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Constitutional Adjudication, Civil Rights, and Social Change

Suzanne B. Goldberg*

*Rutgers Law School (Newark), sgoldberg@kinoy.rutgers.edu

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Abstract

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The article also challenges the claim that courts can and should remain neutral in public debates by sustaining traditional norms when views about social groups are in contest. It argues that this position, like the judicial embrace of fact-based decision-making, rests on the same flawed premise that restrictions on social groups can be evaluated based on facts alone. Our theories of judicial review will be better off, both with respect to descriptive accuracy and normative bite, to the extent they recognize the inevitable involvement of courts in making normative judgments about social groups.

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By Suzanne B. Goldberg[1]

Judicial opinions typically rely on "facts" about a social group to justify or reject limitations on group members' rights, especially when traditional views about the status or capacity of group members are in contest. Yet the fact-based approach to decision-making obscures the normative judgments that actually determine whether restrictions on individual rights are reasonable. This article offers an account of how and why courts intervene in social conflicts by focusing on facts rather than declaring norms. In part, it argues that this approach preserves judicial power to retain traditional justifications for restricting group members' rights in some settings but not others without having to explain the inconsistent treatment of group-related norms. The consequences of the fact-based decision-making fiction appear strikingly in many contemporary same-sex marriage cases, where courts treat procreative facts as decisive and avoid reconciling gay couples' exclusion from marriage with other decisions that treat sexual orientation-based differences as legally insignificant. In that light, the article tests the costs and benefits of greater candor regarding the normative underpinnings of decisions.

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[1] Associate Professor of Law, Rutgers School of Law-Newark. This Article was written while I was a Visiting Professor at Columbia Law School; I thank both Columbia and Rutgers for their financial support for this project. Many thanks for their insights to Michelle Adams, Mary Anne Case, Ariela Dubler, Bill Eskridge, Gary Francione, Richard Goldberg, Philip Hamburger, Edward Hartnett, Nan Hunter, John Leubsdorf, Jim Liebman, Tamara Lothian, Gillian Metzger, Jim Pope, Richard Primus, Catherine Sharkey, Peter Strauss, Susan Sturm, Jeremy Waldron, Mark Weiner, the participants in the Columbia Law School Faculty Workshop and the LGBT Law Faculty Workshop of Greater New York, and especially Henry Monaghan. I am grateful to Todd Anten for outstanding research assistance.

Courts . . . do not sit or act in a social vacuum. . . . . [W]hat once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.[2]

Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white.[3]

Introduction

How do we measure tipping points in constitutional litigation? More specifically, how do courts decide whether traditionally accepted views of social groups have transformed, as a result of societal change, into impermissible justifications for restricting group members' rights?[4] In addressing these questions, this article has two aims: The first is to advance our understanding of how courts intervene in conflicts regarding popular views of social groups. The second is to challenge the widely held view that

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[2] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).

[3] Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

[4] By social groups, I simply mean clusters of individuals that are treated by the surrounding community as comprising an independently identifiable group based on a shared characteristic or practice. The "particular social group" category in asylum law, which is one of five grounds on which individuals who have a well-founded fear of persecution can seek asylum, helps illuminate the social group concept as I use it here. *See* Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) (describing particular social group membership as defined by a shared characteristic "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences"), *overruled in part on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

While the definition of social group might be construed more broadly to encompass groups linked by occupation (e.g., lawyers, opticians, pushcart vendors) or other interests as much as groups linked by traits that are arguably more deeply rooted, my focus here is on groups that are conventionally viewed as making civil rights-based claims and as having the sort of connection identified in *Matter of Acosta*. These groups include people of color, women, people with mental retardation, and lesbians and gay men, among others. *Cf.* Robert Cover, *Origin of Judicial Activism*, 91 YALE L.J. 1287, 1299 (1982) (describing a common conceptualization of minorities as groups "deemed to have a common element of dominating significance, observable in social structure and social process as they affect politics"). Still, the positive and normative accounts set out below likely also would have relevance to adjudication of constitutional claims brought by groups affiliated by "some common impulse or interest." *See* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (characterizing a particular social group as "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest").

For discussion of the relationship of social groups to social movements, see Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1488-1527 (2005). For social science perspectives on the concept of social group, see, e.g., STEREOTYPES AS EXPLANATIONS: THE FORMATION OF MEANINGFUL BELIEFS ABOUT SOCIAL GROUPS (Craig McGarty et al. eds., 2002).

courts ought to minimize the invasiveness of judicial intervention by sustaining the status quo when views about social groups are in contest.

The current wave of litigation by gay and lesbian couples seeking to marry prompts the inquiry here, as these cases saliently illustrate the tensions associated with adjudicating challenges to longstanding norms regarding social groups. At this moment, judges around the United States are deciding whether the rationales traditionally accepted to justify gay couples' exclusion from marriage should now be understood, in light of changing social views, to reflect impermissible hostility rather than legitimate government interests. Some have found it "eminently rational for the Legislature to postpone making fundamental changes to [marriage] until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made."[5] Others, by contrast, have concluded that excluding gay couples from marriage "cannot plausibly further" a state's aim of "ensuring the optimal setting for child rearing" in light of changing demographics and laws recognizing that "people in same-sex couples may be 'excellent' parents."[6]

The inquiry here also is prompted by a similar pattern in federal civil rights litigation where claims are made that once-acceptable views regarding sex, race, and other characteristics have become destabilized as a consequence of societal change. In

[5] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 1003 (Mass. 2003) (Cordy, J., dissenting). *See also* Lewis v. Harris, 875 A.2d 259, 266-67 (N.J. Super. Ct. App. Div. 2005).

[6] *Goodridge*, 798 N.E.2d at 962-63 (majority opinion). *See also* Hernandez v. Robles, 794 N.Y.S.2d 579 (Sup. Ct., N.Y. County 2005). One other court, the Vermont Supreme Court, sought to temper its rejection of the traditional exclusion of same-sex couples from marriage by authorizing the legislature to remedy the state constitutional violation. *See* Baker v. State, 744 A.2d 864, 867 (Vt. 1999). The Legislature ultimately adopted a civil union statute that provided parity of rights and benefits within Vermont for gay and non-gay couples. *See* VT. STAT. ANN. tit. 15, § 1201 (2000). For a defense of this type of balancing approach, see William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004).

these cases, parallel questions arise regarding whether the traditional justifications remain legitimate bases for different treatment.

Yet even if we assume that courts stay roughly within the parameters of acceptable change set by the broader society,[7] we are left to wonder how courts assimilate changing views about social groups and simultaneously avoid being perceived as unduly usurping the legislature's prerogative to reflect the people's will.[8] While this

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[7] *See, e.g.,* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 ("[J]udicial decisions rest within a range of acceptability to a majority of the people,"); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("[C]onstitutional law both arises from and in turn regulates culture."). *See also* Steven G. Calabresi, *Thayer's Clear Mistake,* 88 NW. U. L. REV. 269, 272 (1993) ("Mr. Dooley's dictum about the Supreme Court's tendency to follow the election returns seems no less apt today than when it was first printed almost a century ago."). Although the received wisdom may be acknowledged broadly, the question whether the dialectic relationship between courts and society is desirable remains contentious, especially in originalist quarters. *See generally* SCOTT D. BERGER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999) (describing Justice Thomas's jurisprudence as aiming to discern and apply the framers' original principles).

[8] One could argue that the operative category here is better characterized not as social groups but as issues or conduct. After all, the perceived link among group members may be common conduct or shared sensibilities or capacities that differentiate group members from others. Further, normative judgments about group members tend to inform normative judgments about members' conduct and capacity and vice versa. Thus, the distinction between popular views about a group and views about issues or conduct related to that group is often fuzzy, at best. The dominant tradition of regulating conduct as a means of regulating group members exacerbates this lack of clarity. *Cf.* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (recognizing that Texas's regulation of "homosexual conduct" impacted the rights of lesbians and gay men). Indeed, a significant line of equal protection jurisprudence is occupied with the question whether regulation that is arguably conduct-based actually reflects impermissible sentiment regarding a social group. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973). Because group members bear the brunt of regulation—whether the regulation explicitly targets conduct or a trait, I find the social group category most useful for getting at the process by which courts absorb social change as it concerns subpopulations and the issues affiliated with them. Admittedly, the fit is not perfect. I flag below places where the risk of slippage is greatest and where a focus on issues rather than groups might be the better analytic lens.

More broadly, the focus here on change involving social groups and related issues is but one dimension of a larger conversation about the relationship between courts and societal change. The common law, for example, has long embodied the expectation that courts will take account of change in developing legal principles. *See* Funk v. United States, 290 U.S. 371, 383 (1933) ("[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."); *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3-4 (1982) (describing common law courts as the "principal instruments" for "balanc[ing] the need for continuity and change"). Likewise, strong arguments have been advanced that courts should take societal change into account in statutory interpretation. *See, e.g.,* William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION (1994). The claims here likely have some application to adjudication in non-constitutional settings as well as to constitutional adjudication involving changes to attitudes, practices, and technology that are not related directly to social groups. I leave the development of these arguments to another day.

concern is a perennial one for courts, the relative finality of constitutional adjudication heightens it in ways that statutory interpretation and common law adjudication do not.[9]

The existing scholarship on judicial review goes a step further than the received wisdom regarding the close relationship between judicial analysis and prevailing social views by not only recognizing the tension embedded in the judicial role in these kinds of cases but also advancing normative arguments for its mitigation. Popular constitutionalists, who reject judicial supremacy over constitutional interpretation, contend that courts lack both the accountability and competence to constitutionalize determinations about contested social issues such as the exclusion of gay couples from marriage.[10] Others argue that, rather than categorical judicial restraint, the common law approach of "rational traditionalism," can and should guide judicial review.[11] This approach, as articulated by David Strauss, would require courts to "think twice about . . . judgments of right and wrong when they are inconsistent with what has gone before" and move incrementally, in most instances, rather than breaking sharply with longstanding

[9] *See, e.g.*, CALABRESI, *supra* note 8, at 4 ("The incremental nature of common law adjudication means that no single judge could ultimately change the law, and a series of judges could only do so over time and in response to changed events or to changed attitudes in the people."); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 16 (1995) ("There is of course a 'critical difference' between when courts make constitutional law and when they make common law. Outside the area of constitutional adjudication, state court decisions 'are subject to overrule or alteration by ordinary statute. The court is standing in for the legislature, and if it has done so in a way the legislature does not approve, it can soon be corrected.' But when a case is decided on constitutional grounds, the court solidifies the law in ways that may not be as susceptible to subsequent modification either by courts or by legislatures.") (footnotes and citations omitted).

[10] *See generally* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557 (2002).

[11] *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

traditions.[12] Robert Post has offered still another approach, invoking Louis Brandeis to suggest the centrality of "practical tact and judgment" to preserve legal authority.[13]

Even these arguments, however, offer only general observations about and recommendations for judicial decision-making when the surrounding societal terrain is in contest. By unearthing and critiquing the structural features of adjudication where views regarding social groups are, or have been, in flux, this article aims to provide a more rigorous, specific account of the process by which courts "tip" from one understanding of a social group and its constitutional claims to another.

The starting point for the claims made here is that courts[14] are very much engaged in absorbing, evaluating, and responding to changes in popular views of social groups.[15] A search for overt declarations of new constitutional norms regarding group members will not expose this engagement, however, as these occur relatively infrequently and, typically, after change already has been absorbed in other ways. The better place to look for the judicial response to social change when norms about a group are in flux is in cases resting on "facts" about social groups. In these cases, courts characterize their analyses of restrictions on group members as though they involve neutral assessments of facts about individuals' status and capacity rather than normative judgments about how those facts relate to the restrictions imposed.[16] Only after an initial foray (or series of forays)

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[12] *Id.* at 896-97. Strauss adds that rejection of tradition is justified when, "on reflection, we are sufficiently confident that we are right, and . . . the stakes are high enough." *Id.* at 897.

[13] Post, *supra* note 7, at 109.

[14] Although the discussion below focuses heavily on U.S. Supreme Court jurisprudence, much of the analysis and some of the discussion apply to state courts and lower federal courts as well.

[15] This analysis rests on the belief that constitutional adjudication involves a "gradual process of judicial inclusion and exclusion." Davidson v. Louisiana, 96 U.S. 97, 104 (1877). The decisions below demonstrate this evolutionary theory's descriptive validity and set the foundation for my scrutiny of how social groups fit within the evolutionary process. A normative defense of constitution adjudication as an evolving process rather than as fixed and determined exclusively by text and/or history is beyond the scope here.

[16] As will be explained shortly, the distinction between fact and norm is drawn here for heuristic purposes rather than to suggest a fundamental difference between the two.

through fact-based cases has been made do courts acknowledge the normative underpinnings of the earlier decisions.

Numerous cases illustrate the pervasiveness of this fact-based approach to adjudication. Consider, for example, the Court's determination that "modern knowledge" of race discrimination's harmful effects required invalidation of school desegregation in *Brown v. Board of Education*.[17] Although *Brown* is widely treated as having established the normative impermissibility of racial segregation, the Court's opinion did not actually discuss, much less condemn, societal norms regarding the inferiority of African Americans that had previously justified that race-based distinction. The Court's recent decision in *Grutter v. Bollinger*[18] also highlights the judicial inclination toward fact-based analysis when social norms are in contest.[19] There, the decisional linchpin, at least overtly, related not to the normative value of affirmative action as a remedy for past discrimination but instead to the factual benefits of diversity, which the Court found sufficient to justify the University of Michigan Law School's consideration of race in admissions.[20] Judicial approaches to sex equality in the early 1970s likewise were framed in terms of "new" or changed facts requiring a break with the past normative view that women were less capable in the public sphere than men. Yet even as facts were proffered as decisive—e.g., women have as much experience administering estates as men, so sex-based distinctions in estate administration cannot stand[21]—the decisions unquestionably forged new normative ground. *Romer v. Evans*, which invalidated a

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[17] 347 U.S. 483, 494 (1954). *See infra* text accompanying notes 90-95.
[18] 539 U.S. 306 (2003).
[19] Affirmative action arguably is better characterized as implicating popular views of an issue rather than a social group. *See supra* note 7. *But see* Guy-Uriel E. Charles, *Affirmative Action and Colorblindness From the Original Position*, 78 TUL. L. REV. 2009 (2004) (discussing ways in which views of race shape views of affirmative action).
[20] *Grutter*, 539 U.S. at 330-33. *See infra* text accompanying notes 102-106.
[21] *See* Reed v. Reed, 404 U.S. 71, 76 (1971); *see also infra* text accompanying notes 107-110.

Colorado amendment barring antidiscrimination protections for gay people, also was cast as a fact-driven decision.[22] The Court refused to address the "moral disapproval of homosexuality" norm advanced by the dissent, and instead pinned its holding on the lack of factual connection between Colorado's ban and the government's alleged interests in protecting associational freedom and scarce governmental resources.[23]

While this fact-based decision-making strategy has many appeals, which will be developed below, its theoretical foundations are shaky, at best. After all, facts alone do not supply the judgment necessary to decide whether a law related to a social group is reasonable. As David Hume famously put the point, an "ought" cannot be derived from an "is."[24] The fact that women tend to have primary childcare responsibilities, for example, does not determine whether a law that treats women differently from men responds reasonably to that fact or effectuates illegitimate, negative views about women's capacity. Instead, courts must make normative judgments about the relevance of (purported) factual differences between men and women in order to evaluate laws restricting women's rights. The same is true for evaluations of restrictions on other social groups. That courts focus on facts and leave normative judgments unmentioned obscures but does not eliminate their influence on both analysis and outcomes.[25]

The pervasiveness of this fact-based adjudication strategy, with its fictional premise and its related obfuscation of decisive norms, prompts several questions about the ways in which courts react to constitutional claims by social groups. What, exactly, is

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[22] 517 U.S. 620, 632-36 (1996).

