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IN THIS ISSUE

The Call of the Real

By David J. Perlman

Needless to say, judicial decisions are never made in a vacuum. "The judicial mind is not a *tabula rasa*," as Judge Richard A. Posner wrote.[1] An understanding of how things work in any number of dimensions — socially, psychologically, commercially, technically, medically, scientifically, to name a few — underlies every decision and legal argument. The thoughtful, inquiring

Continued on page 2

Protecting the Appeal from "Truthy" Amici Facts: Strategies for Embattled Party Counsel

By Gaëtan Gerville-Réache & Conor B. Dugan

There is something remarkable about the ease with which third parties can invade litigation on appeal as a "friend of the court" and introduce new facts to influence the court's decision. In the trial court, the rules of evidence and adversarial process empower the parties to exercise considerable control over what information

Continued on page 16

Editor's Note

"All too often, the facts that are important to a sensible decision are missing from the briefs, and indeed from the judicial record" Judge Richard A. Posner wrote in *Reflections on Judging*[1]. "The Appellate Record: Adequate or Not?" is the theme of this *Appellate Issues*.

Continued on page 22

...Continued from page 1: **The Call of the Real**

mind naturally reaches for a breadth of information, and empirical knowledge is a necessary aspect of modern legal reasoning, even if it runs counter to the expectation of a limited record. The roots of the appeal to empirical fact lie in a philosophical shift, a change in outlook, that occurred nearly 150 years ago and that resonates still. William James, instrumental in setting it in motion, called the seismic shift "pragmatism."

Peirce and James

James credited his friend Charles Sanders Peirce with the initial expression of pragmatism.[2] In his 1878 essay "How to Make Our Ideas Clear," Peirce observed that the purpose of thought is to serve as a basis for action.[3] Recognizing that his labels were simplifications, Peirce identified thoughts as leading to "beliefs," which, in turn, form "habits of action." "Beliefs" and "habits of action" might include what today are referred to as "conditioning" and its manifestations in action as well as our more conscious, deliberate inclinations.

In any event, Peirce proposed that ideas are distinct, one from another, not by their differing verbiage or form of expression but by the differing impact they have in action, consequences, effect, practice — that is, in the world of fact. "…The whole function of thought is to produce habits of action," he wrote, " and that whatever there is connected with a thought, but irrelevant to its purpose [of producing habits of action], is an accretion to it, but no part of it…."[4]

"Thus," he concluded, "we come down to what is tangible and conceivably practical as the root of every real distinction of thought, no matter how subtle it may be; and there is no distinction in meaning so fine as to consist in anything but a possible difference of practice."[5]

Peirce, in effect, located meaning in results; the meaning of thought lies in the actions it produces and the real world consequences of those actions. And from here, it's a short step, if a step at all, to locating the validity or truth of an idea in consequences.

Carrying Pierce's perceptions much further, James coined a metaphoric shorthand, referring to the value of an idea — and the words that express an idea — as their "cash-value:"

> …You cannot look at any such word as closing your quest. You must bring out of each word its practical cash-value, set it at work within the stream of your experience. It appears less as a solution, then, than as a program for more work….[6]

Ideas — and the words that convey them — are not self-validating by their own internal logic. Nor can we verify them by presupposing an independent structure, for that, too, would be just another idea. As James continued, italicizing for emphasis, as he habitually did:

> *Theories thus become instruments, not answers to enigmas, in which we can rest.* We don't lie back upon them, we move forward, and, on occasion, make nature over again by their aid.[7]

Our theories act upon the world, sometimes altering it, thereby manifesting their significance. And the consequences of such actions, in turn, remake our theories, at least if we remain atten-

tive to consequences. A theory, then, is a component in a dynamic interplay with fact.

The Boston Clubs

Although James highlighted Pierce's 1878 essay, the seeds for pragmatism were planted earlier. In an unpublished paper, Peirce referred to what he called "The Metaphysical Club." It was a club of eight members, meeting in Cambridge, Massachusetts. Three were lawyers. It was also a club heavily weighted with luminary genius. There were Peirce, James, philosopher John Fiske, philosopher Francis Ellingwood Abbot, and philosopher, mathematician and astronomer Chauncey Wright. The lawyers were Joseph Banks Warner, Nicholas St. John Green, and Oliver Wendell Holmes, Jr.[8]

First meeting in 1872, The Metaphysical Club was a successor to a no less brilliant consortium convening in the late 1860's. Here, too, lawyers were well represented; they were Holmes, John Ropes, John Gray, Moorfeld Story, and Arthur Sedgewick. John Fiske and William James joined the Tuesday night dinner meetings. Also present were novelists William Dean Howells and James' brother, Henry James. And there was a place at the table for another Henry, Henry Adams.

As Louis Menand wrote in a spellbinding intellectual history, "The Metaphysical Club memorialized by Peirce was … one of many places where Cambridge intellectuals got together. Its members knew each other from other gatherings. And they all knew Chauncey Wright."[9]

And, at the center of this seismic shift, as the attendance list suggests, was the law.

Professor Green

One of the leading lights was then Harvard Law Professor Nicholas St. John Green. Peirce, who credited Green as an influence, referred to him as "a skillful lawyer and a learned one."[10] Green rejected the prevailing idea that legal terms, in Menand's words, "refer to something immutable and determinate."[11] In Green's view, the terms of the law are not fixed. They have no absolute referent. They are not things themselves, unchanging over time. Rather, they derive meaning from their application. They are "instruments" in the Jamesian sense.

Darwin understood the concept of "specie" in the same way. It isn't a thing, a phenomenon, a condition fixed in nature but a social construct that aids our understanding of nature; for if species were absolute and fixed, how could new ones evolve?

James described scientific theories similarly:

> "… [Scientific investigators] have become accustomed to the notion that no theory is absolutely a transcript of reality, but that any one of them [i.e. scientific laws or theories] may from some point of view be useful. Their great use is to summarize old facts and lead to new ones. They are only a man-made language, a conceptual shorthand, as some one calls them, in which we write our reports of nature; and languages, as is well known, tolerate much choice of expression and many dialects.[12]

Likewise, according to Green, the legal concept of proximate cause is not itself a fact or reality but a useful, manmade theory. To Green, a giv-

en effect has innumerable possible causes, depending on your perspective; indeed, even the distinction between cause and effect seems to melt away in his description:

> There is no chain of causation consisting of determinate links ranged in order of proximity to the effect. They are rather mutually interwoven with themselves and the effect, as the meshes of a net are interwoven. As the existence of each adjoining mesh of the net is necessary for the existence of any particular mesh, so the presence of each and every surrounding circumstance, which taken by itself we may call a cause, is necessary for the production of the effect….[13]

We pull a single cause from the mesh and deem it proximate in order to attach liability in a particular case or genre of cases. Yet that doesn't render a designation of proximate cause arbitrary. The validity of a selection lies in the consequences of that selection; it depends, that is, on whether the consequences fulfill the underlying purposes of a given legal rule and the body of law as a whole. Whether a designation of proximate cause fulfills broader underlying purposes is determined by an act of interpretation. The field of interpretation would be masterfully illuminated in our era by legal philosopher Ronald Dworkin.

