.B.
175. One might rejoin that Congress can be forced to stake a statute's constitutionality on an identified factual predicate through the litigation process by the parties challenging constitutionality, the structure of legal briefing, and the courts' own questions at oral argument. But once the statute leaves Congress, it is no longer the Legislative Branch but the Executive Branch that defends the act and identifies factual bases supporting constitutionality. Allowing Congress to pepper the legislative record with a diffuse and often contradictory set of factual assertions possibly supporting constitutionality and then leaving it up to the Solicitor General's office to identify and underline the most strategically valuable assertions raises other troubling questions concerning the delegation of legislative power to the Executive. See generally Larry Alexander & Saikrishna Prakash. Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated, 70 U. CHI. L. REV. 1297 (2003).
177. See Caitlin E. Borgmann, Rethinking Judicial Deference to Legislative Fact-Finding, 84 Ind. L.J. 1, 1 (2009) ("Although the courts often speak in terms of deference, they follow no consistent or predictable pattern in deciding whether to defer in a given case.").
past, we have erroneously purported to give equal deference to findings that appeared in mere legislative history and those that were enacted into a statute, satisfying the requirements of bicameralism and presentment. Henceforth, we shall defer only to those findings of fact that are enacted into law.” What would be the net result of such a decision for congressional and judicial outcomes?

One can imagine a wide range of possibilities. If, as postulated earlier, courts currently put little real weight on congressional findings even when they say that they do, then there would be little impact on judicial outcomes. But suppose that the Justices, or at least some of them, are not lying or deluded when they tell us that congressional findings matter. What then?

First, there might be implications for the Court’s average willingness to invalidate statutes. Statutes supported only by findings in legislative history would be more likely to fall prey to the Court’s axe. Statutes supported by enacted findings might receive only the same degree of deference that they currently do, in which case (and for now holding constant Congress’s response) the Court would become even more activist in striking down acts of Congress than it currently is. Or the courts might begin showing elevated deference to statutes containing well-considered legislative findings and hence retreating from some of the perceived activism of recent decades.

It is also possible that the Court’s implementation of its new maxim would be ideologically differentiated. As discussed earlier, judicial assertions about congressional fact-finding are not ideologically directional—the liberals and conservatives on the Court alike invoke and dismiss congressional findings. A shift that elevated enactedness could result in one wing of the Court giving increased deference to Congress on enacted facts while the other wing exploited the shift by justifying invalidation of statutes without enacted facts under the new principle and finding other reasons to condemn disfavored statutes with enacted facts.

Then there is the question of how Congress would respond to the new judicial attitude. Presumably, legislative draftspeople would begin making more frequent use of enacted findings than they currently do. Over time, all constitutionally controversial statutes would contain enacted findings. If the courts took seriously the idea that deference is owed on enacted facts, that could result in a higher average level of constitutional validation or, to put it another way, a decrease in the level of judicial activism. Or, sensing that Congress was too uniformly evading judicial review through its new practice, the courts might

178. See supra text accompanying notes 34–35.
180. See supra notes 36–42 and accompanying text.
begin to tamp down their appetite for congressional findings. In that case, Congress might also begin to care less about enacting facts, and a new equilibrium would emerge where constitutional contestation focused little on findings.

The uncertainty and complex interactions of these potential paths point out the difficulty of charting the likely effects of a modification in legal doctrine. The overall political valence of a shift in the deference standard would depend on the good faith of its implementers and their ongoing construction of the norm. Still, it is quite plausible that observing the enactedness line could enhance democratic values in the legislative process, the quality and integrity of judicial review, and the relationship between Congress and the Court.

Focusing first on the legislative side, it is unlikely that Congress would react to a shift in the deference line by packing statutes with long litanies of unconsidered and unfocused assertions. That would likely have the effect on the courts that boilerplate contracts of adhesion and disclosures have on consumers—they would go unread and unenforced. If judicial deference depended on Congress asserting a few coherent characterizations about the world and asking the courts to judge the statute on that basis, then congressional draftspersons would have incentives to limit, focus, and sharpen.