[23] *Id.* *See infra* text accompanying notes 111-114.

[24] DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (Book III, Part I, Section I) (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford 2d ed. 1978) (1739).

[25] This form of reasoning from fact directly to judgment, without analysis of the norms at issue, allows for incompletely theorized decisions as well as the operation of inchoate, unconscious, or ill-formulated norms, as will be discussed *infra*. For extended discussion of undertheorized decisions, see, e.g., Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

the relationship between facts and norms in constitutional adjudication? Why does a fact-based approach to adjudication dominate where norms about social groups are in contest? What can we learn from it about the factors that influence judicial responses to constitutional adjudication regarding social group members? What does this approach suggest for advocates and courts enmeshed in social change litigation? And, finally, what would be the benefits, and costs, of displacing fact-based adjudication with a commitment to judicial candor regarding the norms underlying decisions?

The remainder of this article will explore these questions in the context of constitutional adjudication where popular views about the status and capacity of social group members are contested. Before sketching the article's claims regarding each of these questions, a preliminary caveat is in order. While separating facts from norms is useful heuristically for purposes of identifying a significant judicial decision-making dynamic,[26] the distinction should not be overstated. Facts, as well as norms, are inevitably theory soaked and socially constructed.[27] Like the difference between law and fact, the distinction between norms and facts "does not imply the existence of static, polar opposites. Rather, [norms and facts] have a nodal quality; they are points of rest and relative stability on a continuum of experience."[28] Yet while the two are inevitably interrelated, courts invest a great deal of significance in the perceived boundary between them. Through interrogating the judicial reification of this boundary, we can begin to

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[26] *Cf.* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985) ("In our legal system, the categories [of law and fact] have functioned as crucially important constructs that permit us to understand, organize, and regulate certain forms of social experience."). Jurgen Habermas has explored a different dimension of the relationship between fact and norm at length as it relates to the status and legitimacy of law. *See* JURGEN HABERMAS, BETWEEN FACT AND NORM: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

[27] *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PENN. L. REV. 1 (1995) (making this point with respect to the treatment of sex as fact and gender as norm); Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 650-53 (2002) (discussing the occasional recognition by courts of the socially constructed nature of facts).

[28] Monaghan, *supra* note 26, at 233.

demystify and critique the process by which courts absorb change in the surrounding society.

In Part I, I lay the groundwork for this analysis by exploring the fact-based approach to adjudication of constitutional claims by social group members. In addition to establishing its existence and pervasiveness as a general matter, I identify two different configurations of the fact/norm relationship that will be critical to later discussion of the pressure points on courts to absorb social change. These clusters can be defined by their reliance on either "thick" or "thin" facts.

"Thick" facts (or normative facts, as I sometimes call them here) are loaded evaluative facts. They contain both description (group X has a particular characteristic) and evaluation (the characteristic limits the status or capacity of group X).[29] Think, for example, of courts sustaining sex-based classifications based on the "fact" of women's natural aptitude for child-rearing and household maintenance.[30] We likewise see reliance on "thick" facts where courts have decided cases based on the "fact" that children born to

[29] The identification of "facts" as including normative judgments in addition to empirical truths about group members is post-hoc. At the time they are relied upon, these "facts" often are so deeply naturalized by the surrounding society that they are believed by both courts and the surrounding society to be empirical. Only later, when perceptions of group members change, do the normative judgments reflected in these facts come to be seen, and, often, rejected by courts. *Cf.* Charles W. Mills, *The Racial Polity*, *in* RACISM AND PHILOSOPHY 13, 18-19 (Susan E. Babbitt & Sue Campbell eds., 1999) ("The point is . . . that a political philosophy necessarily involves factual (descriptive and theoretical) assumptions as well as normative claims about the polity, and if the former are not explicitly stated and highlighted as integral to the political philosophy, it is often simply because they are part of the conservative, background 'common sense' that its proponents take for granted.").

Courts are not merely passive players here, however. By selecting among facts, they reinforce perceptions that those facts are true, even when they are not empirically supportable. In *Bradwell v. Illinois*, 83 U.S. 130 (1872), for example, Justice Bradley's concurrence, which stressed that women were unsuited for employment outside the home in light of their domestic natures and responsibilities, not only rested on but also reinforced an inaccurate perception of women as purely domestic at a time when many women were employed in the labor force. *Id.* at 141-42 (1872) (Bradley, J., concurring). Further, some would argue that courts deploy norms as facts strategically to avoid the conflict associated with supporting controversial norms. *See infra* Part V.

[30] *Bradwell*, 83 U.S. at 141-42 (Bradley, J., concurring).

interracial couples are sickly[31] or the "fact" that people with mental retardation are "manifestly unfit."[32]

"Thin" facts, on the other hand, are non-evaluative, empirical, and largely uncontested.[33] Yet in adjudication, they often stand in for a set of unarticulated judgments about the social group in question. For example, in *Nguyen v. INS*, the Supreme Court relied on the mother's role in childbirth to sustain an immigration law that made it easier for U.S. citizen mothers than U.S. citizen fathers to have citizenship conferred on their foreign-born children.[34] That empirical fact, reasoned the Court, made it more likely for mothers than fathers to develop the "real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[35] Yet the

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[31] Scott v. State, 39 Ga. 321, 323 (1869).

[32] Buck v. Bell, 274 U.S. 200, 207 (1927).

[33] Certain types of "thin" empirical facts are subject to change, such as demographic data about the activities of social group members in the workplace and in society at large. To the extent normative judgments about group members' status and capacity function as limitations on group members' opportunities, we can expect to see changes to economic and other indicators of the role of group members in society as those norms shift. Others, such as facts related to biology and reproduction, are ordinarily unaffected by social change.

[34] 533 U.S. 53, 64 (2001). For purposes of the analysis here, I am setting aside the obvious point that childbirth itself provides evidence of parentage, placing women in a different position from men. I do so because although the majority found this evidentiary justification supported the rule, it separately accepted the government's argument that mothers, by virtue of giving birth, are more likely than fathers to develop a meaningful relationship with the child. *Id.* at 64-65.

[35] *Id.* at 65. Some evolutionary biologists would point to gendered differences in endocrinology, including women's capacity for lactation, to argue that women's child-nurturing orientation is a fact, not a norm. However, the methodological assumptions that support the equation of biology with nurturing instinct are highly contested in ways that the fact of lactation (or childbirth) is not. For that reason, perhaps, contentions regarding endocrinological differences are not the sort of facts on which courts tend to rely to justify sex-based rules. The same is true for the contentions regarding ethnic differences in cognitive ability espoused in *The Bell Curve* and similar literature; while the conclusions are offered as empirical fact, they have not received wide acceptance as such, at least in part because of the contested methodology underlying them.

Some would argue that normative commitments to equality override society's (and courts') willingness to consider "real," empirical differences based on race or sex, among other characteristics. Others would maintain that the methodology these authors utilize to reach conclusions regarding racial differences in intelligence is itself embedded with the normative presumptions it purports to prove. On either view, because the alleged facts are not widely considered uncontestable, they lack the credibility-preserving function that uncontested facts bring to judicial analysis. *See infra* Part IV. For related debate arising from the statements of Lawrence Summer regarding the relationship between sex and scientific aptitude, compare, e.g., Olivia Judson, Op-Ed, *Different but (Probably) Equal*, N.Y. TIMES, Jan. 23, 2005, § 4, at 17, with W. Michael Fox & Richard Alm, Op-Ed, *Scientists Are Made, Not Born*, N.Y. TIMES, Feb. 28, 2005, at A19.

biology of childbirth and demographic statistics related to childrearing could not do the probative work for which they were relied on by the Court. As the Court itself recognized previously, neither "inherent" nor demographic differences between men and women alone can justify sex-based rules.[36] The reason for sustaining one distinction and rejecting another lay not in empirical facts related to biology or demography, in other words, but instead in normative judgments regarding the legal relevance of these "thin" factual differences between men and women.[37]

We also see the work of "thin" facts in the marriage cases mentioned earlier, where courts have relied on the biological facts of procreation to justify the exclusion of gay couples from marriage.[38] As was true for the facts related to childbirth in *Nguyen*, the empirical facts of procreation themselves cannot explain the legal distinction between gay and non-gay people in marriage law. Instead, they stand in for an unarticulated social norm—heterosexuals deserve greater respect in the form of legal recognition of their relationships because they can procreate unassisted—that in turn is relied on to support the exclusion of same-sex couples from marriage.[39]

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[36] *See* United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that "'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity"); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) (holding that wives' greater financial dependence on their husbands could not justify a sex-based workers' compensation rule regarding death benefit eligibility); *see also infra* text accompanying notes 115-118.

[37] As will be explained in Part II.A, *infra*, dissenters often highlight the presence of unspoken mediating norms in majority opinions. This was true in *Nguyen*, where Justice O'Connor accused the majority of allowing gendered stereotypes of women as mothers to control the analysis. 533 U.S. at 87 (O'Connor, J., dissenting). *See also infra* text at notes 57-60.

[38] *See, e.g.,* Lewis v. Harris, 875 A.2d 259, 266-67 (N.J. Super. Ct. App. Div. 2005) (citing approvingly the opinions of several courts that "rejected challenges to the constitutionality of the limitation of marriage to members of the opposite sex [by relying] upon the role that marriage plays in procreation and in providing the optimal environment for child rearing").

[39] If facts rather than norms actually controlled the analysis, we would expect to see all, or at least most, marriage cases treat procreation in the same way. Yet we do not, as courts take different positions regarding whether the same empirical facts are legally significant for purposes of defining access to marriage. *See infra* notes 146-152 and accompanying text. This diversity of opinions confirms that it is not biology but rather social judgments regarding biological facts that make the analytic difference.

Part II elaborates the operation of fact-based adjudication in contested normative arenas. The discussion first maps the judicial inclination to focus on "new" facts about the social group at issue while leaving normative underpinnings of decisions unacknowledged. I then show how fact-based decisions accrete to form the foundation for later cases in which norm shifts are acknowledged openly. Against this background, Part III considers the role of social science and social movements within the fact-based adjudication model.

Part IV takes up the theoretical inquiry into why courts tend to respond societal change through declarations of fact rather than analysis of shifting norms. Two dominant theories of judicial review form the backdrop for the analysis. At one end of the spectrum are the legitimacy and capacity constraints highlighted by legal process theory.[40] To the extent they actually control courts' behavior, the constraints reinforce that judges are limited in their ability to identify accurately popular norms regarding social groups. While these capacity limitations also render fact selection difficult, the normative choices involved in sifting among competing facts about a social group remain largely unexposed in a jurisprudence that accepts fact-based decisions as legitimate. When courts declare norms, by contrast, they necessarily expose their normative commitments. Similarly, decision-making based on facts ordinarily does not trigger the countermajoritarian concerns regarding judicial legitimacy that arise when a court rejects a popular norm and appears to be displacing the majority's views with its own.[41] From this vantage point, the fact-based approach to decision-making can be understood, in part, as a limitations-respecting, reputation-protecting tool.

[40] *See infra* notes 168-169 and accompanying text.

[41] These same concerns can arise when a court affirms a popular norm and appears inappropriately to be substituting majoritarian preferences for meaningful review.

At the other end of the spectrum, fact-based decision-making can be understood through the lens of legal realism as an instrumental tool for masking decisions driven by ideology or other preferences. From this perspective, fact-based decisions are more desirable than norm pronouncements not because they actually respond to legitimacy and capacity constraints but because they minimize a court's risk of being criticized for overstepping its role.

A third possibility is that the focus on facts simply reflects the psychological processes by which human beings absorb societal change. After all, changing norms about social groups frequently are experienced as changed perceptions of the capacity of group members. Until the "thick" normative facts collide with a contrary, observable reality, many judges, like their peers, are unable to see the normative assumptions embedded in so-called natural facts. We see this in the evolution of jurisprudence regarding African Americans, in which both courts and the surrounding society came to understand that bias had shaped the "fact" of racially-rooted intellectual and physical inferiority that had long justified legal burdens on African-Americans.[42] But this theory, by itself, is inadequate to explain judicial fact avoidance. While some courts may be unaware of the norms reflected in their opinions, as the *Nguyen* majority purported to be, other courts deciding hotly contested cases, such as *Brown* and *Romer*, surely are not.

Indeed, while all these theories may carry some weight, they all require supplementation. The fact-based approach to adjudication also must be understood, I argue, as a means for preserving judicial power. By avoiding identification of underlying norms, courts issuing fact-based opinions retain freedom to engage with future cases on factual grounds and reduce the likelihood that the norm reflected in earlier decisions will

[42] Mills, *supra* note 29, at 14-17 (discussing the work of "low-level empirical assertions").

have to be carried over into the new case. The risk of normative overcommitment via *stare decisis*, in other words, is minimized.[43] We see this, for example, in the early women's rights cases. While recognizing women's equality to men in particular contexts, through fact-based decisions, as in *Reed*, fact-based decision-making preserved room for the Court to test and refine its commitment to sex equality over time.

Part V evaluates the benefits and costs that would flow from greater judicial candor regarding the normative judgments embedded in courts' fact-based adjudication. Beyond the general desirability of honesty, candor potentially would bring the benefit of heightening pressure on courts to reconcile, or at least explain, conflicting views of social groups embedded in similar cases. Distinguishing one sex discrimination claim from another, for example, is far easier when facts, rather than norms, appear to be decisive. Likewise, procreation can glibly justify distinctions between men and women in one context and not another only if norms regarding procreation and the privileging of different-sex couples' relationships remain undeclared. Conceivably, too, exposure of the normative underpinnings of judicial review may constrain some judges from exercising result-oriented inclinations in cases where few legitimate, politically palatable rationales support the selected norms. In addition, advocates for social change arguably would be better off challenging clearly expressed rationales than assailing empirical facts that stand in for unexpressed negative judgments regarding social group members.

To the extent norm identification is possible, I conclude, nonetheless, that it is not necessarily desirable as a general rule. As a matter of legal process and institutional design, fact-based decisions foster dynamic interaction among courts, majoritarian

[43] While normative overcommitment can also be avoided by establishing narrow norms, the discussion below illustrates the relative difficulty of doing so. *See infra* text accompanying notes 197-199. Even narrowed norms require a level of explicitly normative defense that fact-based decisions avoid.

branches, and the general public. So long as decisions are fact-centered and uncommitted to particular norms, room remains for legislatures to move incrementally and for extrajudicial sources, including social science and social movements, to contribute their insights and positions related to both fact selection and underlying norms. Conversely, constitutionalization of norms leaves less opportunity exists for extrajudicial settlement.

At the same time, however, unqualified acceptance of the fiction inherent in fact-based adjudication is unacceptably disingenuous and deceptive. A move to treat facts as less than fully explanatory, even without pressure for detailed norm identification, could encourage more explicit, serious efforts to reconcile the continued force of negative norms about a social group in some contexts but not others.

Without free reign for fact-based decision-making, courts adjudicating marriage cases, for example, could not proceed as if they were in a factual vacuum when assessing the relationship between procreative capacity and marriage. Instead, candor would require overt consideration of whether procreative capacity has been treated as a relevant distinction between gay and non-gay people in related contexts, like custody, visitation, and second-parent adoption. While candor would not compel a particular outcome on the question of marriage (or any other issue), it would discourage the judicial elision of normative judgments that takes place relatively freely under the cover of fact-based adjudication.