Ahead of his own time, Green suggested an approach to legal reasoning that Holmes was perfectly comfortable with but that many practitioners and jurists still hesitate to acknowledge — that is, reasoning from a result backward. "It is the merit of the common law," Holmes wrote in 1870, "that it decides the case first and determines the principle afterwards."[14] Instinctively, we all know that it makes sense to posit an outcome to a case, conceive of an argument within the mode of legal discourse that would support the outcome, and then assess how well the argument works, perhaps comparing it to other prospective outcomes and arguments; as a practitioner faced with a client problem, there's not much else you can do. The assessment whether an argument works is, again, interpretive, an assessment of how prospective outcomes and supporting rationales fit together, and, ultimately, fit within broader legal and social practices. Quite properly, legal reasoning is "result oriented;" but it is "result oriented" in the pejorative sense only when the fit is awry.

Wendell Holmes

It was Holmes who illumined the law with the torch of pragmatism. The view that terms are not fixed and that consequence plays a role in reasoning is allied to his view that the law doesn't grow by logic; logic is just another piece in the toolkit: "The life of the law has not been logic: it has been experience."[15] In the same paragraph of *The Common Law*, Holmes disavowed a model of legal reasoning akin to a mathematical system that produces an objective result if only you supply data for the variables: the law "… cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

Sixteen years later, with the 1897 appearance of his essay "The Path of the Law," Holmes expanded his view of legal reasoning, of both what it is and ought to be. Again, he identified as a "fallacy" "… the notion that the only force at work in the development of the law is log-

ic."[16] He did not mean that the law and legal decisions are irrational or unprincipled but that a legal result cannot be derived by logical deduction. The law cannot be "… worked out like mathematics from some general axioms of conduct."[17] Newton, again, explains only so much.

Holmes saw the law as complex in the same way as Green. You can frame a legal argument or decision as a syllogism, but inevitably something bubbles up to expose a blemish or birthmark on the major or minor premise. "You can give any conclusion logical form," he wrote. "You can imply a condition in a contract. But why do you imply it? Is it because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement and therefore not capable of founding exact logical conclusions."[18]

Put another way: "There is a concealed, half conscious battle on the question of legislative policy, and if any one thinks it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper upique et ab omnibus*."[19]

Legal doctrines allocate liability not because the doctrines are absolute or immutable, or correspond to anything absolute and immutable in the universe, or because they are inherently logical, but for underlying, sometimes unacknowledged, ends. This is so not because the law is a evasive or deceptive but because it's part and parcel of a dynamic system — a system of changing fact, our changing perception and understanding of fact, and our changing actions in response to fact. The dynamic includes our using law to shape fact and our reshaping law in response to fact. "Theories thus become instruments."

Holmes understood that the underlying, perhaps unacknowledged, but essential purpose to a legal doctrine will be newly revealed or conceived in time. He illustrated the dynamic of change when he discussed the role of tort law in the commercial and industrial reality of the Nineteenth Century, presaging in the same passage the economic analysis of law. Although the law of torts, he wrote, comes from

> … The old days of isolated, ungeneralized wrongs …[,] the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later, goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable the public should insure the safety of the work it uses.[20]

That legal doctrines reflect underlying purposes and are subject to change does not make them unprincipled. Precisely the opposite is true. They change in order to remain principled. History — past applications of legal doctrine — serves as an aid to identifying a deeper still relevant purpose or principle, if any exists.

> History must be part of the study [of law], because without it we cannot know

> the precise scope of the rules which it is our business to know. It is part of the rational study, because it is the first step toward enlightened skepticism, that is, toward deliberate reconsideration of the worth of those rules.[21]

Perhaps Holmes' best description of applying the law to newly arising facts was metaphoric. When the legal artifact is exposed to the light of the present day, it might resemble a mythic monster. But you can examine its anatomy and determine if it can be refashioned to thrive again in the environment of present day fact, as we know it:

> When you get the dragon out of the cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of law the black-letter man may be the man of the present, but the man of the future is the man of statistics and economics.[22]

Thus, under Holmes' vision, the law is pulled along by utility, by the world of fact, statistics and economics. The black letter distillation gets you only so far, for legal doctrine is only one component in a dynamic exchange; it doesn't rise above or exist apart from an evolving cultural context. It's a Jamesian "theory" forever subject to reformulation to align itself with fact.

Simply because the law was once thus and such is insufficient reason for it to remain so; it must retain some present day relevance. As Holmes famously wrote, again in "The Path of the Law:"

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[23]

The law, on its path, follows the facts. Principle is answerable to fact, no less than fact to principle. The law always remains open to skeptical questioning in light of what we come to know:

> For more fundamental questions still await a better answer than that we do as our fathers have done. What have we better than a blind guess to show that the criminal law in its present form does more good than harm? … Does punishment deter? Do we deal with criminals on proper principles?[24]

The Brandeis Brief

On January 10, 1908, Louis D. Brandeis, Counsel for the State of Oregon, filed with the United States Supreme Court what has come to be known as the "Brandeis Brief." At issue in *Muller v. Oregon* was a statute limiting the working hours of women to no more than ten a day. Three years earlier, in *Lochner v. New York*, 198 U.S. 45 (1905), the Court had declared unconstitutional a New York statute that prohibited employing bakers for more than 60 hours a week. While the Oregon attorney general's brief focused on legal authority, Brandeis focused on non-record facts. Yet, his facts had a place in a legal argument. They were intended to establish a reasonable ground for protecting women from a health risk posed by too many hours of work. The facts, the brief asserted, were "common

knowledge of which the Court could take judicial notice."[25]

And Brandeis served up a great variety of fact. His brief ranged from assertions about physical and physiological differences between men and women to claims about the impact of working women on children's health, children's emotional wellbeing, infant mortality, and even women's morality. He presented the facts as excerpts or quotations from an array of sources and many facts were contestable. The sources tend to portray women as inferior to men or at least not up to the task in the same way as men. For example, women's skeletal structure is such, according to one doctor, that they aren't as suited to standing.[26] On the morality point, one source observed that "hard, slavish, overwork" in mills is "driving girls into saloons."[27] But of course, from another vantage, the growing presence of working "girls" in saloons would be a sign of liberation, not moral degradation.

The brief blurred the distinction between commonly held beliefs that would support the legislation, even if contestable, and contentions of actual fact. Likewise, the Court's opinion, discussing the brief and upholding the protective legislation, blurred a distinction between taking judicial notice of a commonly held belief and of actual facts. A hundred years later, we'd expect an argument on health effects to be entirely different in substance, research methodology, articulation, and presentation. And, today, it would be highly unlikely for a judicial decision to patronize women — to sound sexist, to apply a contemporary judgment — as *Muller v. Oregon*, 208 U.S. 412 (1908) does.

Yet the Brandeis Brief is correctly recognized for paving the way for successors — briefs that focus almost entirely on extra-record facts about the state of the world that a court is called upon to accept. And at the same time, reading it today serves as a potent reminder of the complex dynamics of a changing world. Both fact and our perception of it are protean.

Professor Davis

Professor Kenneth Davis advanced judicial reliance on non-record facts in a series of articles beginning in 1942.[28] Davis drew the distinction between adjudicative and legislative facts, which, in turn, forms the basis for Federal Rule of Evidence 201, adopted with the other rules in 1975. While Rule 201 establishes a procedure for judicial notice of adjudicative fact, the realm of legislative fact remains unconstrained.

Reflecting Davis' influence, the Advisory Committee Notes begin with a general description of the two sorts of facts. "Adjudicative facts are simply the facts of a particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."[29] The notes later quote Davis' more specific description of adjudicative facts as "… concerning the immediate parties — who did what, where, when, and with what motive or intent."[30]

In the end, legislative facts are anything that is not adjudicative that matters to a proceeding. For the description of legislative fact is so broad — having relevance to the legal reasoning in the formulation of a legal principle or ruling — that it seems impossible to demarcate a non-adjudicative category of fact that falls outside of

that description, except for facts beyond the pale of the relevant or rationally contestable.