Further, Congress would find it difficult to throw the kitchen sink into every statute raising constitutional issues. Many of the same political constraints that inhibit Congress from writing longer and more specified statutes for purposes of interpretation would operate here as well. As previously noted, it would have been politically difficult in 2009 for Congress to write into the ACA findings justifying the statute on taxation grounds.

Turning now to the judicial side, a plausible case could be made that, given mainstream judicial values, doctrines, and institutional constraints, a meaningful quorum of Justices would take seriously a set of focused and coherent statutory findings, particularly those making explicit the normative understanding that Congress sought to embody in law. This would not have to mean that the courts would uphold statutes just because they contained concise and focused findings. But by allowing Congress to direct the focal point for judicial review onto congressional findings, the courts could signal willingness to afford Congress some latitude to articulate an independent normative and constitutional vision—a vision that the Court has thus far expressed only inconsistently.

From the vantage point of the courts, part of the problem seems to be a distrust of Congress as a partner in the enterprise of constitutional law. Increasingly in recent years, the courts have exhibited suspicion that Congress does not

182. Nourse & Schacter, supra note 113, at 596–97 (discussing the need for deliberately ambiguous statutory drafting in order to achieve consensus).
183. See supra text accompanying notes 131–33.
take seriously its responsibility to legislate constitutionality.\textsuperscript{184} The courts seem to suspect that Congress focuses during the legislative process exclusively on the immediate politics of the bill, leaving it to the Justice Department to cobble together the constitutional defense post hoc.\textsuperscript{185} An emerging judicial doctrine that promised deference to findings containing intertwined normative and positive claims—but only when Congress had demonstrated its seriousness of purpose by taking its claim through enactment—could provide a blueprint for Congress to regain the Court's trust and for the Court to regain Congress's trust.

B. AESTHETIC CONSIDERATIONS: CLUTTERING THE CODE

As noted earlier, legislative draftpersons have objected to the insertion of factual findings into the statutes on the grounds that this would result in "cluttering the U.S. Code."\textsuperscript{186} This aesthetic concern probably motivates the official position of the statutory stylists in the House and Senate legislative counsels' offices that findings of fact are better left to committee reports than embedded in the text of acts.\textsuperscript{187} Such concerns cannot justify the current practice of disregarding the enactedness line.

First, this aesthetic view may be predicated on an understanding that statutory facts have "no force of law"\textsuperscript{188} and are thus equally potent in legislative history and statutory texts. If this assumption is wrong, as I have argued, so is the conclusion. Whatever cluttering of the U.S. Code might result from an enhanced emphasis on enacted findings would be well worth it to Congress if it resulted in greater clarity and consistency on the role of congressional findings in judicial review. And it would certainly be worth it if such a doctrinal shift resulted in the courts upholding statutes that they might otherwise have

\textsuperscript{184} See Hillary Rodham Clinton with Goodwin Liu, Remarks, Separation Anxiety: Congress, the Courts, and the Constitution, 91 Geo. L.J. 439, 447 (2003) (discussing "[t]he current Court's palpable distrust of Congress"); Ruth Colker & James J. Brudney, Dissenting Congress, 100 Mich. L. Rev. 80, 80 (2001) (quoting Justice Scalia as saying that "if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution... then perhaps [the] presumption [of constitutionality] is unwarranted" and more generally discussing the trend in the Supreme Court to show disrespect of Congress (quoting Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Address at the Telecommunications Law and Policy Symposium (Apr. 18, 2000))); Timothy Zick, Marbury Ascendant: The Relnquist Court and the Power to "Say What the Law Is," 59 Wash. & Lee L. Rev. 839, 843 (2002) (discussing the Supreme Court’s distrust of Congress in the context of Section 5 of the Fourteenth Amendment).

\textsuperscript{185} Indeed, this is pretty much what happened with the ACA. See Devins, supra note 114, at 1832 (reporting that Members of Congress paid little attention to constitutional issues during debates over the ACA and "did not use the hearings as a vehicle to meaningfully engage in fact-finding that would strengthen claims that (1) the ACA regulates economic activity pursuant to Congress’s Commerce Clause power or (2) the ACA’s Medicaid expansion was noncoercive"). But see Rebecca E. Zietlow, Democratic Constitutionalism and the Affordable Care Act, 72 Ohio St. L.J. 1367, 1367–70 (2011) (concluding that Congress did engage in deliberation over constitutional issues).