Stepping back, we can see that whether courts affirm or reject tradition, rulings on social group claims involve selections among norms even when the reasoning related to norms remains unarticulated. When courts sustain existing laws over challenges by social groups that traditional justifications are no longer valid, their decisions must be understood as strengthening the claim of the traditional norm, and not as neutral

avoidance of the public debate. When stripped of the cover of the fact-based adjudication fiction, affirmation of tradition is thus neither a neutral or non-invasive approach to judicial review, notwithstanding protests to the contrary. While other good reasons may exist to affirm tradition, the claim that rejection of social change-based claims is necessarily more respectful of the judiciary's limited, non-majoritarian role should not be counted among them.

I. The Pervasive Practice of Fact-Based Decision-Making

Facts about social groups tend to dominate judicial opinions reviewing limitations on group members' rights. Yet facts are only a small part of the analysis necessary to answer the standard constitutional inquiry whether a restriction on group members' rights can be justified.[44] Normative judgments about the weight to be accorded to facts that distinguish social groups play the critical role, even though they typically appear in the guise of facts or are ignored altogether.[45]

A. "Thin" Facts and Unstated Norms

Most facts will, on their own, be unable to tell us (or courts) whether the singling out of a social group for a legal burden is reasonable. The fact that people with mental retardation learn differently than others, for example, does not, in itself, justify a limitation of rights. The fact that women can give birth likewise does not itself justify rules treating women differently from men. So too the fact that same-sex couples cannot

[44] Heightened scrutiny will place greater demands on the fit between the government action and the characteristic of the group but the question whether a salient difference exists between members and non-members is the same.

[45] While empirical facts play a leading role for the majority in this type of case, the dissent, if there is one, does not accord them the same centrality. *See infra* notes 55-65 and accompanying text. For clarity, references to judicial opinions throughout the article encompass majority and unanimous opinions unless otherwise indicated.

conceive a child without third-party assistance does not tell us whether gay and lesbian couples may legitimately be excluded from marriage.

We need more information—specifically, we need the social judgments associated with these empirical facts to determine whether the factual difference between group members and others should be permitted to justify the legal restriction imposed. With respect to mental retardation, for example, we might conclude that the limitation on information processing capacity justifies less restrictive involuntary institutionalization rules than are imposed on people with mental illness.[46] Or we might conclude that the difference, while uncontestable as a factual matter, is not important for this purpose.[47] We can see this, likewise, with respect to the facts of childbirth and conception. None of these facts that we conventionally think of as science-based or empirical automatically generate either conclusion.

The point, simply put, is that empirical facts and the social norms related to them, while often seen as inextricably related, are actually separate strands of information.[48] I belabor the point, though it is an obvious one, because courts tend to ignore it while holding out empirical facts, alone, as sufficient to justify legal rules that distinguish between social groups. In *Heller v. Doe*, for example, the Court did precisely that, citing facts about mental retardation related to the timing and methods of diagnosis to justify a lower standard of proof for involuntary commitment of people with mental retardation

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[46] *See* Heller v. Doe, 509 U.S. 312 (1993) (sustaining a Kentucky statute making it easier for the state to institutionalize involuntarily a person with mental retardation than a person with mental illness).

[47] *See id.* at 335-49 (Souter, J., dissenting).

[48] Norms themselves also should be understood as comprised of multiple judgments, even when they appear to express a broad, unilateral view of a characteristic or form of conduct. When the norm is well-settled, the individual strands of judgment remain unseen. But if the general norm is contested and becomes destabilized, the strands become relevant as some specific norms fall away while others retain their force. A general norm disapproving homosexuality, for instance, may be comprised of several specific strands—some disapproving adult relationships with children as parents or teachers; others related to valuing non-gay partnerships over gay partnerships; and still others related to disapproval of gay people as tenants or employees. As the broad norm becomes destabilized, some strands will carry greater force than others, as will be discussed in greater detail below.

than people with mental illness.[49] "Kentucky's basic premise that mental retardation is easier to diagnose than is mental illness has a sufficient basis in fact,"[50] the Court concluded. Similarly, the fact of childbirth became the focal explanation for the sex-based citizenship rule in *Nguyen*.[51] Likewise, the facts of procreation have been relied upon to validate the exclusion of gay couples from marriage.[52]

In treating an empirical fact as proof of the reasonableness of a related law, courts relegate the social norm, which is doing the actual probative work, to a behind-the-scenes role.[53] In *Heller*, for example, something more than different processing skills had to be at issue to sustain the different institutionalization rules; after all, that same information-processing difference did not justify the zoning rule in *City of Cleburne v. Cleburne Living Center* that singled out for burdensome treatment a group home for people with mental retardation.[54] In the marriage context, a negative judgment about the status or worth of gay people relative to non-gay people must likewise operate to justify a state's refusal to let gay couples marry. The difference in procreative capacity alone does not mandate the exclusion; if it did, we would not expect to see either a diversity of opinions in marriage cases or the many legal regimes outside marriage that do not differentiate based on sexual orientation. So too for the fact of childbirth in *Nguyen*. Sometimes women's capacity to give birth matters; sometimes it does not—a norm that gives social meaning to the fact in context, not a fact alone, must explain the difference.

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[49] *Heller*, 509 U.S. at 321-23.

[50] *Id.* at 322; *see also id.* at 323 ("Mental retardation is a permanent, relatively static condition, [] so a determination of dangerousness may be made with some accuracy based on previous behavior."); *id.* at 324 ("The prevailing methods of treatment for the mentally retarded, as a general rule, are much less invasive than are those given the mentally ill."). More generally, the Court concluded that the "distinction between the mentally retarded and the mentally ill" is a matter of "commonsense." *Id.* at 326-27.

[51] *See supra* text accompanying notes 33-37.

[52] *See infra* text accompanying notes 211-218.

[53] As will be elaborated below, there is a set of cases in which norms are declared to be decisive. But this generally occurs when a norm is thought to be well-settled by virtue of earlier opinions or positive law, which avoids or at least moderates concerns about judicial overreaching. *See infra* Part I.B.

[54] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450-51 (1985).

These judgments about group members' capacity or status are able to go unmentioned as they fill in the pieces between the facts about a group and a restrictive law limiting group members' rights only because of a widespread legal fiction. This fiction—that empirical facts can lead directly to judgments—enables courts to engage in a form of judicial notice through which they incorporate the social overlay given to empirical facts. Unlike ordinary judicial notice, however, which requires transparency regarding assumptions made by courts, judicial assumptions regarding social norms generally go unmentioned. The fiction of fact-based adjudication thus enables hosts of normative determinations about the capacity and status of social groups to operate both unidentified by and undefended in majority opinions even as they determine the analysis.

The work of these norms is often made explicit by dissents, which regularly identify and challenge the majority's unspoken normative judgments. In *Heller*, for example, Justice Souter's dissent (for four members of the Court) conceded that "[o]bviously there are differences between mental retardation and mental illness,"[55] but concluded that the factual differences could not support Kentucky's separate rules. Instead, Justice Souter argued, an impermissible norm, unacknowledged by the majority, enabled these factual differences to be given undeserved significance. It is "difficult," he wrote, "to see [the classification, which gave family members greater control over institutionalization of people with mental retardation than people with mental illness] as

[55] *Heller v. Doe*, 509 U.S. 312, 337 (1993) (Souter, J., dissenting). In addition to highlighting the norms that he believed to be at work, Justice Souter also disagreed with the majority's account of empirical differences between mental retardation and mental illness. *See id.* at 342-46 (arguing , based on social science literature, that treatment of people with mental retardation often involves invasive procedures, contrary to the majority's contention); *see also id.* at 342 ("[A]ny apparent plausibility in the Court's suggestion that 'the mentally retarded in general are not subjected to [invasive mind-altering treatment] dissipates the moment we examine readily available material on the subject, including studies . . . cited by the Court.") (internal citation omitted).

resting on anything other than the stereotypical assumption that the retarded are 'perpetual children.'"[56]

The dissenters in *Nguyen* similarly criticized the majority's move directly from empirical fact to legal conclusion via an unacknowledged (and, according to the dissent, impermissible) norm.[57] They stressed the lack of automaticity between the empirical fact (women give birth to children) identified as decisive by the majority and the sex-based citizenship rule that imposed a lesser burden on mothers than fathers.[58] "The physical differences between men and women . . . do not justify [the statute's] discrimination," O'Connor wrote.[59] She added that the majority could connect the two and sustain the challenged law only by overlaying the empirical fact of childbirth with the normative view that women have a stronger instinct to parent than men.

> The claim that [the statute] substantially relates to the achievement of the goal of a "real, practical relationship" . . . finds support not in biological differences but instead in a stereotype—*i.e.*, "the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children." Such a claim relies on "the very stereotype the law condemns," "lends credibility" to the generalization, and helps convert that "assumption" into "a self-fulfilling prophecy."[60]

And this normative view, she contended, was impermissible.

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[56] *Id.* at 348.
[57] Nguyen v. INS, 533 U.S. 53, 74-97 (2001) (O'Connor, J., dissenting).
[58] *Id.* at 88-89.
[59] *Id.* at 87 (internal citation and punctuation omitted). To strengthen the case that an impermissible traditional norm had been applied, Justice O'Connor situated the law historically, declaring it "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children." *Id.* at 92 (citing to legislative history).

The dissenters also rejected the majority's fact-based conclusion that more evidence of parenthood is needed from fathers than mothers because the evidence of pregnancy and childbirth is missing. *See id.* at 81-82 ("[A] mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost. Conversely, a father's name may well appear on a birth certificate. While it is doubtless true that a mother's blood relation to a child is uniquely 'verifiable from the birth itself' to those present at birth, the majority has not shown that a mother's birth relation is uniquely verifiable *by the INS,* much less that any greater verifiability warrants a sex-based, rather than a sex-neutral, statute.") (internal citation omitted).
[60] *Id.* at 88-89 (internal citations omitted).

Romer v. Evans[61] illustrates the point as well, although in *Romer* the dissent highlighted a norm that, in its view, should have overlaid the majority's analysis and validated the challenged Colorado ban on antidiscrimination protections for lesbians, gay men and bisexuals. The majority had pinned its rejection of the government's proffered rationales[62] on their lack of connection to empirical facts, finding the ban to be "a status-based enactment divorced from any factual context" that might support its legitimacy.[63] The dissent argued, in response, that the majority had improperly disregarded a legitimate norm—"moral disapproval of homosexual conduct" —that could have established a connection between the empirical facts and Colorado's distinction between gay and non-gay people.[64]

B. "Thick" Facts And The Merger of Norm Into "Fact"

Sometimes, in contrast to the "thin" empirical facts described in the preceding discussion, "facts" about a social group on which courts rely actually do justify, as a logical matter, restrictions on group members' rights. The "facts" that people with mental retardation are "socially inadequate" and "manifestly unfit," for example, could reasonably support the conclusion that the state may sterilize them.[65] Similarly, the "fact" that women are naturally domestic itself justifies restrictions on women's role in the workplace.[66] Likewise, the "fact" that gay people are less adequate than non-gay people to parent children supports a ban on adoption by lesbians and gay men.[67]

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[61] 517 U.S. 620 (1996).
[62] *Id.* at 635 (describing the rationales as "respect for . . . the liberties of landlords or employers who have personal or religious objections to homosexuality" and "interest in conserving resources to fight discrimination against other groups").
[63] *Id.*
[64] *Id.* at 644 (Scalia, J., dissenting).
[65] *See* Buck v. Bell, 274 U.S. 200, 207 (1927).
[66] *See* Bradwell v. Illinois, 83 U.S. 130, 141-42 (1872) (Bradley, J. concurring).
[67] *See* Lofton v. Sec'y of Dep't of Children and Family Svcs., 358 F.3d 804, 819 (11th Cir. 2004) (characterizing parenting by a mother and father as the "optimal social structure" for childrearing), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

Yet these "facts" have explanatory bite precisely because they contain judgments under the pretense of empiricism. Put another way, while they are put forward as truths, which would suggest they are subject to observation-based verification, they are actually evaluative, and not merely descriptive, of the social group in question.

This is not to suggest that courts are necessarily conscious that the thick facts on which they rely are embedded with normative judgments. To the contrary, during the time that they are thought of as fact rather than norm, these "facts" are frequently understood as natural attributes of the affected social group. Normative judgments, in other words, have great power to shape perceptions of fact. The "fact" that women were seen as naturally better suited than men to care for home and hearth is illustrative. For many courts (and the surrounding society),[68] the empirical fact of women's greater likelihood to be primary caregivers for children evidenced not just a demographic reality but also a "truth" ordained by nature that woman's place was in the home.[69] From this "natural" fact, all sorts of distinctions between men and women reasonably could be sustained.[70]

The conflation of fact and norm into normative fact typically becomes apparent only after perceptions of the status or capacity of social group members have shifted. When the reality of women's lives could no longer be reconciled with the image of women as helpless and ignorant, for example, the normative, gendered nature of the

[68] As Michael Klarman has observed, judges typically share the normative views (and, consequently, the perceptions of norms as fact) that are popular in the elite social circles in which they live and work. *See* Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189-91 (1998).

[69] This conversion of a demographic fact into "natural" truth about a social group was selective, of course. Demographic research also showed that many women—particularly women who were not white or married to wealthy men—worked outside the home. Yet courts disregarded these other facts in making determinations about women's capacity.

[70] *See, e.g.*, *Bradwell*, 83 U.S. at 141-42 (Bradley, J. concurring); Gosaert v. Cleary, 335 U.S. 464, 465-66 (1948) (validating Michigan's sex-based restrictions for liquor licenses).

presumptions underlying assertions of women's natural domesticity became clear.[71] Until that time, though, normative facts and empirical facts tend to function indistinguishably in the eyes of courts.

Some of the most striking uses of normative facts to justify legal burdens on social groups appear in early race discrimination cases, where normative judgments about African Americans were treated as facts that proved the legal relevance of racial differences. In 1867, for example, the Pennsylvania Supreme Court sustained the state's antimiscegenation law on the ground that "[t]he *natural* separation of the races is . . . an undeniable fact."[72] By treating the normative conclusion about racial separation as "natural," the court facilitated a logical flow between the "facts" and the challenged law.[73]

Around the same time, the Georgia Supreme Court upheld the state's antimiscegenation statute based on "[o]ur daily observation . . . that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the fullblood of either race."[74] Sustaining a similar law in 1883, the Missouri Supreme Court pointed to the "well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny."[75]

Analogous deployments of normative facts appear in cases involving social groups defined by sex, mental retardation and sexual orientation, among other

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[71] Some evolutionary biologists would point to gendered differences in endocrinology and the capacity for lactation to argue that women's domestic orientation is a fact, not a norm. As mentioned earlier, however, courts do not rely on these facts as the basis for sex-based differential treatment. *See supra* note 35.

[72] West Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 213 (1867) (emphasis added).

[73] *See id.* at 213-14 (defending decision as "not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races . . . and not to compel them to intermix contrary to their instincts").

[74] Scott v. State, 39 Ga. 321, 323 (1869).

[75] State v. Jackson, 80 Mo. 175, 179 (1883).

characteristics. A few additional illustrations are offered here to flesh out the work of these "thick" facts.