Frequently referencing Davis, the Notes provide the rationale for unconstrained consideration of legislative facts; in essence, they posit that a judicial decision cannot be reached without factual presuppositions, even if the facts are contestable. "The judicial process cannot create every case from scratch, like Descartes, creating a world based on the postulate *Cogito, ergo sum*."[31] As practical matter, we're well aware of limits; we can't litigate everything. Budgets exist and efficiency counts. Also, as we're aware, broader issues of fact may become known only as thinking unfolds, as a case ascends the appellate ladder, or a wider range of stakeholders foresee its ramifications. But even beyond practical considerations, the Notes point toward deeper conundrums: is it even theoretically possible to prove ever expanding concentric rings of implicated facts? Wouldn't you need a starting factual premise? Wouldn't that be contestable? Or if not, mightn't it become so?

The Notes firmly avoid excluding general non-record facts from consideration or masquerading under a fiction that cases can be decided without them. Rather, they quote Davis for the Holmsian point that they're essential: "What the law needs at its growing points is more, not less, thinking about the factual ingredients of problems of what the law ought to be …."[32]

Problems, Of Course

Of course, this category of fact raises problems. Perhaps the most disturbing fall under the general head of intellectual dishonesty. One might imagine a continuum of diminishing culpability. On one end is the intentionally deceptive use of fact, extending to negligent error and ultimately to errors impossible to avoid due, for example, to the limits of human knowledge. Examples of intellectual dishonesty would include manufacturing a study for advocacy purposes and skewing it accordingly, unabashedly drawing conclusions from inadequate data, or relying on the discredited fringes of a discipline.

But while the inclusion of legislative facts may create occasions for dishonesty or error, it doesn't reward or promote them, at least not in the case of judicial decisions. The source of both dishonesty and error lies not in an expanded opportunity but at another level — in a propensity to falsely shade a decision or argument or in an insufficient understanding of a factual matter. One check on intellectual dishonesty and error in judicial decisions remains public scrutiny, and not just by lawyers but by authorities in specialized fields. Correctives or checks on advocates remain what they are for other forms of distortion — opposing advocates or amici, and, of course, the court itself. Undoubtedly, inclusion of a greater range of sometimes specialized fact increases the intellectual demands of both lawyering and judging, but shaving away necessary or useful information is an inapt answer to that challenge.

Factual Ballast

Last term's Obamacare case, *King v. Burrell*, is especially instructive on the role of legislative fact, for it affords an opportunity to contrast a judicial opinion that incorporates a wider field of fact with an opinion that excludes it.

Chief Justice Roberts' majority opinion (joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagen) benefited from a range of

fact-oriented amicus briefs. The spectrum of voices providing factual ballast included hospitals and other health care providers, insurance companies, economists, the chronic and fatally ill, and organizations representing the diseased.

The legal issue was one of statutory interpretation. Respondents' position was that the phrase "Exchange created by the State" included exchanges created by the federal government for purposes of affording tax credits to individuals purchasing insurance on a federal exchange; the federal government had created backup exchanges, as the statute required, whenever a state opted not to create an exchange. Petitioners' position was that the phrase denied those purchasing insurance on a federal exchange the tax credits otherwise available to their state exchange counterparts.

The majority opinion's first sentence sets a theme concerning the design and purpose of the statute, which, in turn, is a foundation for the Court's interpretation. Specifically, it references interdependent statutory reforms and the statute's purpose: "The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance markets."[33] While that theme might be derived from the statute alone, it is strengthened, along with Court's interpretation of the disputed phrase, by the incorporation of fact. Ultimately, principles of statutory interpretation, the statute as a whole, and a related factual field work in concert to confer meaning on the phrase at issue. The principles of statutory interpretation might be considered tools in the Jamesian sense, while the statute as a whole and the real world facts constitute the context in which the phrase must exist in the way that makes the most sense.

The Reality Of A Parable

The first section after the introduction provides the factual context. The Affordable Care Act "… grew out of a long history of failed health insurance reform."[34] Specifically, it describes state governments' earlier attempts to broaden insurance coverage using only two of The Affordable Care Act's interlocking reforms. These were a "guaranteed issue requirement," which barred insurers from denying coverage for health reasons, and a "community rating requirement," which barred insurers from charging higher premiums for like reasons. It then explains how this led to "adverse selection," people waiting until they got sick to buy insurance. That, in turn, led to higher premiums since fewer healthy people were paying premiums, which, in turn, led to more people postponing an insurance purchase. This was the economic "death spiral," which in turn, drove insurers from the market.[35]

Two statutory requirements were missing: a penalty for those who failed to buy insurance and tax credits to ensure that certain people could afford the required insurance. Massachusetts added these components and the insurance system worked. Of course, it's the second component, the tax credits, that respondents' interpretation would retain and petitioners' would remove. To support these facts the opinion cites an insurance industry amicus brief, a economists' amicus brief, a study of the state insurance systems, and Congressional testimony on the state health insurance experience.[36]

This background forms a factual parable, a true

story illustrating the real life consequences of each of the two possible interpretations of the statute. It demonstrates, in fact, not theory, how the components of the Affordable Care Act are integral and must exist and work together. At the same time, it happens to be the story of a pragmatic approach to a legal problem. First, one legal fix was attempted and it didn't achieve the intended objective, so it was tweaked, and then it did. Implicitly, it asks a pragmatic question: are we really prepared to say, now, at this moment, considering the federal statute and the case before us, that absolutely nothing was learned?

The Reality Of Legislation

The opinion returns to fact at a later point. It acknowledges that the statute's drafting was inartful, here and elsewhere. But it goes deeper, finding a touchstone beyond the face of the statute, in experiential fact. "Several features of the Act's passage contributed to that unfortunate reality."[37] It then identifies circumstances particular to this Act's passage that might have fostered drafting errors. Thus, it explains the "unfortunate reality" of inartful drafting by a larger reality, the shared, lived reality in which errors occur. This additional reach bolsters the interpretation not merely because it provides a reason for linguistic infelicity but because it taps another dimension, a dimension of experience that we're familiar with and understand; the interpretation is validated by more than legal technicalities. Here, a statute isn't the command of a disembodied, flawless sovereign but, in fact, the product of people under pressure.

The Reality Of Consequences

Finally, when it draws to its conclusion, the opinion again finds a touchstone, among others, in factual ground, specifically in probable consequences — consequences reminiscent of the opening parable. It rejects the petitioners' interpretation because, if given effect, it would "destabilize the insurance markets" and "likely create the very 'death spirals' that Congress designed the Act to avoid."[38]

The opinion concludes that, even in Petitioners' view, "… one of the Act's three major reforms — tax credits — would not apply. And a second major reform — the coverage requirement — would not apply in a meaningful way." For without the tax credits, the coverage requirement would apply to fewer individuals. "And it would be a *lot* fewer." On this point, the opinion provides statistics, citing an expert study and the economists' amicus brief. And, contributing to the death spiral, the opinion observes, would be increases in insurance premiums. The opinion again provides statistics supported by citations.[39]

The inclusion of facts beyond the ordinary, party-specific record strengthens the interpretation. In short, the facts validate the interpretation while the interpretation accounts for a wider range of facts.

James' words bear a prophetic ring. They can be applied even to the intellectual act of interpretation: "You must bring out of each word its practical cash-value, set it at work within the stream of your experience."