\textsuperscript{187} See supra text accompanying notes 48–49.

\textsuperscript{188} Brzonkala, 132 F.3d at 967 n.10 (quoting Frazee, Noel & Brenneke, supra note 87).
invalidated.

Second, the actual practice of enacted fact-finding to date does not suggest a major cluttering problem. Enacted findings tend to be a short set of concise assertions, rather than the sort of sprawling amalgam that often appears in committee reports. It is of course possible that judicial emphasis on the enactedness line would result in a greater prolixity of findings in statutes, but for the reasons discussed in the previous section, that is unlikely.

Finally, concerns over cluttering are easily resolved by adopting the practice already seen in a number of recent statutes of enacting findings of fact in a public law and then embedding them in the U.S. Code as notes following the operative portions of the statute. The presentation of findings in the U.S. Code has no consequence for their juridical effect because it is the text of the Statutes at Large rather than the U.S. Code that controls. Statutory findings could satisfy the bicameralism and presentment requirements for purposes of judicial review without cluttering the U.S. Code at all.

C. FEEDBACK TO STATUTORY INTERPRETATION

This Article has focused on the significance of the enactment line for purposes of judicial review on constitutional questions. As noted throughout, this stealth issue parallels the hotly contested issue of using legislative history to interpret statutes. This Article has considered the relevance of the statutory-interpretation discussion for constitutional analysis. In closing, it is worth turning the tables and pondering what relevance the constitutional-analysis issue has for the statutory-interpretation issue. Two brief observations follow.

First, a more systematic and targeted use by Congress of enacted findings could help to clarify some interpretive issues. Because neither textualists nor purposivists object to considering enacted facts in interpretation, a movement of Congress's foundational assumptions from legislative history to the statutory text could provide greater clarity on Congress's intentions and reduce statutory ambiguity.

Second, this Article's claim raises a challenge for textualists. Many of the arguments for requiring findings to be enacted for purposes of constitutional analysis derive from arguments made by textualists about interpretation. This includes both formal arguments (that is, Congress itself has not found anything until it has satisfied bicameralism and presentment) and functional ones (that


190. See supra notes 124–25 and accompanying text.


192. See supra Part II.
is, legislative history is loser’s history,193 using legislative history empowers judges to “pick their friends out of the crowd,”194 and using legislative history corrupts the legislative process).195 At present, textualists on interpretation seem not to be textualists for purposes of findings in constitutional analysis—they insist dogmatically on enactment when it comes to interpretation but seem perfectly willing to attribute findings to Congress that appear in mere legislative history when it comes to constitutionality. If the arguments have equal force in both contexts, then either enactedness should be important in both contexts, or else something is wrong with the textualist arguments. If nothing else, the observations made in this Article shed light on controversies over interpretation.

**CONCLUSION**

This Article has argued that courts reviewing the constitutionality of congressional statutes should defer only or principally to facts that are enacted, thus satisfying the bicameralism and presentment requirements. Assertions of fact made in committee reports or other legislative history are not findings of Congress—to quote from the children’s television classic *Schoolhouse Rock*, they are “just a bill, sitting on Capitol Hill.”196 Giving them weight in constitutional analysis entails all of the pathologies of legislative process and judicial manipulation of which textualists complain in the statutory-interpretation context.

Conversely, enacted findings of Congress deserve deference from the courts—arguably more deference than they receive today. This is not, as commonly asserted, because Congress has some comparative advantage over courts in finding statistical or aggregate facts but because congressional findings usually contain deeply normative claims of the kind that democracies entrust to legislatures. When Congress is willing to stake the constitutionality of a statute on a set of assertions about how the world is and ought to be, it sharpens judicial review and exposes itself to risks in the courts of law and of public opinion. In return, the courts need not accept Congress’s assertions without question, but nor should they reject them lightly.

193. *See supra* note 121 and accompanying text.
194. *See supra* note 106 and accompanying text.
195. *See supra* text accompanying notes 105–08.