In the context of sex-based distinctions, Justice Bradley's concurring opinion in *Bradwell v. Illinois*[76] is perhaps the most familiar example of a norm operating as fact. From the "fact" of "[t]he natural and proper timidity and delicacy which belongs to the female sex,"[77] Justice Bradley concluded that women were "unfit[] . . . for many of the occupations of civil life," including the practice of law.[78] Famously too, the Supreme Court in *Muller v. Oregon*[79] converted the demonstrable fact of biological sex differences into the normative fact of women's physical limitations.

> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence.[80]

From these "facts," the conclusion that restrictions on women's labor were permissible flowed logically: "This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her."[81]

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[76] 83 U.S. 130 (1872).

[77] *Id.* at 141 (Bradley, J., concurring).

[78] *Id.* In doing so, he also commingled empirical facts, like the law of coverture, along with other "facts" like "the law of the Creator" to reinforce his conclusion about women's capacity. *Id.*

[79] 208 U.S. 412 (1908).

[80] *Id.* at 422. Justice O'Connor's point in *Nguyen*, discussed above, was that the Court had again taken physical differences between men and women and imputed them impermissibly with normative significance to justify upholding differential sex-based rules. *See supra* text accompanying notes 57-60.

State courts took an approach to women's and men's physical differences similar to that of the *Muller* majority. Calling on received wisdom about women's physical capacities, the New York Court of Appeals observed that "no one doubts that as regards bodily strength and endurance, [woman] is inferior and that her health in the field of physical labor must be specially guarded by the state." People v. Charles Schweinler Press, 108 N.E. 639, 640 (N.Y. 1915). In an earlier ruling in the Washington Territory, the territorial supreme court likewise pointed to physical differences between men and women to bolster the normative fact that women lacked the sort of competence required of grand jurors. Harland v. Territory, 3 Wash. Terr. 131 (1887). Jury duty, the court wrote, imposed a responsibility "so onerous and burdensome" that it was "utterly unsuited to the physical constitution of females." *Id.* at 140.

[81] *Muller*, 208 U.S. at 422-23. The power of this gendered normative fact to rationalize a restriction on women's work hours may help explain how the Court could have sustained that law while striking down on contractual freedom grounds nearly all other protective legislation that came before the Court in the same

Buck v. Bell[82] illustrates the similar operation of norms-as-facts in connection with mental retardation. In upholding the Virginia law authorizing sterilization of "mental defectives" on due process grounds, Justice Holmes, in his brief opinion, did not discuss mental retardation in terms of its empirical effect on intellectual capacity.[83] Instead, consistent with the views of the day and his own views, he treated as fact that people with mental retardation were potential "menace[s]," "manifestly unfit," and more prone to crime and dependence on public support than others.[84] In other words, the fears and related normative judgments about the dangers of people with mental retardation that were popular at the time were presented as empirical fact.[85] As a result, the analytic move from fact to justification was perfectly logical; the normative fact itself did sufficient explanatory work to sustain the decision to sterilize Carrie Bell.

In the context of sexual orientation, a recent Eleventh Circuit ruling actually conceded that the "fact" about gay people on which it relied to sustain Florida's ban on

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time period. Of course, other related factors, including a lesser tradition of contractual freedom for women than men also might have influenced the Court. *See* David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1969 (2003) (book review) (stating that at the time of *Muller*, "[t]he Supreme Court . . . was not yet ready to treat women as fully equal citizens entitled to the same degree of liberty of contract as men.").

[82] 274 U.S. 200 (1927).

[83] *Cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 443 n.9 (1985) (discussing four categories of mental retardation based on IQ scores).

[84] *Buck*, 274 U.S. at 206-07. At the same time, we know that Justice Holmes was not particularly concerned with the accuracy of the facts before him. "I hate facts," he once wrote in response to Justice Brandeis' suggestion that he visit textile mills in Massachusetts. 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 13 (Mark DeWolfe Howe ed., 2d ed. 1961) (1941).

[85] In his opinion in *Cleburne*, Justice Marshall elaborated the widespread use of normative facts about people with mental retardation to justify severe burdens. As part of his historical argument for heightened scrutiny of mental retardation-based classifications, he noted that by the late 19th and early 20th centuries, "leading medical authorities and others began to portray the 'feeble-minded' as a 'menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems.'" *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring). These views then became the normative facts that guided the analysis in *Buck v. Bell*. *Cf.* Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 283 (E.D. Pa. 1972) (invalidating statute premised on the assumption "that certain retarded children are uneducable and untrainable").

adoption by lesbians and gay men was not subject to substantiation.[86] Florida had argued that "children benefit from the presence of both a father and mother in the home" more than they would from two parents of the same sex.[87] Although extensive expert testimony had contested this "fact" at trial, the court concluded that it was "one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action."[88] Affirmation of the state's adoption ban flowed logically from the acceptance of this normative fact. After all, if gay couples are believed to be less suitable parents than non-gay couples, how could the state do anything other than ban gay people from adopting?[89] The normative fact, in other words, "explained" the classification.

In sum, the facts held out as decisive by many courts turn out to supply little of a decision's reasoning. Instead, it is the norms associated with or embedded in those facts that do the explanatory work in adjudication related to social groups, even as those norms remain unspoken.

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[86] Lofton v. Sec'y of Dep't of Children and Family Svcs., 358 F.3d 804 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005).

[87] *Id.* at 819. This "fact" has been contested strenuously by many experts as well as the 11th Circuit's dissenters from the denial of rehearing en banc. *See Lofton*, 377 F.3d at 1297 (Barkett, J., dissenting) ("[T]he fact that Florida places children for adoption with single parents directly and explicitly contradicts Florida's post hoc assertion that the ban is justified by the state's wish to place children for adoption only with 'families with married mothers and fathers.'"); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 AM. SOCIOL. REV. 159 (2001).

[88] *Lofton*, 358 F.3d at 819-20. The court might have been discomfited by its admission that the rationale on which it rested depended on gut instinct. Shortly after acknowledging the absence of proof for its assumption that mothers and fathers were better for children than two mothers or two fathers, the court pointed to the failure of "the accumulated wisdom of several millennia of human experience . . . [to] discover[] a superior model" to the household headed by a mother and a father. *Id.* at 820.

This is not the first time a court has relied on unprovable assumptions. Indeed, the Supreme Court specifically endorsed these sorts of assumptions in connection with obscenity, holding that "a state legislature may [] act on the [] assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, ha[s] a tendency to exert a corrupting and debasing impact leading to antisocial behavior[.]" Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973). The cases on which the Court relied for this proposition in *Paris*, however, concerned antitrust, securities, environmental regulation, and obscenity. *See id.* at 61-63. None concerned assumptions regarding social groups or the effect of aspects of individual identity.

[89] Of course, the same normative fact could support restrictions on gay parents other than an outright adoption ban. For example, via this normative fact, Florida also could ban gay people from serving as foster parents, which it does not, or place gay parents at the bottom of an adoption priority list.

II. Fact-Based Interventions in Contested Normative Terrain.

The fiction of fact-based decision-making is at its most powerful (and most questionable) when invoked by courts in response to social groups' claims that changed societal views require reconsideration and rejection of traditional rationales for restricting group members' rights. In these cases, courts typically remain silent regarding their normative positions and either embrace "new" facts about a group or hew to old ones. Eventually, as fact-based decisions accrete, courts appear to gain the confidence necessary to tip toward making norm-based decisions. This Part will track these dynamics and close with consideration of the point at which norm contests become relevant to adjudication regarding social groups. Later Parts will analyze the practical and theoretical conditions that lead courts to prefer facts to norm declarations while views of social groups are in contest**.**

A. Intervention Via "New" Facts

The judicial inclination toward norm avoidance where social norms are in contest can be seen in a wide range of cases brought by social groups maintaining that traditionally accepted rationales for discriminatory treatment must give way in light of changing social views. *Brown v. Board of Education*[90] is perhaps the best-known example of the judicial inclination to use "new" facts to justify new conclusions about previously settled matters while avoiding mention of the underlying norm shifts. In reversing *Plessy v. Ferguson*'s[91] separate but equal doctrine as applied to public education, the Court identified "modern" knowledge as its analytic linchpin: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that racially segregated schooling causes harm] is amply supported by

[90] 347 U.S. 483 (1954).
[91] 163 U.S. 537 (1896).

modern authority."[92] The Court also pointed to other changed facts to support its analysis, noting, for example, the changed "status of public education"[93] and the heightened achievements of African Americans in professional and cultural circles.[94] Nowhere in the decision did norms regarding African Americans or racial equality receive mention.[95]

The California Supreme Court similarly treated "new" facts regarding race as decisive in striking down the state's antimiscegenation law at a time when such laws were widely viewed as permissible.[96] The factual grounds for race discrimination in marriage had long been seen as well-settled: "[T]he prohibition of intermarriage . . . prevents the Caucasian race from being contaminated by races whose members are by

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[92] *Brown*, 347 U.S at 494.

[93] *Id*. at 489. *See also id.* at 492-93 ("We must consider public education in the light of its full development and its present place in American life throughout the Nation.").

[94] *Id.* at 490 ("Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world.").

[95] In offering a rationale for *Brown* different from the one advanced by the Court, Charles Black acknowledged the Court's reliance on facts rather than norm declarations in its opinion.

> It seems to me that the venial fault of the opinions consists in its not spelling out that segregation . . . is perceptibly a means of ghettoizing the imputedly inferior race. (I would conjecture that the motive for this omission was reluctance to go into the distasteful details of the southern caste system.) That such treatment is generally not good for children needs less talk than the Court gives it.

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1959-60).

The surrounding global political context, in which the persistence of racial segregation was perceived as undermining the United States' position in the Cold War, also went unmentioned in *Brown*. *See* Mary L. Dudziak, *Josephine Baker, Racial Protest, and the Cold War*, 81 J. AM. HIST. 543, 544 (1994) ("On one hand, the United States claimed that democracy was superior to communism as a form of government, particularly in its protection of individual rights and liberties; on the other hand, the nation practiced pervasive race discrimination. . . . The Soviet Union and the Communist press in various nations used the race issue very effectively in anti-American propaganda.").

For illustration of state court inclinations to avoiding normative declarations that might be subject to contestation, see, e.g., Braschi v. Stahl Assocs., 543 N.E.2d 49, 55 (N.Y. 1989) (citing facts about how two gay men lived together as "permanent life partners" to include them within the statutory term "family" for purposes of succession to a rent-controlled apartment rather than addressing the issue of sexual orientation or marital status discrimination that underlay the attempted eviction).

[96] Perez v. Lippold, 198 P.2d 17 (Cal. 1948). *See also* Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 601 (2000) (describing the court's ruling as "the first true crack in the courts' monolithic support for the constitutionality of miscegenation statutes"); *see also* Jackson v. State, 72 So. 2d 114 (Ala. Ct. App. 1954) (sustaining Alabama's antimiscegenation statute), *cert. denied*, 72 So. 2d 116 (Ala. 1954); Naim v. Naim, 87 S.E.2d 749 (Va. 1955) (sustaining Virginia's similar law).

nature physically and mentally inferior to Caucasians."[97] In response, the court turned to science to demonstrate that the once-operative facts[98] had discredited normative underpinnings.

> The categorical statement that non-Caucasians are inherently physically inferior is without scientific proof. In recent years scientists have attached great weight to the fact that their segregation in a generally inferior environment greatly increases their liability to physical ailments.[99]

The court also pointed to the absence of "scientific proof that one race is superior to another in native ability."[100] Once it had framed the facts in this way, its rejection of the racial classification seemed all but mandatory.[101]

Although the Court's decision upholding the University of Michigan Law School's consideration of race in admissions in *Grutter v. Bollinger*[102] arguably involves the issue of affirmative action more so than the social group of African Americans or people of color more broadly, it similarly illustrates the judicial preference for intervening in contested normative territory via facts. Rather than declare affirmative action to be a normatively desirable form of redress for past discrimination,[103] the Court focused on the factual benefits derived from student diversity, as evidenced by "expert studies and reports entered into evidence at trial."[104] "Numerous studies show that

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[97] *Perez*, 198 P.2d at 23.
[98] *Cf. id.* at 26 ("Out of earnest belief, or out of irrational fears, [defenders of the antimiscegenation law] reason in a circle that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice.").
[99] *Id.* at 23-24.
[100] *Id.* at 24-25 (footnote omitted) (also observing that '[t]he data on which Caucasian superiority is based have undergone considerable re-evaluation by social and physical scientists in the past two decades.").
[101] To support this analytic move, the court also highlighted Gunnar Myrdal's work linking the earlier normative facts about race to bias in observation. *Id.* at 723 n.6. The court held out Myrdal's observations, together with the scientific data just mentioned, as requiring its conclusion that previous beliefs about African Americans amounted to norms rather than facts. *Id.* (" '[T]he ordinary white American . . . has made an error in inferring that observed differences were innate and a part of 'nature' ' ").
[102] 539 U.S. 306 (2003).
[103] *Cf.* Charles R. Lawrence III, *Two Views from the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001).
[104] *Grutter,* 539 U.S. at 330.

student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals,'" the Court wrote.[105] Nowhere in the opinion did the Court acknowledge the contestable methodological choices made by the studies on which it relied.[106]

Early decisions in the contemporary women's rights cases also illustrate this pattern of norm-avoidance. Beginning with *Reed v. Reed*,[107] numerous fact-based decisions reflected a commitment to women's equality without ever acknowledging the shift from earlier, contrary norms. In *Reed*, the Court relied on a fact (women have at least as much experience as men with administering estates) to reject an Idaho law that subordinated wives to husbands in the prioritization of estate administrators.[108] It never mentioned, much less refuted, the traditional sex-based norm relied on by the Idaho Supreme Court to sustain the law: "[N]ature itself has established the distinction" between men and women, the Idaho court wrote.[109] Instead, through exclusive reliance on facts about estate administration experience, the U.S. Supreme Court sidestepped the traditionally accepted judgment about men and women, leaving the norm confrontation for another day.[110]

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[105] *Id*.

[106] Arguably, Justice O'Connor's statement that the "path to leadership" must be "visibly open to talented and qualified individuals of every race and ethnicity" to insure leaders' "legitimacy in the eyes of the citizenry," *id*. at 332, constitutes a norm declaration regarding the value of affirmative action. *See* Brown-Nagin, *supra* note 4, at 1484 (describing this statement as "the most morally focused argument for race-conscious admissions in the majority opinion"). However, the statement also can be read as a positive description of affirmative action's effects on democracy and legitimacy, rather than as a commitment to affirmative action as a moral good.

[107] 404 U.S. 71 (1971).

[108] *Id.* at 76-77.

[109] Reed v. Reed, 465 P.2d 635, 638 (Idaho 1970).

[110] In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S 632 (1974), and *Weinberger v. Wiesenfeld*, 419 U.S. 822 (1974), among others, the Court similarly invalidated pregnancy-based and sex-based rules, not by declaring normative opposition to those sorts of legal distinctions, but instead by finding that the facts related to pregnancy and to child care did not support the legal restriction imposed. This is true as well for cases affirming sex-based distinctions post-*Reed*, such as *Kahn v. Shevin*, 416 U.S. 351 (1974), and *Schlesinger v. Ballard*, 419 U.S. 498 (1975), in which norm declarations were largely absent from the majority opinion and the focus was, instead, on the factual support for the challenged rules.