The Literal Plane

By contrast, Justice Scalia's dissent (joined by Justices Thomas and Alito) excludes the factual context. Its horizon is narrow. Justice Scalia is

the leading proponent of an approach to statutory interpretation that elevates canons of construction to a set of rules, perhaps the exclusive set of rules, for understanding statutory language regardless of consequences. The dissent's approach is a form of literalism.

The dissent repeatedly focuses on an incongruity that inhabits the literal plane — the distinction between the statutory words "Exchange established by the State" and the words as the statute might have been written but wasn't, "Exchange established by the State or the federal government." While the majority opinion answers the dissent's points on the dissent's terms, the dissent avoids answering the majority on its terms. Instead, it circles back to its own literal-level starting point that the words "Exchange established by the State" cannot bear a meaning more directly expressible in different words.

Noteworthy here is the single moment when the dissent at least glances in the direction of the legislative facts the majority had incorporated in its opinion:

> The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements "would destabilize the individual insurance market." If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statue means the opposite of what it says.[40] [Citation omitted.]

Under this view, the facts don't count as an interpretive aid. Interpretation stops at the literal surface. If there's an incongruity between a single, literal reading of the words and a broader experiential context, the latter plays no role in conferring meaning. The incongruity is labeled a "flaw "and we're stopped in our tracks. Interpretation is drawn up short. Flaws are for Congress to fix.

A Refusal to Interpret

Certainly, the constitutional principle of separation of powers is potential interpretive material that might weigh in favor of a legislative solution, but the dissent fails to bring that principle to bear, particularly against the majority's facts. On this score, the dissent says that the court can't "rescue Congress from its drafting errors" except to correct "misprints."[41] Later it says, "it is up to Congress to design laws with care…."[42] By proceeding with the interpretation, in the dissent's view, the majority "… both aggrandizes judicial power and encourages congressional lassitude."[43] But these are pronouncements — pronouncements mainly about draftsmanship — not constitutional arguments. They fail as justifications for bringing interpretation to a halt, declining the interpretive aid of related facts, and remaining on a literal plane.

The dissent incorporates general statements of principle on separation of powers ("…ours is government of laws and not of men…"[44]), but they're platitudinous precisely because it refuses to account for fact. One avenue for justifying that it's Congress' job to solve the problem is the familiar one of returning to the literal incongruity the dissent originally identified. But this is not a separation of powers argument. It's a repetition of stopping short the interpretation — i.e. proclaiming that this is a "flaw" or "error"

or "whatever" that courts simply don't deal with further. It's not a constitutional reason for halting at the very point where facts might be considered, and then, at that very moment in the interpretive endeavor, passing the problem to Congress.

The other avenue is virtually identical, just a little more elaborate. The dissent proposes that the exclusion of tax credits on federal exchanges may have been intentional.[45] And of course, if Congress purposefully denied tax credits to people purchasing on federal exchanges and that creates a problem, then Congress should fix the problem.

But the tripping point here is that the context relied upon to suggest that the denial of tax credits was purposeful is merely the literal context of statutory language. Determining Congressional intent from only a literal context cannot, for starters, justify on separation of powers grounds not accounting for the legislative facts the majority raises. For it's circular to conclude that separation of powers precludes utilizing the majority's legislative facts for purposes of determining Congressional intent when the very same separation of powers argument is itself based on locating Congressional intent by going no further than the literal level. In the end, separation of powers is not brought into play as a reason not to fully incorporate legislative facts, including those the majority raises, into an interpretation.

Similarly, it is not brought into play to justify the dissent's bigger step, the one it really aspires to take, the conclusion not simply that legislative facts are beyond judicial evaluation but that it's for Congress to fix whatever statutory flaw exits. For the only way that separation of powers could justify that conclusion would be for the dissent to plunge into the same pool of facts as the majority, see what the facts say about Congressional intent on the disputed phrase, and then determine that the facts as a whole convey a message contrary to what the majority found. In other words, the dissent must dive to at least the same interpretive depth as the opposing side, inquire within evidentiary and empirical parameters at least as encompassing, to reach a contrary conclusion of adequate validity to defeat the majority's.

Again, James' words carry the prophetic ring: "You cannot look on any such word as closing your quest." Clinging to the literal becomes a refusal to interpret.

The House of Mirrors

By excluding the larger, factual context — reality, one might say —the canons of construction inevitably become a house of mirrors. The dissent assumes, for example, that if "Exchange established by the State" can be interpreted in the tax credit section to have a meaning rewriteable as "Exchange established by the State or federal government," then every statutory occurrence of the first must be replaced with the second, and once you do that, the statute makes no sense; therefore, the reasoning goes, "Exchange established by the State" cannot have the same meaning as "Exchange established by the State or Federal government" in the tax credit provision.[46] The dissent makes a similar move with the word "such." It argues "such" can't bear the meaning the majority would attribute to it in the provision requiring the Secretary of Health and Human Services to

establish "such exchange" because then a like phrase in the election clause of the Constitution, "such Regulations," wouldn't make sense.[47]

But interpretation, and the majority's interpretation in particular, doesn't mandate that words and phrases retain absolute semantic equivalence across all contexts. Such a requirement and all the bugaboos it might generate are solely of the dissent's own creation. The majority's answer to the dissent-imagined anomalies is that context counts; in a specific response, the majority quotes a Justice Scalia opinion from the prior term as a canon tiebreaker: "the presumption of consistent usage readily yields to context."[48] But the majority's overarching point, beyond any face-offs of opposing canons — the point that allows the majority to reach a conclusion that "Exchange established by a State" can encompass a federally operated exchange "at least for purposes of the tax credits"[49] — is that context in all of its dimensions counts. The phrase, the sentence, the statute, the purpose of the statute, and the legislative facts shedding light on the statute, they're all part of a contextual universe available to confer meaning.

Language itself works in just that way, conferring meaning by context. Jonathan Swift happened to sketch a satirical cartoon of the impulse to nail meaning beyond the vagaries of freely flowing contexts; in *Gulliver's Travels*, the learned men at the University of Legado carried around knapsacks full of things; that way, they could communicate by reaching for concrete things, avoiding the trouble of slippery words. Despite the insights of Peirce and James and the Boston luminaries, the reification of words reenters legal reasoning through literalism. One doorway, as Judge Posner has observed, is a reliance on dictionaries to solve problems of legal interpretation. "Dictionary definitions are acontextual," he wrote, "but the meaning of words and sentences depends critically on context, including background understandings."[50]

Ultimately, a stack of definitions is no better than a sack of things. Neither is language. Ironically, dictionaries themselves recognize that words find their semantic running legs in use. In his monumental English dictionary, Samuel Johnson offered source citations, and in a later edition, quotes, a practice the Oxford English Dictionary and other Johnsonian descendants have followed ever since. Dictionary definitions are merely summaries, descriptions, or approximations of context-dependent meaning. And when it comes to legal interpretation — that is, formulating an argument, decision, or legal rule that arises from, and is expected to impact, a world beyond a fabric of texts —context encompasses a factual, not just the textual, setting.

A Claim Relinquished

Narrowing the interpretive focus to a closed universe of canons and text offers no compensating gain in objectivity. Chief Justice Roberts' majority opinion demonstrates this slyly by repeatedly citing Justice Scalia's opinions when invoking canons of construction. In other words, the canons can work the other way, too.