Romer v. Evans[111] illustrates this same point with respect to sexual orientation classifications. Until *Romer*, *Bowers v. Hardwick*'s declaration that homosexuality was rightfully the subject of moral and legislative disapproval represented the prevailing constitutional discourse regarding homosexuality.[112] Thus, for *Romer* to recognize the claim that a state constitutional ban on antidiscrimination protections for gay people violated the rights of lesbians and gay men, it had to reject, or at least deviate from, the traditionally embraced views of gay people reflected in *Bowers*. Yet the majority opinion did not acknowledge this move. Instead, as noted earlier, it refused to recognize the normative shift implicit in its decision and instead anchored its invalidation of Colorado's amendment on the ban's factual disconnect with the state's asserted interests.[113] Despite Justice Scalia's objection in dissent that the traditional social norm disapproving of homosexuality sufficed to justify the challenged measure,[114] the *Romer* Court avoided any overt engagement with that moral judgment.

As these cases illustrate, when breaking with tradition, the Court has led with facts and left norms aside.

B. Fact-Based Decisions as the Groundwork for Norm Declarations

Even in light of courts' apparent preference for fact-based decision-making in contested cultural arenas, it would strain credibility to suggest that courts avoid norms altogether. My argument, instead, is that fact-based decision-making is the first step of a

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[111] 517 U.S. 620 (1996).
[112] 478 U.S. 186, 196 (1986)
[113] *Romer*, 517 U.S. at 635. The State had advanced two interests that failed the majority's factual assessment: "The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups." *Id.*
[114] "It is unsurprising that the Court avoids discussion" of the moral disapproval rationale, Justice Scalia wrote, "since the answer [to the question of the rationale's applicability here] is so obviously yes." *Id.* at 640 (Scalia, J., dissenting). *See also id.* at 653 (describing as legitimate the people's desire "to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans").

two-step decision-making dynamic. As numerous cases illustrate, fact-based decisions lay the groundwork for later declarations of normative shifts; overt rejection of traditional views about the worth of social groups tends to occur only after one or more fact-based decisions have effectively, though not explicitly, disavowed the previously embraced norms. We might think of this process as involving the accretion of fact-based decisions—once the "new" understanding of facts has become settled, the potential controversy associated with judicial intervention into contested normative terrain is diminished. This accretion model applies not only to review of individual cases but also, as I will show below, to the labeling of classifications as suspect or quasi-suspect.

The trajectory of women's rights cases nicely illustrates the accretion dynamic. Only after *Reed* and several additional fact-intensive opinions that sustained claims for sex equality did a majority of the Court openly embrace the normative value of sex equality. When the Court ultimately made that commitment explicit, it treated its move not as declaring a "new" norm but as articulating a norm whose settlement was evidenced by earlier (fact-based) decisions. For example, in *Wengler v. Druggists Mutual Insurance Co.*,[115] the Court found that women's disproportionate financial dependence on their husbands could not support a workers' compensation provision requiring widowers but not widows to prove dependence before recovering death benefits.[116] Although that fact undoubtedly would have been taken to justify the different rule in the past, and, indeed, was treated as decisive by the lower court,[117] the Court declared the devaluation

[115] 446 U.S. 142 (1980).
[116] *Id.* at 151 ("It may be that there is empirical support for the proposition that men are more likely to be the principal supporters of their spouses and families.").
[117] *See id.* at 150 ("'[T]he substantive difference in the economic standing of working men and women justifies the advantage that [the law] administratively gives to a widow.'") (quoting *Wengler*, 583 S.W.2d 162, 168 (Mo. 1979)). For discussion of earlier norms and their influence on workers compensation and wrongful death statutes, see JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF THE AMERICAN LAW (2004).

of women's work relative to their husbands' to conflict with a now-settled norm of sex equality: "It is this kind of discrimination against working women that our cases have identified and in the circumstances found unjustified."[118]

The accretion phenomenon also explains the timing of announcements of heightened scrutiny. These declared commitments to rigorous review of particular classifications have occurred only after the accretion of a series of fact-based decisions regarding the social group in question.[119] Once earlier decisions are in place, the Supreme Court appeared to reach a comfort level that serious contestation of the social group's status relative to its counterpart group has passed. Heightened scrutiny, in other words, signals the settlement of the "new" norm, at least from the Court's perspective.[120] This trajectory—of fact-based cases first and norm declarations thereafter—also helps explain why the Court appeared to be applying heightened scrutiny in cases involving both sex and illegitimacy classifications before it acknowledged that it was doing so.[121]

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[118] *Wengler*, 446 U.S. at 147. *See also* Taylor v. Louisiana, 419 U.S. 522, 535 n.17 (1975) (holding that facts related to women's workforce participation "certainly put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home"); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (invalidating sex-based child support rule based on judicial notice of "[t]he presence of women in business, in the professions, in government and, indeed, in all walks of life" and the related conclusion that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

[119] Heightened scrutiny, after all, represents a deviation from court's ordinary orientation toward norm avoidance as it reflects an explicit commitment to an equality norm regarding the designated social group characteristic.

[120] This point is somewhat more complicated with respect to racial classifications than with respect to the sex classifications discussed below. For one, some version of a race equality norm was acknowledged by courts almost immediately after the passage of the Reconstruction Amendments. *See* Strauder v. West Virginia, 100 U.S. 303, 303-08 (1879). At the same time, however, this recognition did not translate into broad skepticism of racial classifications. *See, e.g.,* Plessy v. Ferguson, 163 U.S. 537, 543 (1896). Further, even after the Court first characterized race as a "suspect" ground for classification in *Korematsu v. United States*, 323 U.S. 214, 216 (1944), the Court did not begin actual rigorous review of racial classifications for another twenty years. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stressing the Fourteenth Amendment's "strong policy" against racial classifications); *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 496-503 (2004) (analyzing evolution of suspect classification analysis); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 232 (1991) (same).

[121] Many scholars have maintained that the Court had been applying heightened scrutiny to sex classifications since *Reed*. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-26 (2d ed. 1988); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a*

Once heightened scrutiny has been declared, an equality norm begins to displace or reshape consideration of facts in adjudication. In *United States v. Virginia*,[122] for example, the Court overrode perceived factual differences between men and women and relied on a sex equality norm to invalidate Virginia Military Institute's sex-based admission policy.[123] Likewise, in *J.E.B. v. Alabama*,[124] the Court recognized possible differences between male and female jurors but rejected sex-based peremptory strikes on equality grounds.[125] This is not to suggest that the sex equality norm always carries the day, as *Nguyen* and other cases show.[126] But, as in *Wengler* and *Virginia*, among others, the application of heightened scrutiny illustrates a willingness to engage in overt norm-based adjudication in a way that does not take place when norms are perceived to be unsettled.

The accretion phenomenon is not limited to classifications that are ultimately subjected to heightened scrutiny. Among sexual orientation cases, for example, we can explain the relationship among *Bowers v. Hardwick*,[127] *Romer v. Evans*,[128] and *Lawrence v. Texas*[129] through this lens. In all three cases, the baseline question was whether anything about homosexuality justified the state's limitation of gay people's rights. In *Bowers*, the Court treated social norms condemning homosexuality as sufficiently settled

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Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 33-34 (1972). The Court likewise appeared to be applying intermediate scrutiny to classifications of nonmarital children long before its formal pronouncement of quasi-suspect classification status for those classifications in 1988. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988); Gunther, *supra*, at 33-36.

[122] 518 U.S. 515 (1996).

[123] *See id.* at 533-34 (finding that "inherent differences between men and women" did not justify constraints on women's opportunities and that sex-based classifications "may not be used, as they once were, [] to create or perpetuate the legal, social, and economic inferiority of women.") (citations and punctuation omitted).

[124] 511 U.S. 127 (1994).

[125] *Id.* at 138-42.

[126] *See, e.g.*, Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (upholding a statute that subjected only men to criminal liability for statutory rape).

[127] 478 U.S. 186 (1986).

[128] 517 U.S. 620 (1996).

[129] 539 U.S. 558 (2003).

so that they could be stated, without more, as the justification for Georgia's sodomy law.[130] Then in *Romer*, as discussed earlier, the Court rested its rejection of Colorado's antigay ban on facts and avoided mention of the *Bowers*-approved norm.[131] *Romer* then served as the fact-based, norm-avoidant precursor for *Lawrence*'s outright rejection of the moral disapproval norm.[132]

Of course, a host of other explanations could account for the different adjudicative approaches of *Romer* and *Lawrence*, including the different doctrinal foundations of the two decisions, with *Romer* focused on equal protection and *Lawrence* on due process.[133] The moral disapproval rationale was also the leading justification proffered in *Lawrence* while several others had been advanced more prominently in *Romer*.[134] And, certainly, the outlier status of the Texas Homosexual Conduct Law as only one of a handful of such laws in the nation[135] made the normative declaration relatively safe in *Lawrence*. But none of these factors fully explain why the *Romer* majority did not touch the moral norm advanced so forcefully by the dissent and why

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[130] *Bowers*, 478 U.S. at 196 (relying on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"). The near-universal condemnation of *Bowers* suggested that the Court had miscalculated (or deliberately misrepresented) the degree to which social norms regarding homosexuality were contested when it glibly asserted the moral disapproval rationale and brushed off Michael Hardwick's privacy claim as "at best, facetious." *Id.* at 194. *See Lawrence*, 539 U.S. at 576-75 (citing criticism of *Bowers*).

[131] *Romer*, 517 U.S. at 635.

[132] *Lawrence*, 539 U.S. at 582 ("This case raises . . . whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."). *Cf.* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1281-83 (2004) (analyzing the *Lawrence* majority's limited engagement with the moral disapproval rationale).

[133] *Compare Romer*, 517 U.S. at 631-35 (invalidating the Colorado amendment on equal protection grounds), *with Lawrence*, 539 U.S. at 564 (stating that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution").

[134] *See Lawrence*, 539 U.S. at 571-73 (analyzing morals-based government interest); *Romer* 517 U.S. at 632-36 (addressing government interests related to associational freedom and scarce resources).

[135] *Lawrence*, 539. U.S. at 573 (stating that only four states at that time had sodomy laws targeted only at sexual conduct of same-sex couples).

Lawrence ultimately did. The inclination toward norm avoidance when the normative waters appear to be unsettled, I would argue, provides at least some of that explanation.

C. The Non-Neutrality of Fact-Based Decision-Making

Judicial responses to norm contests are not monolithic; not always are courts provoked into norm-avoidance simply because a settled norm has been contested. This section sets out a model for identifying the conditions under which norm contestation might affect adjudication,[136] and offers a preliminary critique of the claim, made by many courts, that sustaining the status quo enables courts to remain neutral in cultural conflicts. I return to this point in greater depth in Part V's consideration of the value of candor in adjudication.

Most of the time, norms are so deeply integrated into society that they are unseen and, if seen, are understood to reflect indisputable judgments about certain aspects of social group members' identity and conduct.[137] The *Nguyen* majority's declaration that it was "unremarkable" to equate women's role in childbirth and child care is illustrative.[138] In this naturalized state, norms can go virtually unnoticed as they create links between empirical facts (men cannot give birth) and laws limiting social group members' rights (fathers must take more steps than mothers to have citizenship conferred on their children even if they are present at birth).

Even in the most homogeneous communities, however, norms rarely receive

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[136] The framework is not intended to suggest that all norms move through all stages or that the occurrence of a shift is necessarily desirable from the standpoint of the social group in question.

[137] In this state, norms might be said to be at room temperature. Much critical legal scholarship has concentrated on exposing the way norms blend into what is perceived as natural. A significant body of feminist literature, for example, has concentrated on exposing the male bias in many naturalized norms. *See, e.g.*, Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 7-8 (1985) (explaining the way in which "the subordination in gender inequality[] is made invisible; dissent from it becomes inaudible as well as rare"). Separately, a growing body of law and economics literature has focused on harnessing the power of naturalized norms toward efficient or socially beneficial ends. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

[138] Nguyen v. INS, 533 U.S. 53, 66 (2001).

universal ratification. Outlier groups or individuals not only defy but also seek to abolish or reformulate prevailing norms, invoking constitutional "principles in their own search for greater freedom."[139] We might think of Myra Bradwell's challenge to Illinois' attorney licensing rule or Carrie Bell's challenge to Virginia's sterilization rule in this way.

Yet these challenges tend to have little effect on adjudicators. Courts either see no contest or find that contestation too peripheral to have gained traction, and proceed as though nothing has occurred to destabilize the traditionally accepted facts and norms. Take, for example, the challenges to marriage laws brought by lesbian and gay couples in the 1970s and 1980s.[140] At that time, movements for gay liberation and gay rights had made substantial headway in disrupting the view of gay people as mentally ill[141] and some progress toward dispelling the belief that gay people were inherently inferior to heterosexuals, as evidenced by the passage of anti-discrimination ordinances prohibiting sexual orientation discrimination.[142] Yet not even a tremor of these norm changes received recognition from any court asked to decide whether state marriage laws discriminated unlawfully against same-sex couples. Instead, these marriage challenges were the proverbial easy cases, with arguments dismissed out of hand.[143]

Some norm contests move past this relatively settled stage and tip into the

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[139] *Lawrence*, 539 U.S. at 579.

[140] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1972) (rejecting challenge to marriage law's exclusion of gay couples); Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973) (same); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (same); DeSanto v. Barnsley, 476 A.2d 952 (Pa. 1984) (same).

[141] *See infra* note 164 (describing removal of homosexuality from the American Psychiatric Association's Diagnostic and Statistical Manual in 1973).

[142] *See* LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 5-6 (1998).

[143] As Mahatma Gandhi observed, with respect to social change, "First they ignore you, then they laugh at you, then they fight you, then you win." At this early contestation stage, courts could be described as ignoring plaintiffs' claims.

mainstream.[144] Even when norm contests become so prominent that they cannot credibly be ignored, the inclination to avoid serious discussion of norms remains apparent. Like the use of facts in other cases, courts deploy references to norm contestation strategically and often without elaboration, as if to direct attention away from their role in selecting among competing norms. As will be developed in Part IV, this judicial norm avoidance may be explained by instrumental interests in a particular outcome, a sense of constraint on the part of judges, or, as I believe, a judicial inclination to maximize decision-making power. Whatever the motivation—and whatever the decision, leaving norms unmentioned does not leave the public debate over norms unaffected, notwithstanding judicial rhetoric to the contrary.

The current marriage challenges brought by same-sex couples are positioned in this norm-avoidant way and are replete with suggestions by defendants, and sometimes by courts, that while a norm contest may be taking place, the court's role is to follow, rather than lead, the public debate. Like the lawsuits from the 1970s and 1980s, the argument in the contemporary marriage cases is that changed views regarding gay people have undermined rationales for sexual orientation-based distinctions once thought to be reasonable. Yet, even as courts are gauging whether sufficient social change has occurred, they go to great lengths to avoid casting themselves as deciding that norm-related question.[145]

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[144] Precisely when challenges to settled norms move from margin to center is, of course, difficult to identify with precision, as the determination depends on which evidence of contestation, empirical or otherwise, is valued. *See infra* text accompanying notes176-188 (discussing conflicting perspectives of majority and dissenting opinions on the status of norms regarding the juvenile death penalty). Further, to be clear, the tipping point does not suggest that contestation is entirely past but rather that a once-natural norm has begun to lose its dominance among the general public. This recognition is not meant to imply a judgment regarding the shift's desirability.

[145] Courts in these cases also deploy references to norm contestation in analyzing fundamental rights claims by same-sex couples. *See, e.g.*, Standhardt v. Superior Ct., 77 P.3d 451, 459 (Ariz. Ct. App. 2003), *rev. denied* (2004) ("Although same-sex relationships are more open and have garnered greater societal acceptance in recent years, same-sex marriages are neither deeply rooted in the legal and social history of

At one end of the spectrum, for example, while recognizing that "[g]reat strides have already been made in protecting same-sex partners in New Jersey," a New Jersey court wrote that "difficult social issues," "vital debate, and delicate political negotiations" required it to sustain "the traditional understanding of marriage" and reject the plaintiffs' challenge to the exclusion of same-sex couples from marriage.[146] The Arizona Court of Appeals likewise concluded that "although many traditional views of homosexuality have been recast over time," the court should leave to "the people of Arizona, through their elected representatives . . . to decide whether to permit same-sex marriages."[147]

At the other end, the Supreme Judicial Court of Massachusetts dismissed as "a destructive stereotype" the traditional view "that same-sex relationships are inherently

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our Nation or state nor are they implicit in the concept of ordered liberty."). Because analysis of fundamental rights claims tends to be backward looking, *see* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988), only minimal focus is placed on the contemporary validity of the traditional norm that is my focus here.

Notably, whether courts affirm or reject the status quo, they take care in these cases to express respect for the sincerity of the views held by those whose position they reject, perhaps as a legitimacy-preserving device consistent with their invocation of the countermajoritarian difficulty. *See, e.g.*, Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114, at *23 (N.J. Super. Ct. Law Div. Nov. 5, 2003) ("[T]he court is sympathetic to the interests of the plaintiffs . . . ."), *aff'd* 875 A.2d 259 (N.J. Super. App. Div. 2005); In re Kandu, 315 B.R. 123, 146 (Bankr. W.D. Wash. 2004) ("This Court's personal view [is] that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples . . . ."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) ("Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman . . . ."); Anderson v. King Cty., No. 04-2-04964-4-SEA, 2004 WL 1738447, at *1 (Wash. Super. Ct. Aug. 4, 2004) ("The social issue before the Court [same-sex marriage] is one about which people of the highest intellect, the deepest morality and the broadest public vision maintain divergent opinions, strongly held in good faith and all worthy of great respect.").

[146] *Lewis*, 2003 WL 23191114, at **25-26. *See also id.* at *25 ("[T]he Legislature and the courts have taken significant steps to protect the rights of same-sex couples."). The court went so far as to catalogue an extensive series of judicial decisions and statutes providing extensive legal protection for and recognition of same-sex couples. *See id.* at **25-26. *See also id.* at *23 ("Social change of the type sought by plaintiffs is properly accomplished in the legislative arena."); Seymour v. Holcomb, 790 N.Y.S.2d 858, 866 (Sup. Ct., Tompkins County 2005) ("The decision to extend any or all of the benefits associated with marriage is a task for the Legislature, not the courts. Social perceptions of same-sex civil contracts may change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best."); Shields v. Madigan, 783 N.Y.S.2d 270, 277 (Sup. Ct., Rockland County 2004) ("It is the Legislature that is the appropriate body to engage in the studied debate that must necessarily precede the formulation of social policy with respect to same-sex marriage and the decision to extend any or all rights and benefits associated with marriage to same-sex couples, and, in turn, the amendment or expansion of the laws presently governing the institution of marriage in New York.").

[147] *Standhardt*, 77 P.3d at 465.

unstable and inferior to opposite-sex relationships and are not worthy of respect."[148] In light of this norm shift, rationales once accepted to justify different marriage rules for gay people now must be understood to reflect impermissible "prejudices against persons who are . . . homosexual," the court wrote.[149] With the problem framed in this way, the court then fulfilled its duty as the "last instance" protector of constitutional rights and rejected the discriminatory marriage rule.[150] One of several New York Supreme Court rulings on the state's marriage law likewise treated the norm contest regarding the legal significance of sexual orientation differences as essentially over.[151] It then characterized its invalidation of the state's different-sex requirement for marriage not as staking out new normative territory but instead as harmonizing with norms already settled by related jurisprudence and positive law in New York. Its decision, the court wrote, was "consistent with the evolving public policy as demonstrated in recent decisions of the Court of Appeals and other New York courts, and actions taken by the State Legislature, the executive branch and local governments."[152]

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[148] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003) (footnote omitted). *See also id.* at 968 (finding that no rational basis existed to justify the state's sex-based marriage restriction and that "the marriage restriction is rooted in persistent prejudices against persons who are . . . homosexual").

The court also repudiated a normative preference for heterosexual relationships that may have led other courts, albeit not overtly, to treat marriage recognition as more sacred, and therefore less subject to compliance with the equal protection guarantee, than other forms of state action. "Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage," the court wrote. *Id.* at 965.

[149] *Id.* at 968.

[150] *Id.* at 966.

[151] Hernandez v. Robles, 794 N.Y.S.2d 579 (Sup. Ct., N.Y. County 2005).

[152] *Id.* at 607. Two other state supreme court justices disagreed, finding the contest to be sufficiently live that the issue of equal marriage rights for gay and lesbian couples required legislative, not judicial, intervention. *See supra* note 146.

A California Superior Court also looked to the norms reflected in extant state law, including a state law providing "marriage-like rights," to find that no legitimate purpose could justify excluding same-sex couples from marriage.

> California's enactment of rights for same-sex couples belies any argument that the State would have a legitimate interest in denying marriage in order to preclude same-sex couples from acquiring some marital right that might somehow be inappropriate for them to have. . . . [T]he State's position that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational basis in denying them the rites of marriage as well.

Under either framing of the norm, however, courts do not effectively absent themselves from the public debate. Choosing the "old" norm over the "new" out of deference to the countermajoritarian difficulty neutralizes neither a court's decision-making agency nor the influence the decision will have on strengthening one norm over the other. In the marriage cases, judicial affirmations of normative preferences for heterosexual couples, even if not articulated explicitly, reinforce the legitimacy of that traditional norm. They supply legislators with reasons to block marriage rights for same-sex couples and provide opponents of same-sex couples' marriages with additional ballast for their claims that marriage by same-sex couples is not legitimate. To the extent the trajectory of other legislative and jurisprudential changes is toward rejecting sexual orientation-based distinctions, a decision affirming the traditional norm derails that process. Indeed, where shifts in law and policy have eliminated longstanding legal burdens on lesbians and gay men and have recognized the equality of gay and non-gay parents, courts affirming the traditional negative norm in the marriage context conceivably could be accused of disrupting or disrespecting the democratic process.[153]

Because both affirmation and rejection of tradition requires selection among competing norms, the gloss of neutrality often attributed to judicial support for the status quo is, in short, a legal fiction much like the concept of fact-based adjudication. So too is the charge that decisions rejecting traditional norms are "activist" in making normative judgments while those that embrace tradition are passive, having kept themselves out of the business of norm selection. Consequently, to the extent concerns about a democracy

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In re Coordination Proceeding, Marriage Cases, Tentative Ruling, No. 4365, 2005 WL 583129, at *4 (Cal. Super. Ct. Mar. 14, 2005).

[153] By the same token, courts that reject the traditional norm and harmonize marriage law with more recent developments that reject sexual orientation-based distinctions also are making a contestable normative judgment regarding the relevance of sexual orientation to marriage. There is no question that these courts have an effect on the public debate. What interests me here, however, is why courts that affirm tradition are not also perceived to be making contestable, influential norm selections.

deficit can be raised legitimately in connection with courts that are deciding cases in the midst of norm contests, those concerns have bite where courts affirm traditional norms as well as when courts affirm the displacement of traditional rationales with new norms. Affirming tradition, in other words, is not a neutral decision-making stance.

III. The Role of Social Science and Social Movements in a Jurisprudence of Fact-Based Decision-Making

Three observations regarding the relationship of social science and social movements to the transformation of facts and norms flow from the operation of fact-based decision-making described above.[154] First, social science research can destabilize traditional perceptions of group members' capacity by exposing and discrediting norms embedded in "factual" characterizations of groups. Most classically, courts invoke social science for this purpose by relying on a particular fact as "proof" to justify the outcome of a case, as in the Labor Department studies cited in *Taylor v. Louisiana* to support invalidation of an automatic jury service exemption for women.[155] Dissenters and scholars regularly criticize this form of reliance on facts as selective or acontextual, yet these criticisms have comparatively little effect so long as the data are basically credible and the fiction remains in place that facts alone can determine reasonableness.[156] Thus,

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[154] For extended discussion of the relationship between courts and social science, see DAVID L. FAIGMAN, LABORATORY OF JUSTICE: THE SUPREME COURT'S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW (2004); Rachel Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PENN. L. REV. 655 (1988); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). On the relationship between courts and social movements, see, e.g., Brown-Nagin, *supra* note 4; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001); Reva B. Siegel, *Text in Context: Gender and the Constitution From a Social Movement Perspective*, 150 PA. L. REV. 297 (2001).

[155] 419 U.S. 522, 535 n.17 (1975)

[156] *See infra* notes 179-188 and accompanying text (discussing critiques posed by dissenters in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002), regarding the process by

while literature aimed at showing courts how to work with social science more productively may be useful to the extent it assists adjudicators in sifting through and thinking critically about information sources, it is unlikely to overcome the judicial inclination to rely on data without acknowledging the normative choices involved in that data selection or in the methodology by which the data themselves were derived.

A separate, potentially more effective function of social science in adjudication is to identify and explain how bias has shaped perceptions of group members' status and capacity. In this respect, social science can destabilize normative facts about a social group by revealing how misplaced normative judgments have distorted popular "facts."[157] Heuristic devices of cognitive psychology may be useful in showing, for example, that a widely accepted fact about a social group rests on faulty premises because researchers anchored themselves at an arbitrary starting point or ignored fundamentally conflicting facts.[158] In connection with the same-sex marriage example developed earlier, cognitive psychology may add value to the analysis of the claims that heterosexual parents are preferable for children by raising questions about biased anchoring, cognitive dissonance in the evaluation of research data, and other potential

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which the majority moved from fact to constitutional judgment without acknowledgment of the norms that shaped the interpretation of evidence).

[157] Of course, the direct effect of any social scientific analyses of fact on adjudication is limited largely to what litigators bring to courts' attention. Often, this information comes to courts through amicus curiae briefs filed by professional organizations such as the American Psychological Association. *See, e.g.,* Brief Amicus Curiae of the Massachusetts Psychiatric Society, the American Psychoanalytic Association, the National Association of Social Workers, et al., filed in *Goodridge v. Dep't. of Public Health,* 798 N.E.2d 941 (Mass. 2003) (on file with the author).

Questions have been raised separately regarding the utility of cognitive psychology related, more broadly, to issues of institutional design. *See* William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616 (2002).

[158] *See, e.g.,* David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, *in* THE NEW ECONOMICS OF HUMAN BEHAVIOR 188 (Mariano Tommasi & Kathryn Ieruli eds., 1995) (explaining biased anchoring, cascade effects, and other phenomena).

Social science also may serve as a check on factual perceptions held by the general public as well as other researchers. Its potential revelatory benefit separately motivates arguments in the employment discrimination context that decision-makers' biases are often not apparent. *See, e.g.,* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

methodological flaws.[159] The California Supreme Court, in striking down the state's ban on interracial marriage, similarly deployed social science analysis, as well as epidemiological data, to enhance its argument that earlier, flawed factual perceptions regarding the significance of racial differences had been shaped by false normative presumptions.[160]

Second, social movements likewise may heighten awareness of the dissonance between traditional views of a social group and contemporary perceptions.[161] Unlike social science research, which can enter the courtroom as evidence, albeit in a limited fashion, the work of social movements is confined largely to extra-litigation activities.[162] Yet it warrants brief attention because the analytic framework advanced here helps clarify the movements' particular influence on adjudication.

Very broadly speaking, identity-based social movements aim to alter what they view as unfair perceptions of, and unjust laws imposed on, the group they represent.[163] Disruption of "facts" embodying negative normative judgments about group members is a first task of these movements. With negative normative facts about a social group in place, law reform in the name of equality is virtually impossible because the facts

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[159] *See, e.g.*, Stacey & Biblarz, *supra* note 87 (discussing and critiquing studies); s*ee also* Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537 (2004-05).

[160] *See supra* text accompanying notes 96-101, discussing *Perez*.

[161] The suggestion here that some perceptions are more accurate than others is offered with the awareness that the concept of accuracy itself is temporally contingent.

[162] Some social movements also have highly sophisticated legal organizations that participate directly in the litigation process on group members' behalf. *See, e.g.*, PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (1999); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1995). My focus here is not on gauging the efficacy of legal intervention in achieving movement goals but rather on identifying with specificity the particular ways in which the work of social movements may shape judicial responses to claims of societal change. For discussion of the efficacy of social movements in achieving social justice goals of various constituencies, see, e.g., RICHARD KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); GERALD N. ROSENBERG, HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Brown-Nagin, *supra* note 4; Eskridge, *supra* note 154.

[163] For an extensive discussion of the effects of identity-based social movements on law reform, see Eskridge, *supra* note 154; Siegel, *supra* note 154.

themselves justify ill treatment of group members. For example, one of the first efforts of the contemporary gay movement was to challenge the American Psychiatric Association's listing of homosexuality as a psychiatric disorder in Diagnostic and Statistical Manual of Mental Disorders.[164] Absent that change, most challenges to government action distinguishing between gay and non-people would have been destined to lose because the "fact" of mental illness could justify innumerable restrictions on gay people's lives. Similarly, the "fact" that whites were more competent both physically and intellectually than African Americans had to be destabilized, as did the "fact" of women's and men's natural aptitude differences, before equality claims could be adjudicated meaningfully.

In the current social climate, the assertion that gay people are less suitable role models for children than non-gay people presents a similar challenge. To the extent the assertion is treated as "fact," it follows logically that governments can restrict gay people from adopting or from marrying (if marriage is treated as the state's preferred foundation for childrearing). While social scientists undertake studies, social movement leaders undertake public education campaigns and media outreach efforts and pursue a host of other strategies for raising awareness of the lives of gay people in general and gay parents in particular.[165] As with the mental illness delisting, efforts at law reform in this area can

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[164] *See* Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1, 26-27 (2003) (describing "the elimination of diagnosis" of homosexuality as a mental disorder as "a necessary step to secure equal rights for gay men and lesbians"); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1582-83 (1993) ("[T]he most successful challenge by these new activists was the assault mounted against the American Psychiatric Association to remove homosexuality from its list of mental disorders. . . . Because the medical profession's definitions of illness can have meaningful legal consequences, this victory within the American Psychiatric Association was equivalent to winning an important test case in the courts.") (footnote omitted); Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 541 (stating that "[t]he elimination of the stigma of mental disease has had a significant influence" on "recognizing the legal rights of homosexuals").

[165] *See, e.g.*, CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS (John D'Emilio et. Al. eds., 2000).

only be successful if the negative "facts" about gay parents are denaturalized and discredited.

Yet, as a third point regarding the influence of extrajudicial sources, discrediting perceived facts about a group is not always sufficient to eradicate legal burdens on group members. While changes to perceptions of group members' capacity may help change normative attitudes as well, this kind of synergistic transformation is not automatic. In some instances, negative norms are so deeply rooted that they influence adjudication of social change-based claims even after negative facts about group members are no longer believable. Courts in these cases let empirical, uncontested facts about group members stand in silently for norms that justify continuing limitations on group members' rights in the way that "thick" facts had done before. The "fact" that gay people are less able parents may no longer be credible to justify the exclusion of gay people from parenting,[166] for example, but the empirical fact of procreative capacity continues to stand in to preserve the operation of the traditional disapproving norm.[167] For as long as procreative capacity is seen to justify a preference for heterosexuality, courts will find the marriage exclusion justified.