But the dissent itself inadvertently relinquishes any claim to a superior grip on objectivity or validity. To refute the majority, the dissent is again impelled to cast a momentary glance beyond canons and text. The majority had noted that the unavailability of tax credits on federal exchanges would cause a whole new set of stat-

utory anomalies. When the dissent counters, it's as if an image flashes in the house of mirrors but the self-reflection is missed:

> Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions lined up perfectly with each other.[51]

Indeed, the majority's point exactly. But the majority went one better for going further. It found an interpretive fit with the larger reality of fact. For one, it recognized specific, fact-based circumstances that contributed to the "unfortunate reality" of "mismatches" in the text actually before the Court. But more significantly, it saw the relevance in similar health care statutes that had, in fact, failed without a tax credit. And then, it derived meaning from authoritative fact-based assessments that the Affordable Care Act would likewise fail without a tax credit. The majority embraced fact. The dissent retreated.

On the Path of the Law

The law is ill served by entrenchment behind a redoubt of canons. Likewise, by repair to the scholarly garret of history only to pull up the ladder. Self-imposed myopia is a failed discipline.

The particular facts of a case are inextricably embedded in a still larger world. The law attains continuing relevance only by remaining open to that sometimes elusive, changeable environment of fact.

On the path of the law, we may be carried to the edge. We may be challenged. But we can stay attentive. And if we do, perhaps we'll hear a call sounding from afar, "distinct and definite as never before."[52]

It's the call of the real.

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[1] Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013), 272.

[2] William James, "Philosophical Conceptions and Practical Results," in *The Heart of William James*, ed. by Robert Richardson (Cambridge: Harvard University Press, 2010), 186-187. ("Philosophical Conceptions and Practical Results was an address delivered at the Philosophical Union, Berkeley, California on August 26, 1898); William James, "What Pragmatism Means," in *William James: Writings* 1902-1910, ed. by Bruce Kulick (The Library of America, 1987), 506.

[3] Charles S. Peirce, "How to Make Our Ideas Clear," *Popular Science Monthly* 12 (January 1878): 286-302 (http://www.peirce.org/writings/p119.html).

[4] Ibid.

[5] Ibid.

[6] James, "What Pragmatism Means," in *William James: Writings 1902-1910*, 509.

[7] Ibid., 509-510.

[8] See Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001), 201-232.

[9] Ibid., 216.

[10] Ibid., 201.

[11] Ibid., 223.

[12] James, "What Pragmatism Means," in *William James: Writings 1902-1910*, 511.

[13] Louis Menand, *The Metaphysical Club*, 224, citing Nicholas St. John Green, "Proximate and Remote Cause" (1870), *Essay and Notes on the Law of Torts and Crime* (Menasha, Wis. George Banta, 1933), 13, 15.

[14] Oliver Wendell Holmes, Jr., "Codes and the Arrangement of Law," *American Law Review* 5:1 (1870) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995) Vol. 1, 212.

[15] Oliver Wendell Holmes, Jr., *The Common Law* (1881) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995) Vol. 3, 115.

[16] Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10:457 (1897) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (1995) Vol. 3, 396.

[17] Ibid.

[18] Ibid., 397

[19] Ibid.

[20] Ibid., 397-398

[21] Ibid., 399.

[22] Ibid.

[23] Ibid.

[24] Ibid., 400.

[25] Louis D. Brandeis, "Brief of Defendant in Error," *Muller v. Oregon*, 208 U.S. 412 (1908), 10. (The Brandies Brief is available at: http://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/the-brandeis-brief-in-its-entirety)

[26] Ibid., 19-20.

[27] Ibid., 45.

[28] Fed. R. Ev., 201, Advisory Committee Notes, citing "An Approach to Problems of Evidence in the Administrative Process," *Harvard Law Review*, 55:364, 404-407 (1942).

[29] Fed. R. Ev., 201, Advisory Committee Notes.

[30] Ibid., citing 2 *Administrative Law Treatise*, 353 (1958)

[31] Ibid.

[32] Ibid., quoting Davis, "A System of Judicial Notice Based on Fairness and Convenience" in *Perspectives of Law* (1964), 83.

[33] King v. Burrell, 576 U.S. ____, (2015) slip op., majority opinion, 1.

[34] Ibid., 2.

[35] Ibid., 2-4.

[36] Ibid.

[37] Ibid., 14.

[38] Ibid., 15-18.

[39] *Ibid*.

[40] Ibid., dissent, 14.

[41] *Ibid*.,17.

[42] Ibid.,19.

[43] *Ibid*., 20.

[44] *Ibid*., 18.

[45] Ibid.,17-18.

[46] Ibid., 6-7. ("Equating 'establishment by the State' with establishment by the Federal Government makes nonsense of other parts of the act.")

[47] Ibid., 7-8.

[48] Ibid., majority opinion, note 3, 15-16.

[49] Ibid., 13.

[50] Posner, 180

[51] *King v. Burrell*, dissent at 9.

[52] Jack London, *The Call of the Wild* (New York: Dover, 1990), 54.

...Continued from page 1: **Protecting the Appeal from "Truthy" Amici Facts: Strategies for Embattled Party Counsel**

will enter the record. Procedures abound for challenging unreliable information—e.g., discovery, motions in limine, *Daubert* hearings, objections—and trial courts are expected to play the gatekeeper and filter out the chaff. But then after that record becomes fixed on appeal, appellate courts will often allow amici curiae to create a new record—with new data, statistics, testimonials, and scientific research—to assist the appellate court in its "legislative fact-finding."[1]

The court's interest in new evidence relevant to its lawmaking creates opportunities for amici, but it presents a conundrum for party counsel. Unlike the trial courts, appellate courts rarely if ever provide a formal adversarial process for challenging questionable amici facts, and the rules of evidence that would lend teeth to the process do not apply. The trial court's rigorous evidence-testing mechanisms are not available to filter out unreliable amici information, even though fashioning sound legal principles that govern all future cases is surely as important as making correct factual determinations in the instant case, if not more so.

Certainly, many amicus briefs are relatively innocuous on this front. The typical brief that merely retraces legal reasoning of the supported party or that offers undisputed or uncontroversial contextual information is of no concern here. The true concern—for party counsel at least—is the amicus who provides specious information at the eleventh hour that is likely to resonate with the court and influence its rule-making. This article offers some strategies for striking back, despite the lack of formal procedures for doing so.

Appreciating the trend toward increased reliance on amici for legislative fact-finding

The power of amicus briefs to influence our highest court has been known for some time.[2] Indeed, 15 years ago, Professors Joseph Kearney and Thomas Merrill observed in an important article that the rise of the amicus curiae represented a "major transformation in Supreme Court practice" over the course of the 20th Century. Whereas in the early part of the 20th Century, amicus briefs were filed in "only about 10% of the Court's cases," by the end of the century, "one or more amicus briefs" were being "filed in 85% of the Court's argued cases." Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744 (2000). The rare case became the one without an amicus brief. This trend has only accelerated in the 15 years since Kearney and Merrill wrote their seminal article. Just two terms ago, over 1,000 amicus briefs were filed—the all-time record. Word has gotten around that amicus briefs can make a difference.

If social proof is not enough, the justices of our highest court have expressly confirmed the potential influence of amici. For instance, while still on the Court, Justice Sandra Day O'Connor noted the importance of amicus briefs in tax and intellectual property cases. Tony Mauro, "Bench Pressed: A Pair of High Court Justices Offer Advocates Advice About the Proliferation of Amicus Briefs," *The American Lawyer*, vol. 27,

p. 83, March 2005. Justice Breyer has stated that amicus "briefs play an important role in educating judges on potentially relevant technical matters . . . and thereby helping to improve the quality of our decisions." "Justice Breyer Calls for Experts to Aid Courts in Complex Cases," *N.Y. Times*, Feb. 17, 1998, at A17. Then-Judge Alito noted in an opinion granting a motion to file an amicus brief that "[e]ven when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002).