In this scenario, neither social movements nor social scientists are likely to have a direct effect on disrupting patterns of negative treatment of social group members.

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[166] *See, e.g.*, Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("The father's continuous exposure of the child to his immoral and illicit relationship [with another man] renders him an unfit and improper custodian as a matter of law."); Pascarella v. Pascarella, 512 A.2d 715, 717 (Pa. Super. 1986) ("It is inconceivable that [the children] could go into that environment [where the father lived with his male partner], be exposed to this relationship and not suffer some emotional disturbance, perhaps severe.") (citation omitted).

[167] This reliance on empirical rather than questionable normative facts is also evident in litigation strategy. For example, in defending New York's exclusionary marriage law, the City of New York offered procreation as a justification for the law's classification yet, at the same time, disavowed the position of disapproving gay people as parents. As shown earlier, since procreative capacity alone cannot explain the law's different treatment of gay and non-gay people, it is difficult to understand the procreation argument as linked to anything other than a preference for heterosexuals as parents. Yet, for political or other reasons, the City apparently felt it could not embrace that position. Consequently, it proffered the empirical facts of procreation to do its unspoken normative work. Appellant's Brief at 45, Hernandez v. Robles, No. 103434/2004 (N.Y. App. Div. 1st Dep't filed June 27, 2005).

Because the norm goes unmentioned rather than being advanced explicitly as a decisive "fact," it is a more elusive target than normative-factual assertions about group members. Further, even to the extent the norm's operation could be isolated, the norm—as norm—is offered as a social judgment, not a fact. As such, it is not subject to disproof in the way that facts are; rational, evidentiary-based arguments by definition will not be as effective.

Consequently, social movements are relatively helpless in challenging norms that silently justify continued burdens on group members after facts supporting those burdens have been disproved. For similar reasons, social science is most effective at attacking fact-based perceptions of social groups and far less effective at destabilizing negative norms that persist in the wake of discredited facts. While both have some ability to disrupt the norms associated with uncontested facts about group members, the diffuse operation of those norms and their lesser susceptibility to rational argument renders the effect of those efforts far less predictable. Thus, challenges to the norms associated with empirical facts may be understood best as a second-order task of social movements or social scientists, for these attacks can begin to gain traction only if normative facts are displaced first.

IV. Theorizing Judicial Norm Avoidance

This Part considers the pragmatic and theoretical conditions that lead courts to respond to social change as a factual phenomenon before recognizing changes to norms. It looks, in other words, at why the pressure for constitutional tipping on issues related to social groups is located in perceptions of facts about group members rather than in perceptions of evolving norms.

Legal process theories, with their focus on courts' limited capacity to gather information related to changing social norms and on their tenuous legitimacy relative to majoritarian bodies, offer one possible frame for understanding the judicial response to social change claims.[168] Results-oriented theories offer another, with their claim that opinions are best understood as improvisations of a court aimed to obscure or legitimate an outcome that is largely unrelated to the stated reasoning.[169] The discussion below evaluates and refines the application of these and other theories in the context of social change-based claims. Remaining questions regarding the legitimacy of fact-based analysis relative to other approaches to adjudication will be taken up in Part V.

If we assume, *arguendo*, that courts approach adjudication with genuine concern for their legitimacy (either in the eyes of the general public or their elite peers) and with recognition of their limited capacity, their preference for fact-based decision-making appears to be a sensible, conservative, reputation-protecting strategy for several reasons. First, the very project of identifying norms (and changes to those norms) has an intangible, almost anthropological quality to it as compared to the project of fact identification. Because a norm signifies a societal judgment, determining a norm's contours requires delving into the inner life of a community, a task for which courts are

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[168] *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1396 (1996) (explaining that, under legal process theory, "the particular task of courts . . . is to decide cases on the basis of reasoned argument, and only issues that can be resolved by that approach are appropriate for judicial resolution. When courts go beyond this role, they endanger their legitimacy as legal institutions—first, because they assert an unjustifiable claim to political superiority, and second, because they act beyond their area of competence."); *see also* G. Edward White, *The Path of American Jurisprudence*, 124 PENN. L. REV. 1212, 1247-49 (1976) (discussing development of legal process theory).

Critiques of the legal process paradigm have spawned more elaborate and nuanced analysis of the relationship between the judiciary and the other branches. *See, e.g.,* Rubin, *supra*; Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 895-96, 925-35 (2003).

[169] *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1993). Not all of these statements are critical of the underlying judgment. *See, e.g.*, Black, *supra* note 95, at 430 (offering alternate explanation for result reached in *Brown*).

notoriously ill-suited from a legal process perspective.[170] Not surprisingly, then, when courts talk about norms, they typically transform the inquiry from an abstract gauging of social sensibilities to a fact-finding project based on legislation, judicial opinions, and, on occasion, polling data and reports from expert organizations. Absent consensus on the meaning of this information, however, the difficult normative choices inherent in declaring norms are inescapable and, often, not easily defended. Although deciding which data are credible as an empirical matter requires only thin agreement, determining which empirical "evidence" should be included (e.g. do opinion polls count?) and how best to interpret whatever evidence makes the cut is not automatic. Declaring norms thus leaves courts vulnerable to accusations that they have mistaken their own views for those of the majority.

Sifting among facts and treating selected facts as decisive does not fully escape these sorts of problems. Still, fact-based decision-making enables courts to take account of societal change while maintaining the appearance, superficially at least, of being less subject to manipulation based on the preferences of individual adjudicators. In part, this is because the norms for which those facts stand in typically remain unmentioned. Moreover, facts are relatively more obvious, more measurable, and more subject to proof than norms. If the observable evidence belies the normative fact that children of interracial couples are incapable of reproducing, for example, that reproductive "fact" will be destabilized and a court will have to embrace that change or risk its credibility as

[170] Justice Scalia made much of this judicial capacity issue in his *Roper* dissent. *See* Roper v. Simmons, 125 S. Ct. 1183, 1222 (2005) (Scalia, J., dissenting). *See infra* text accompanying notes 182-184.

The rise of juries could be said to reinforce this point, to the extent that juries are understood to bring into the judicial process a more accurate sense of community norms than judges might bring to bear. On the other hand, the decline of juries might be read to suggest that courts have become more adept at assessing norms. *See generally* WILLIAM DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES AND FUTURE IN AMERICAN DEMOCRACY (2001).

a fact-finder.[171] Concerns with legitimacy thus prevent courts from retaining a picture of a social group substantially different from the one that is known broadly, even if that picture is a longstanding one and the subject of the "new" facts is unpopular in the surrounding society.[172]

The difficulty for a court in declaring norms, as opposed to facts, is well illustrated by two recent death penalty cases, in which the majority's measure of this country's "evolving standards of decency"—*i.e.*, social norms—was hotly contested.[173]

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[171] A recent case assessing the scope of maritime jurisdiction, Norfolk S. Ry. Co. v. Kirby, 125 S. Ct. 385 (2004), illustrates this point in a different context. At issue was whether maritime jurisdiction would encompass the "'new era'" of technological change in cargo container transportation. *Id.* at 394 (internal citation omitted).

> While it may once have seemed natural to think that only contracts embodying commercial obligations between the "tackles" (*i.e.,* from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations.

Id. at 394. We might guess at the nature of the norms that enabled the Court to move from one vision of maritime jurisdiction to another—perhaps it was a commitment to realism over formalism or a *Swift v. Tyson*-like judgment that the nation would benefit from broadening the reach of federal law in this area. For our purposes here, though, the specific norm or norms that guided understandings of the fact of the changed technology is unimportant; what matters is that, to the Court, the norms did not require mention as part of its decision to abandon one set of facts for another.

[172] This observation may have only limited value outside the context of facts related to social groups. For example, many of the facts on which evidence law is based have been shown to be incorrect, yet the law's dissonance with reality continues to be tolerated relatively easily. *See, e.g.*, Bryan A. Lang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 259 (1998) (observing that "none of the considerations" that support the dying declaration exception to the hearsay rule "rest on any relevant empirical evidence or study of the matter"). However, factually inaccurate assumptions of evidence law are far less likely to be known by the general public, and, therefore, less likely to raise doubts about judicial capacity than similarly incorrect characterizations of social groups.

In addition, if a community remained invested deeply in a traditional normative fact, a court would not necessarily be compelled to embrace the "new" knowledge even if it persuasively destabilized the old "fact." In this respect, courts have discretion either to embrace change, which they can do credibly by highlighting empirical evidence that discredits the old fact, or ignore "new" evidence and embrace the fact that is popular in the surrounding community. *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), might be said to reflect the latter option. In sustaining Virginia's antimiscegenation law, the Virginia Supreme Court acknowledged the California Supreme Court's observation in *Perez* that interracial marriage "could not be considered vitally detrimental to public health and morals." *Id.* at 753 (citing Perez v. Lippold, 198 P.2d 17, 31 (Cal. 1948)). It rejected that view, however, and embraced instead the fact that interracial marriage would produce a "mongrel breed of citizens," linking its validation of Virginia's antimiscegenation law to historical fact: "[H]istory teach[es] that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius." *Id.* at 756.

[173] Eighth Amendment doctrine commands the Court to identify the social norms, in the form of decency standards, against which particular applications of the death penalty must be weighed. *See Roper*, 125 S. Ct. at 1190 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *see also id.* at 1191 (discussing "[t]he

As these cases show, while agreement could be reached relatively easily regarding the content of "thin" facts—*i.e.*, the "objective indicia of consensus" such as "the enactments of legislatures,"[174] determination of those fact's social meaning was anything but uncomplicated.[175]

In *Roper v. Simmons*, most recently, the majority found that "objective indicia" demonstrated "national consensus against the death penalty for juveniles"[176] based on, *inter alia*, state legislatures' abolition of the juvenile death penalty, "the infrequency of [the penalty's] use even where it remain[ed] on the books; and the consistency in the trend toward abolition of the practice."[177] The Court found, too, that social science evidence of juveniles' "diminished culpability" relative to adults reinforced this position.[178]

According to Justice O'Connor's dissent, however, the same facts "fail[ed] to demonstrate conclusively that any [genuine national] consensus has emerged" in the "brief period" since the Court sustained the juvenile death penalty in 1989.[179] She characterized the pace of change as "halting,"[180] and found the majority's analysis

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inquiry into our society's evolving standards of decency"); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting *Trop*, 356 U.S. at 101) (same).

[174] *Roper*, 125 S. Ct. at 1192. The Court has described this statutory source as "[t]he clearest and most reliable objective evidence of contemporary values." Penry v. Lynaugh, 492 U.S. 302, 331 (1989). Disagreement, unrelated to the point here, exists as to whether and to what extent judges should consider their own judgment as well. *See Atkins*, 536 U.S. at 304 (Scalia, J., dissenting) (criticizing majority's view that "[t]he Constitution . . . contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eight Amendment.") (internal punctuation omitted) (emphasis in original).

[175] For example, norms, not facts, would dictate whether evidence of differences in decision-making capacity of people with mental retardation and juveniles should be accorded legal salience. Further, norms would determine whether and how information about international norms should be factored into the analysis.

[176] *Roper*, 125 S. Ct. at 1194, 1192. These indicia, the Court found, "provide sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Id.* at 1194 (quoting *Atkins*, 536 U.S. at 316).

[177] *Id.* at 1194.

[178] *Id.* at 1196.

[179] *Id.* at 1206 (O'Connor, J., dissenting) (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).

[180] *Id.* at 1211.

regarding the culpability of juvenile offenders to "def[y] common sense."[181] Justice Scalia, also dissenting, declared the majority's identification of norm change based on changed empirical facts to be "implausible,"[182] especially given "the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year old offenders" since the Court's earlier ruling on the issue.[183] He, like Justice O'Connor, accused the Court of giving meaning to empirical facts based on personal preferences: "[A]ll the court has done today . . . is to look over the heads of the crowd and pick out its friends."[184]

A similar split erupted in *Atkins v. Virginia*.[185] For the *Atkins* majority, the "consensus reflected in [the] deliberations" of "the American public, legislators, scholars, and judges" was against imposition of the death penalty on people with mental retardation.[186] Justice Scalia, in dissent, declared the majority's identification of a norm based on those sources to be "empty talk,"[187] and charged that the majority had relied on its "*feelings* and *intuition*" to give meaning to these facts.[188]

The sharp dispute over how to glean norms from facts highlights the amorphous, contestable nature of norms relative to facts. This difference means not only that courts are particularly vulnerable in declaring norms but also that, conceptually, facts are easier to discredit than norms. Norms, as judgments, are simply not subject to the same kinds

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[181] *Id.* at 1214.
[182] *Id.* at 1218 (Scalia, J., dissenting).
[183] *Id.* at 1220.
[184] *Id.* at 1223. *See also* Jeffrey Rosen, *Juvenile Logic*, THE NEW REPUBLIC, Mar. 21, 2005, at 11 (criticizing the majority's conclusion that international norms almost universally oppose application of the death penalty to juveniles).
[185] 536 U.S. 304 (2002).
[186] *Id.* at 316, 307. The Court also pointed to social science evidence to conclude that people with mental retardation have diminished culpability. *Id.* at 318-19 & nn. 23 & 24. ("Their deficiencies . . . diminish their personal culpability.").
[187] *Id.* at 348 (Scalia, J., dissenting).
[188] *Id.* (emphasis in original). Chief Justice Rehnquist, in dissent, focused criticism on the majority's reliance on "international opinion, the views of professional and religious organizations, and opinion polls not demonstrated to be reliable." *Id.* at 328 (Rehnquist, C.J., dissenting).

of testing and verification as facts, whether those facts are "thick" or "thin." As a result, demonstrating a court's flawed reliance on an outdated norm is difficult, at best. Not surprisingly, then, courts experience more pressure to reject discredited facts (which will typically be "thick" facts, as "thin" facts are less likely to undergo change) and to steer clear of overtly selecting among contested norms wherever possible.

In addition to the relatively high exposure of facts and the relative difficulty of discerning norms, risks related to judicial legitimacy incentivize courts to focus on facts and avoid evaluating norms. Should a court affirm a norm as a justification for government's limiting a social group's rights, it could appear to be inappropriately substituting categorical acceptance of majoritarian preferences for its own judicial review. If, on the other hand, a court rejects the dominant norm, it might appear to be substituting its own normative views for those of the people, a disfavored countermajoritarian move. In this light, fact-based decision-making appears to offer a convenient escape from these two undesirable options.

This institutional constraint-based theory seems, on its face, to provide a neat explanation for fact-based decision-making—courts are likely to be less vulnerable to criticism of overstepping if they make decisions based on relatively uncontested facts and avoid staking out positions among competing norms. On the other hand, however, fact-based adjudication has not protected courts from controversy regarding the limits of judicial power. It is hard to imagine that the criticism of the Supreme Court's interventions in contested social arenas as in *Brown*, *Romer*, and *Grutter* would have been significantly different had the Court been more open about the normative underpinnings of its decisions. To the extent the public pays attention to the Supreme

Court's actions, it reacts to holdings, not reasoning.[189] Likewise, the focus on facts has not prevented academics and lawyers, as well as peers in the judiciary, from identifying and criticizing decisions' normative underpinnings and implications either in scholarly publications, trade publications or dissenting opinions.