The praise has not been unqualified. While acknowledging that amicus briefs might "sometimes try to fill empirical gaps," Judge Posner has criticized them as mere "advocacy documents, not subject to peer review or other processes for verification." Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 48 (2005). Indeed, in one case in which he denied a motion to file amicus briefs, Judge Posner wrote that "the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003). Perhaps he is saying that "friend of the court" is at times a misnomer.

The fact remains that the United States Supreme Court has often relied on amicus briefs to support significant factual issues. On this point, Professor Allison Orr Larsen of William and Mary has done yeoman's work. In an important and, at times, sobering article in a recent issue of the *Virginia Law Review*, Professor Larsen lays out the frequent reliance of the United States Supreme Court on facts brought to its attention by amici. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014). Her article details some of the problems caused by this reliance and also offers some systematic and structural changes that might help safeguard the Court from "bad" facts. Though our focus here is on working within the existing system and structure, we gratefully rely upon Professor Larsen's article for many of the useful illustrations below.

Two well-known instances are the majority opinion in the University of Michigan Law School affirmative action case, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and the majority opinion in the partial-birth abortion case, *Gonzales v. Carhart*, 550 U.S. 124 (2007). In the former, Justice O'Connor, writing for the Court, said that the "Law School's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. . . [N]umerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330 (quoting Brief for American Educational Research Association et al. as Amici Curiae 3). Referencing a testimonial amicus brief, Justice Kennedy wrote in *Carhart* that he could "find no reliable data to measure the phenomenon, [but] it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." 550 U.S. at 159 (citing Brief for Sandra Cano, et al., as Amici Curiae in No. 05–380, pp. 22–24).

Professor Larsen's article supplies a host of other cases where the Supreme Court has turned to these briefs to support minor and major points in its legislative fact-finding.[3] In analyzing the Supreme Court's 417 opinions (majority, dissents, and concurrences) in the five years from 2008 through 2013, Professor Larsen found that they contained a total of 606 citations to amicus briefs and slightly over 20% of those citations—124 total—were citations in support of legislative facts. Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1778.

One explanation for the court's increased interest in amicus briefs that judges now recognize the need for a broad perspective to discern good policy. As Oliver Wendell Holmes, Jr. famously wrote in *The Common Law*: "The life of the law has not been logic; it has been experience." Perhaps in this age of increased cultural self-awareness and greater faith in social science, the judiciary is less willing to rely on its own limited, subjective, and outdated experience as the exclusive lodestar. Perhaps it finds the support of subject-matter experts reassuring. Rightly so. But at the same time, the court risks undermining the public's respect for those policy decisions if it relies on ill-founded amici facts for support.

Identifying the weaknesses in an amicus brief's legislative facts

Professor Larsen identifies some recurring foundational defects in amici briefs. First is the amicus brief that cites to some source that is either on file with the author or not publicly available. One of the most striking examples that Larsen gives is that of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). There, the question presented was "whether the Due Process Clause of the Fourteenth Amendment was violated when" a state supreme court justice refused to recuse himself from hearing a case that involved a corporate party whose president had donated millions of dollars to support the justice's election—much of it in the form of independent expenditures. 556 U.S. at 872. The corporate party prevailed in the state supreme court on a 3-2 vote. But the United States Supreme Court held that the failure to recuse *did* violate due process. In his dissent, Chief Justice Roberts cited an amicus brief for the proposition that independent expenditures might actually harm a candidate. *Id*. at 901 (citing Brief for Conference of Chief Justices as Amicus Curiae 27, n.50 (which, in turn, cited various "examples of judicial elections in which independent expenditures backfired and hurt the candidate's campaign"). As Larsen points out, the "amicus brief cites a law review article for the fact, which, in turn, cites an e-mail from a state judge that is only 'on file with the author.'" Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1785.

Another problem with amicus facts is what one might term the navel-gazing or self-referential brief. This sort of brief relies upon an amicus's own research for support. The Supreme Court has relied on such *amicus* briefs. For instance, in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8, 10 (2010), the court examined whether a federal statute which "makes it a federal crime to 'knowingly provid[e] material support or resources to a foreign terrorist organization,'" violated the First Amendment and was unconstitutionally vague. The court held that it did not violate the First Amendment and was not unconstitutionally vague and supported its hold-

ing with the observation that money raised for charitable purposes had been redirected for terrorist activities. To support this assertion, the court relied, in part, upon an amicus brief filed by the Anti-Defamation League (ADF). *See id*. at 32 (citing Brief for Anti-Defamation League as Amicus Curiae 19–29 (describing fundraising activities by the PKK, LTTE, and Hamas)). As Larsen notes, the ADF brief's "principal support for this claim comes from a series of 'fact sheets' that it authored and published on [ADF's] own website." Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1793.

A related category is the amicus brief containing research that seems to have been manufactured for litigation. In *Kirtsaeng v. John Wiley and Sons, Inc.*, 133 S. Ct. 1351 (2013), the court addressed whether the "first sale doctrine" in copyright law—the doctrine that a copyright owner has the right to control only on the first sale of his copyrighted work—is geographically limited. The majority opinion cites the American Library Association's brief for the fact that "library collections contain at least 200 million books published abroad," to underscore the need to apply the first sale doctrine abroad. *Id*. at 1354–55. As Larsen notes, that amicus brief cites to a blog post written by a person who works at the Online Computer Library Center, a worldwide library cooperative organization. The blog post notes that it was written in response to a request "to provide an estimate on the number of books held by US libraries that were published outside of the United States." The blog "ceased to exist" after the litigation ended. Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. at 1792.

Though certain factual assertions would not withstand scrutiny in a trial court, they could be entirely accurate. Or perhaps, as in *Kirtsaeng*, the general point is so undebatable, and the factual accuracy of the details so inconsequential, that nobody really cares. However, these examples do illustrate two points: One, the cited support for an amici's legislative facts should not be accepted at face value. Two, appellate counsel cannot expect the appellate court to ignore an amici's dubious assertions when they go unchallenged.

Strategies for challenging factual assertions in an amicus brief

Appellate counsel face two potential difficulties in effectively challenging the factual assertions of amici. The first is procedural: the appellate courts often lack formal procedures for objecting to or responding to an amicus brief. The obvious solution is to file a motion for leave to file a responsive brief, but there is a risk it might be denied. We suggest some tactics below for persuading the court to grant the motion. The second challenge is that the normal rules of evidence do not apply; in other words, there are no formal rules governing what sort of evidence or bald factual assertions amici can introduce, as long as they pertain to legislative facts. *See, e.g.*, Fed. R. Evid. 201(a) (governing judicial notice of an "adjudicative fact only, not legislative fact"). As we explain below, that obstacle is overcome by leveraging the principles that undergird well-established evidentiary rules and procedures.

Short of taking the drastic, usually unwelcomed, and routinely ineffective measure of filing a motion to strike, the only other defensive procedure available to appellate counsel is to file a responsive brief. Sometimes the court

rules provide an opportunity to respond in the regular briefing schedule, by setting the amicus brief deadline before the deadline for filing the appellee's principal brief or the appellant's reply brief. *See, e.g.*, Sup. Ct. R. 37(3)(a). At other times, the **amicus** brief is not due until after the deadline for briefing has passed. *Compare* Sup. Ct. R. 37(2)(a) (requiring the amicus brief in support of the petitioner to be filed within 30 days after the case is placed on the docket) and Sup. Ct. R. 15(3) (requiring the brief in opposition to a petition for a writ of certiorari to be filed within 30 days after the case is placed on the docket); *see also* Mich. Ct. R. 7.306(D)(1). In the latter case, the problem may be resolved by motion. Many appellate courts have a relatively liberal motion practice and the power to grant leave to file a response to an amicus brief.

Though the trial court's procedures for evidence testing do not apply here, the underlying principles of fairness and truth-seeking still do. Those principles should be brought to bear in the motion for leave. Fairness calls for parties to be given an opportunity to respond when amici make controversial factual assertions that could influence the rule of law and, consequently, the outcome of the case. Moreover, the court should want notice that important amici facts are incorrect or unreliable for the sake of developing the correct rule of law. If anything, amici need to know that their factual assertions are subject to challenge, as this keeps them honest. Disallowing a response allows amici to become ploys for raising ostensibly compelling arguments that do not withstand scrutiny.

Of course, the most important element in persuading the court to grant the motion is the merits of the response brief itself. To that end, why not, again, evoke the ethos of the trial court's evidentiary rules? Though the rules themselves do not apply, the concerns they embody certainly do. Those concerns are three fold: relevance, reliability, and fairness. For the appellate court to take notice of an amici fact, it should be relevant to the rule of law at issue, the source should be reliable, and the source should be fairly available for scrutiny.

The best way to undermine the credibility of the amicus brief is to attack the reliability of the brief's factual assertions. Reliability generally boils down to two issues: verifiability and credibility. If the amicus does not cite any supporting authority or the cited authority is inaccessible, then information cannot be verified. *Caperton* provides a good example, where the ultimate source for the point that independent expenditures can backfire was an email from a state judge locked away in a professor's desk drawer. 556 U.S. at 901. On the other hand, if the source is verifiable but biased, or lacks relevant subject-matter expertise, then the information lacks credibility. An argument could be made that the Anti-Defamation League's self-referential point in *Holder*, 561 U.S. at 32, lacked credibility because it was based on ADLD's own work. Appellate courts will normally avoid relying on information if they realize it comes from unverifiable or incredible sources.

Apart from the lack of opportunity to respond, fairness is less of an issue in the context of legislative fact-finding. However, there is a fairness argument to be made when the source of information is not accessible. For instance, in federal court, the parties are entitled to the disclosure of

evidence the other side intends to rely upon before it is submitted to the trial court, as this provides the other side an opportunity to examine it and prepare a response. By analogy, it is unfair for amici to cite sources that are not publicly available or attached to their brief, as this unfairly shields the source from the scrutiny of the parties and the court.

As for the principle of relevance, we advise against troubling the court with a responsive brief to object on that basis alone. If the facts are not relevant, one can expect an appellate court to ignore them. Whether a motion is required or not, the dignity of a response should be reserved for those factual assertions that are damaging to your client's position. Irrelevant facts are not. That said, if you will be challenging the amicus brief on the basis of unreliability, then it does not hurt to briefly make the point on relevance as well (perhaps in a footnote).

Final recommendations for deciding when and how to bring a challenge

In evaluating whether to object to an amicus brief's factual assertions, the first question is whether the point is sufficiently damaging to your client's case to warrant a response. If so, then the second question is whether a persuasive argument can be made that the court should ignore it. There is no formula for answering the first question. The issue is case and brief specific. It is important to recognize that filing a response to an adverse amicus brief will undoubtedly highlight the damaging points in that brief for the court. It may also bring to light weaknesses in briefs of supporting amici. But sticking one's head in the sand (or hoping the court will) may not be the best strategy either. The best strategy is to have experienced appellate counsel involved when making this judgment call.

In answering the second question, consider using the rules of evidence as a starting point. Every rule of evidence reflects one of the fundamental concerns above. Hearsay, for instance, is usually excluded because the information cannot be verified, as the source is unavailable. Proper qualifications are required to be admitted as an expert to ensure a certain degree of credibility. You can use the rules as a framework for spotting weaknesses in the amici's facts and sources. But just remember that the rules of evidence themselves are not the standard for deciding whether to object. A far lower standard applies to legislative facts. A social sciences survey might technically fail the hearsay test; but that alone does not make citation to it objectionable. And challenging it in a response brief will only bring it to the court's attention.

Finally, keep the response timely and short. Exposing a few egregious examples of the amicus using self-referential sources or making unverifiable claims tends to discredit the whole brief. Because the amicus has no meaningful opportunity to respond, there is no need to knock every ball out of the park once you are a few points ahead. Moreover, when seeking leave to file the response, a lengthy brief will only discourage the court from granting the motion. And in any event, nitpicking every flaw in the brief only gives the brief more credit than it is due.

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[1] "Legislative facts" are those facts which have no relevance to the particular case but "which have relevance to

legal reasoning and the lawmaking process," such as in "the formulation of a legal principle or ruling by a judge or court." Fed. R. Evid. 201 (Notes of Advisory Committee on Proposed Rules subdivision (a)).

[2] Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 828 (2000) ("As the number of amicus submissions has soared, so have the citations and quotations of amicus briefs found in the Justices' opinions."); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 175, 1777 (2014) ("Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void."); Anthony J. Franze and R. Reeves Anderson, "Justices Are Paying More Attention to Amicus Briefs," Nat'l L. J. (Sept. 8, 2014) (stating that 2012-2013 term saw a "record-breaking 1,001 [amicus] briefs" filed and that 2013-2014 saw just over 800 amicus briefs filed).

[3] *See, e.g.*, *Williams v. Illinois*, 132 S. Ct. 2221, 2244 (2012) (citing Brief for New York County District Attorney's Office et al. as Amici Curiae 6 for the proposition that often numerous "technicians work on each DNA profile"); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) (citing Brief for National Association of Social Workers et al. as Amici Curiae 6–14 for the reasonableness of expectation of privacy of an adolescent); *Graham v. Florida*, 560 U.S. 48, 68, (2010) (citing Brief for American Medical Association et al. as Amici Curiae 16–24; Brief for American Psychological Association et al. as Amici Curiae 22–27 for proposition that "parts of the brain involved in behavior control continue to mature through late adolescence").

...Continued from page 1: **Editor's Note**

It's a theme that's attracting increasing attention. One driver, to be sure, is Judge Posner, both his commentary and his opinions. But his writing is the product of still other, underlying forces prompting consideration of the constraints the record does or does not, should or shouldn't, place on legal analysis.

These underlying pressures are multiple and inter-related. They include the increasing factual complexity of the world from which disputes arise (as Judge Posner observed in *Reflections on Judging*); the fingertip availability of an infinitude of fact, accessible to the parties, the court, and a scrutinizing public as well; the growth of factual information itself and of methods of factual analysis; a greater awareness of appellate decisions and of their potential impact, spurred by the increasing efficiency of Internet communication; and a general pragmatic awareness, arising from people's own endeavors in business and daily life, that decision-making is fact oriented.

What is more, the question of how the record should constrain judicial determinations touches on tensions that lie at the very heart of the judicial system. On the one hand, there's an impulse to restrict the field of view to a closed universe. As a practical matter, everything can't be litigated and re-litigated. Litigation would go nowhere if the resource of accessible evidence and argument remained boundless. Likewise, it would go nowhere if appeals were de novo repetitions of the trial; not only would the initial trial become a mere dress rehearsal but successive trials would be an economic catastrophe. Finality at both the trial and appellate level is achieved only by imposing limits.

In addition, a concern for fairness supports re-

legal reasoning and the lawmaking process," such as in "the formulation of a legal principle or ruling by a judge or court." Fed. R. Evid. 201 (Notes of Advisory Committee on Proposed Rules subdivision (a)).

[2] Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 828 (2000) ("As the number of amicus submissions has soared, so have the citations and quotations of amicus briefs found in the Justices' opinions."); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 175, 1777 (2014) ("Supreme Court Justices, like the rest of us, seem to be craving more factual information, and the amicus briefs are stepping in to fill the void."); Anthony J. Franze and R. Reeves Anderson, "Justices Are Paying More Attention to Amicus Briefs," Nat'l L. J. (Sept. 8, 2014) (stating that 2012-2013 term saw a "record-breaking 1,001 [amicus] briefs" filed and that 2013-2014 saw just over 800 amicus briefs filed).

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...Continued from page 1: **Editor's Note**

It's a theme that's attracting increasing attention. One driver, to be sure, is Judge Posner, both his commentary and his opinions. But his writing is the product of still other, underlying forces prompting consideration of the constraints the record does or does not, should or shouldn't, place on legal analysis.

These underlying pressures are multiple and inter-related. They include the increasing factual complexity of the world from which disputes arise (as Judge Posner observed in *Reflections on Judging*); the fingertip availability of an infinitude of fact, accessible to the parties, the court, and a scrutinizing public as well; the growth of factual information itself and of methods of factual analysis; a greater awareness of appellate decisions and of their potential impact, spurred by the increasing efficiency of Internet communication; and a general pragmatic awareness, arising from people's own endeavors in business and daily life, that decision-making is fact oriented.

What is more, the question of how the record should constrain judicial determinations touches on tensions that lie at the very heart of the judicial system. On the one hand, there's an impulse to restrict the field of view to a closed universe. As a practical matter, everything can't be litigated and re-litigated. Litigation would go nowhere if the resource of accessible evidence and argument remained boundless. Likewise, it would go nowhere if appeals were de novo repetitions of the trial; not only would the initial trial become a mere dress rehearsal but successive trials would be an economic catastrophe. Finality at both the trial and appellate level is achieved only by imposing limits.

In addition, a concern for fairness supports re-

strictions. The adversarial process presumes that the validity of a proposition is affirmed by subjecting it to rebuttal. So there's an expectation that whatever one side raises the other should have a chance to counter. Similarly, there's an expectation that parties should have a chance to respond to adverse matter newly raised by a judge; for what's the source of judicial validity if not the adversarial test? So fairness supports excluding matter if there was no rebuttal opportunity.

On the other hand, there's an abiding impulse to get things right and render a correct, or at least, the best, decision. Inevitably, the interest in getting things right is an incentive for more information, whether it's an undisclosed or newly administered DNA test or sociological and psychological data on whether the death penalty deters.

In addition, apart from inevitable errors that can misdirect a proceeding from what is factually or legally correct, the adversarial process suffers from an inherent defect, which, in turn, finds its cure by enlarging the field of available information. It might be called the "either/or defect."

In essence, the adversarial process strives to cram a multi-dimensional, nuanced world into an either/or dichotomy fueled by self-interest. Yet there's no assurance that any aspect of a case is necessarily as either the plaintiff or the defendant portrays it. The plaintiff can argue A and the defendant can argue B. But reality may well be neither. It could be C. Or it might be something that resembles A but with a bit more of the A-like qualities or of A's verifying supports — AA. C and AA could be points of fact or law. But in either case, since neither was raised, neither would be included in the appellate case — unless there's a way of bringing them in.

The articles in this issue examine such tensions from varying perspectives.

In my contribution, "The Call of the Real," I trace an intellectual line through William James and Oliver Wendell Holmes, Jr., among others, arguing that the still resonate philosophical outlook known as "pragmatism" compels legal reasoning to remain open to non-record legislative facts. I conclude with an analysis of the majority and dissenting opinions in *King v. Burrell*.

Gaëtan Gerville-Réache and Conor B. Dugan, in "Protecting the Record from 'Truthy' Amici Facts: Strategies for Embattled Party Counsel," offer advice on how a party can counter non-record facts raised by opposing amici; in the process, they provide an historical perspective on the use of legislative facts and insightful examples of legislative fact abused.

Devin C. Dolive's and E. Travis Ramey's "Appellate Judicial Notice in a 'Google Earth' World" is a thoroughly researched study of judicial notice at the appellate level. They, too, examine history. They consider current use of the Internet and criticisms leveled against it. They conclude with recommendations to advance the goals of both fairness and correctness.

In "Judges and the Internet: Does the Record Still Matter?" John J. Bursch discusses the growing prevalence of judicial use of the Internet to access non-record facts, concluding with advice for preventing this sua sponte judicial reliance from taking an unfavorable turn.

D. Alicia Hickock discusses knotty, cutting-edge conundurms in her widely researched "As a Matter of Fact … Why Such Controversy Over Legislative Fact-Finding?" Is a lower court bound by a higher court's outcome-determinative finding on a matter of legislative fact? What if the finding is wrong? Or what if the finding becomes wrong in time because both the realm of fact and our understanding of it are in constant flux? And does a legislature's finding take precedence if it's at issue in a constitutional challenge?

Ellie Nieberger's "Judicial Notice of Adjudicative and Nonadjudicative Facts" is a useful, practitioner's overview of judicial notice under Federal Rule of Evidence 201 and related issues, such as appellate review of a trial court's judicial notice.

In "Improved Accuracy through Improved Accuracy: Rule 10(e) and the Record on Appeal," Nancy M. Olson explores making corrections or modifications to the record under Rule of Appellate Procedure 10(e).

"A Tale of Two Records" by Robert S. Shafer and Martin A. Kastin is the story of two cases before two state supreme courts on virtually identical records on parallel theories of liability with over $1 billion at stake. Yet the outcomes and opinions in each are entirely different with one court invoking non-record factual matter to which it lends a particularly disturbing shade.

In "You Fight or You Die: When Bending the Knee at Trial Costs You the Throne," Brian K. Keller relies on his experience as Deputy Director of the Navy's Appellate Division to identify types of cases vulnerable to record inadequacies because of a failure of appellate counsel to participate at the trial court level.

Howard J. Bashman discusses the legal side of an inadequate record: the impulse, if not the judicial obligation, to get a point of law right even though it wasn't argued before the trial court. In the process, "Raising New Issues on Appeal: The Legal Aspect of the Record on Appeal" describes useful circuit court exceptions to the waiver rule.

"Red Tie Guy: a True Story of the Overpowering Influence of Facts Outside the Record" is the issue's coda. Wendy McGuire Coates unearthed this gem from the mine of real life interviews. It's a reminder of the range of influential phenomena that seep through the boundaries of the record and established procedure. It's also a reminder that, for better or worse, both advocacy and judicial decision-making are distinctly human endeavors not easily reducible to a set of formal rules.

To stretch oneself beyond the practiced literary mode of the legal brief is rewarding. You become more limber and adept as a writer. You acquire a deeper understanding of the law. At the same time, it's challenging work. There's no single correct way. You might start without a clear view of where you'll finish. But in the end, the benefit extends to a community of readers and echoes beyond.

I wish to thank each of the contributors for sticking with the task and sharing a piece of their mind.

David J. Perlman, Editor

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[1] Richard A. Posner, *Reflections on Judging* (Cambridge: Harvard University Press, 2013), 131.