Even if fact-based decision-making is dubious as a strategy for preserving judicial legitimacy, the difficulties associated with norm identification arguably trigger real concerns regarding institutional capacity that could explain courts' orientation toward fact-based decision making. Yet this argument is also less than fully convincing—there is no admission in the Eighth Amendment cases, for example, that norms of decency are difficult to identify. Even the dissents in *Roper* and *Atkins*, which excoriate the majority's norm identification, do not suggest that discerning norms from facts is difficult but only that the majority erred in doing so. Further, there is no shortage of cases in which courts declare norms and treat them as decisive, as shown above.[190] The judicial dynamic by which fact-based decisions precede norm declarations illustrates a preference for delaying the normative analysis but not for avoiding it altogether. There is nothing in the cases, in other words, suggesting that courts sense themselves to be fundamentally constrained from identifying norms because of capacity limitations.

Perhaps fact-based decision-making should be seen as without significance, then, beyond its function to mask judges' penchant for manipulating the adjudication process to reach preferred results. After all, to the extent that fact-based decisions are more defensible than norm declarations for the reasons discussed above, they provide better cover for judges' underlying interests in outcome. On the other hand, though, the cover-

[189] John M. Scheb II & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273 (1994), *cited in* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2028-30 (2002).

[190] *See supra* Part I.

up theory is inadequate for the same reasons the legitimacy and capacity arguments are not fully satisfactory. To the extent the public pays attention to judicial action, it is looking to outcomes, not opinions. The legal elite likewise suspects ideological motivation on the part of many judges.[191] Deployment of careful rhetoric does not alleviate that concern and, in fact, may heighten criticism of judicial dishonesty.

This is not to suggest that either institutional constraints or results-orientation have no effect on adjudicators. Surely it is true that, at times, fact-based decisions will be less likely to trigger criticism, or at least less likely to trigger as much criticism—either from the public or the bar—than overtly normative decisions. But given that neither theory fully resolves our inquiry, several others warrant consideration.

Quite possibly, the judicial reaction to changing views of social groups simply mirrors the way in which the broader public experiences those changes. That is, while norms inevitably inform attitudes about the status and capacity of group members, they are often not consciously experienced, particularly as those attitudes begin to change. Instead, a previously disdained group comes to be seen as more capable than previously thought based on group members' workforce participation, artistic accomplishments, or other activities. Only later does the normative overlay of the earlier-held views regarding group members become apparent. In this light, fact-based intervention neither reflects institutional constraints nor masks result-orientation but instead reflects the way in which human beings change their views about social groups.

This theory, which can also be taken as a description of how norms move from a

[191] *See, e.g.*, BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002); A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY (Ronald Dworkin ed., 2002).

naturalized to a destabilized state,[192] goes some way toward explaining how courts can rely on facts to reject previously accepted norms regarding social group members' rights and leave unacknowledged the normative shift implicated by their changed position. This helps explain, too, some of the ways in which courts seem genuinely unaware of the normative underpinnings of their decisions, as in the seemingly authentic disbelief of the majority in *Nguyen* at being called sexist by the dissent.[193]

But the "nature of social change" theory, by itself, is also insufficient. Even if the *Nguyen* majority could not see that women's role in childbirth could not automatically explain the sex-based immigration rule, surely the Court in *Brown* and *Romer*, among other cases, was well aware of those decisions' normative dimensions and was quite deliberate in not acknowledging them. What else then, beyond institutional constraints and the desire for rhetorical cover, might explain the strategic use of facts to intervene in norm contests regarding social groups?

A further reason that courts may avoid declaring changes in social norms relates more to institutional interests in aggrandizing power than to institutional constraints on the way judicial power is exercised. Courts that frame a decision as rejecting a norm rather than as responding to a fact (or a fact change) risk committing themselves to a broad doctrinal position that limits room to maneuver in later cases. A court might want to reject a norm in one context, for example, but might not want to risk embracing rejection of that norm in similar settings. By avoiding all discussion of the norm, the risk

[192] *See supra* notes 137-144 and accompanying text.

[193] Although one could argue that the majority was willfully ignoring the dissent's point, I read the majority's response as failing to join issue with the dissent's claim of sex-based bias because it simply does not grasp or find credible the dissent's point.

of a *stare decisis* roadblock is averted or at least minimized.[194]

A counterfactual may help test this. In *Reed v. Reed*,[195] as discussed above, the Court never addressed the normative fact of "natural differences" between men and women that the Idaho Supreme Court held justified the subordination of wives to husbands in estate administration. What if, instead of ignoring the Idaho court's rationale, the U.S. Supreme Court had unraveled norm from fact and rejected the natural domesticity norm as impermissible? In addition to the risk of being charged with inappropriately and ineptly intervening in a cultural debate, the Court potentially would have disabled use of "natural" sex differences to justify government action in other cases. This is a position the Court was, and remains, unwilling to take.[196] Rejecting the general norm, in other words, would have gone too far doctrinally, in addition to the myriad legal process-type problems it might have generated.

Perhaps, then, the court could have limited its rejection of the general norm's application to the context at issue. Instead of focusing on the empirical justification's inadequacy, the court might have held that judgments about "natural sex differences" did not support differential sex-based estate administration rules. But recognizing the norm shift even in this narrow way would have been riskier than the Court's empirically-focused analysis because the concession of normative change begs the questions whether *any* sex-based distinction in treatment could be justified by "natural" differences and, if so, how? By not acknowledging its rejection of the norm, the court enabled itself and lower courts to sidestep more easily the resurfacing of "natural" differences in other

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[194] The literature on judicial minimalism illustrates the existence of this approach, *see, e.g.,* Sunstein, *supra* note 25, but does not explore the particular incentives courts have to make minimalist decisions in the context considered here.

[195] 404 U.S. 71 (1971).

[196] *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

cases.

Justice Scalia highlighted the power of explicit norm rejection to constrain future decision-making in *Lawrence v. Texas*. There, he castigated the majority and the concurrence for assuming they could reject the norm of gay people's immorality as a rationale for Texas' Homosexual Conduct Law but then accept the same norm to justify sexual orientation-based distinctions in the military or marriage.[197] "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court," he wrote.[198]

> One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action[.][199]

In contrast to majoritarian bodies, which can pick and choose among norms, courts, as Justice Scalia suggested, have significantly less flexibility. Once a general norm has been rejected in one context, it is difficult, at best, to resuscitate that norm in a related case.

In some respects, this last theory is the strongest candidate to account for the fact-oriented approach courts bring to social change claims. Its explanatory value does not depend on courts being conscious of the normative positions implicated by their opinions; courts making fact-based decisions might either be unsure of how to articulate the normative shift or, conceivably, unaware of the normative position their opinion reflects,

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[197] Lawrence v. Texas, 539 U.S. 558, 589-90 (2003) (Scalia, J., dissenting). The mediating norm here was unable to remain unacknowledged in *Lawrence* because it was held out, by the state, as the justification for continued differential treatment of gay people. Had some other, more empirical justification been advanced, the Court conceivably could have rejected that, as it did in *Romer*, without engaging explicitly with the underlying norm.

[198] *Id.* at 605.

[199] *Id.* at 604.

as in cases where norms remain deeply naturalized. Whatever the motivation for its use, whether to achieve instrumental goals or respect institutional constraints, fact-based intervention in contested normative arenas is only minimally restrictive of future exercises of judicial power. In other words, this power-conservation theory recognizes that a variety of concerns may motivate courts to prefer facts to norms but that underlying all of these potential motivations is an instinct to preserve as much decision-making power as possible for future cases.

This theory's weakness, however, is that it fails to explain why courts would ever declare norms if to do so is power-restricting. One also could argue, in a different vein, that norm declarations are not as restrictive of future exercises of judicial power as the theory suggests. The Supreme Court has regularly rejected a normative preference for equality, for example, on the grounds that the facts require a different analysis.[200]

Still, we might resuscitate the theory by distilling its essence—that although courts may reach a point of comfort with norm declarations, the judicial instinct upon entering new normative terrain is to drop a relatively light anchor that allows for ease of movement in the future. Only later, once the terrain is better know, is greater security regarding the selected position likely to arise. At that point, but not before, courts may find sufficient comfort to drop the heavier anchor in the form of stating the underlying norm, though still with the knowledge that some limited future drifting is possible.

V. The Legitimacy of Fact-Based Adjudication: Would Candor Be Better?

Up to this point, this article has focused mainly on the positive task of describing and theorizing the way in which courts respond to changing societal views regarding

[200] *See, e.g.,* Nguyen v. INS, 533 U.S. 53 (2001); *Lawrence*, 539 U.S. 558, 585 (distinguishing restrictions on gay people in marriage and the military from restrictions related to sexual intimacy).

social groups. This final section will take a more evaluative approach to assess whether, even in light of the reasons supporting the emergence of fact-based reasoning as an adjudication strategy, candor about the normative grounding of judicial decision-making would be preferable. Put another way, since we know that every decision regarding limitations on the rights of a social group takes a normative position regarding that group's status or capacity, whether acknowledged or not, the discussion here considers what would be gained—and lost—by consistent exposure of those normative positions.

In the literature on judicial candor, several general positions have been staked out. At one end is the argument that candor is always, or almost always, preferable. From this perspective, obscuring the "real" reason for decisions is disagreeable as a matter of general principle and potentially dangerous to the stability and credibility of courts if accepted as a matter of institutional design.[201] On the other end is the argument that candor, in the sense of introspection by judges regarding the genuine reasons for their decisions, actually might harm the judicial process by weakening judges' internalized sense of obligation to follow rules rather than exercise unconstrained discretion.[202] In between are pragmatic, instrumental arguments suggesting that political and other constraints render candor, even if desirable, an unrealistic aim.[203]

Before assessing the potential value of increased candor in connection with social group litigation, two preliminary points require attention. First, I assume that even if

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[201] *See generally* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 251-52 (1964) (describing "a reputation for candor" as the Supreme Court's "precious political asset"); JEROME FRANK, LAW AND THE MODERN MIND (1930); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) [hereinafter Shapiro, *Judicial Candor*]; Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721 (1979). *Cf.* CALABRESI, *supra* note 8 (advocating candor but acknowledging that judges experience different constraints than scholars).

[202] *See* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Kathleen M. Sullivan, *The Candor of Justice Marshall*, 6 HARV. BLACKLETTER J. 83 (1989); Robert Weisberg, *The Calabresian Judicial Artist: Statues and the New Legal Process,* 35 STAN. L. REV. 213, 249-57 (1983). *But see* Gail Heriot, *Way Beyond Candor*, 89 MICH. L. REV. 1945 (1991) (critiquing Altman's arguments).

[203] *See* Shapiro, *Judicial Candor*, *supra* note 201, at 742.

norms cannot be described as precisely as facts, it is possible, in virtually all cases, to articulate some aspect of the governing norm. Indeed, given the frequent efforts in dissenting opinions to expose and criticize the norms allegedly ignored by the majority, the hurdle of norm identification does not seem insuperable as a practical matter.

The second concerns the meaning of candor. Although the literature defines candor in multiple ways, a consistent thread is a focus on "the declarant's state of mind."[204] Much of the literature deems a candor requirement to be satisfied if a judge does not intend to deceive others; self-deception is treated as a separate issue.[205] For purposes here, I take a view of candor that extends beyond avoidance of deliberate deception and includes an expectation that courts identify and articulate the normative underpinnings of their decisions. Through this approach, I mean to reach cases in which norms are deeply naturalized and seen as inseparable from fact, as in decisions based on the "natural" ordering of race or sex, as well as decisions in which courts deliberately avoid addressing norms. In this way, I can test more fully the consequences of displacing the fact-based adjudication fiction with a more transparent approach to decision-making in social group cases.

What might be gained, then, from increased pressure on courts to acknowledge expressly the normative grounds for their opinions in social change cases? Leaving aside general moral preferences for honesty,[206] several possible benefits come to mind. First, returning to the theories offered earlier as to why courts prefer to avoid norms, we might

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[204] *Id.* at 732.

[205] *See* Altman, *supra* note 202, at 297 (suggesting a distinction between candid, meaning "never being consciously duplicitous" and introspective, meaning "critically examining one's mental states to avoid any self-deception or error"); Shapiro, *Judicial Candor*, *supra* note 201, at 732 (excluding self-deception from an analysis of the value of judicial candor). Earlier literature, such as that of the legal realists, treated the two as more closely aligned. *See* Altman, *supra* note 202, at 297-98 ("The realists urged judges to recognize and to disclose the motivations that the judges deny . . . .").

[206] *Cf.* Sissela Bok, LYING: MORAL CHOICE IN PRIVATE AND PUBLIC LIFE (1978).

conclude that greater transparency regarding decisions' normative underpinnings would constrain courts to take consistent normative positions regarding a social group, or at least to make efforts to reconcile dissonant positions. As is, courts can largely blink *stare decisis* constraints and step around earlier decisions by reference to facts without explaining conflicting normative positions in their jurisprudence.

Second, it might be that, if forced to expose their normative positions, some courts would decide cases differently, suggesting that transparency could impose at least partial restraint on judges' otherwise relatively unconstrained exercise of their result-oriented preferences. Of course, one can always argue that courts will offer what they perceive to be "acceptable" norms to justify decisions that are actually driven by "unacceptable" motives. But the demand of exposure both adds pressure to do the additional work of identifying a non-controversial norm and may, in some cases, impose a meaningful limit on result-oriented decision-making. Perhaps the scope is limited, but for certain types of distinctions between social groups, the task of drumming up a passable norm may be either too difficult or not worth the risk to judicial credibility. For example, as suggested earlier, had the Court in *Nguyen* been pressured to identify the norm that linked the empirical fact of childbirth to a rule that presumed women were more likely to nurture their children than men, it might have hesitated to take that strongly contested position.

Third, we might conclude that greater openness regarding normative motivation would be desirable from the vantage point of social change advocates. Even if litigation resulted in losses for a social group, the justificatory rationales would have to be stated clearly. In contrast to the current practice, which permits empirical facts to stand in for negative norms, even after these norms have been discredited as factual descriptions of

group members, the clarity that would flow from a candor requirement might enable future challenges to be more focused and, potentially, more successful.

On the other hand, this last point also calls attention to the double-edged nature of transparency from the point of view of social group advocates. Social movements are in a relatively stronger position to debunk erroneous traditional facts about group members than to disprove norms, as discussed earlier, since norms are not falsifiable in the way that facts typically are.[207] Social science analysis likewise can be deployed against factual mischaracterizations of groups but is far less effective in challenging norms. Thus, if decisions turn on facts rather than norms, advocates for social change have greater opportunity to offer definitive, or at least more powerful, critiques than if decisions turn overtly on norms.[208]

Further, and perhaps more importantly from a legal process and institutional design standpoint, fact-based decisions may, through their lack of overt norm declaration, encourage extrajudicial conversation regarding appropriate norms by other governmental institutions and the general public. Judicial declarations, in contrast, are likely to limit the scope of future legislative activity[209] and the effectiveness of social science and social movements on views of social groups. Simply put, norm declaration closes doors more definitively than norm avoidance. Much like common law decisions are more easily adjustable than constitutional decisions, even though those also are not fixed absolutely, fact-based decisions leave room for greater movement than norm-based decisions. In this

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[207] *See supra* text accompanying note 172.

[208] An additional risk for advocates of social change is that a court's explicit identification and approval of a negative norm about group members will reify and strengthen the norm to a greater extent than a decision that affirms the norm implicitly.

[209] Judicial affirmation of a traditional norm raises political risks for a majoritarian legislature that is inclined to reject that norm. Advocates for the traditional norm will be strengthened in their claim that the legislature has acted based on personal preferences rather than to reflect the majority's will. Likewise, legislative rejection of a traditional norm may spark legal challenges and sharpen public criticism by adherents of the traditional norm.

way, when making fact-based decisions, particularly in contested normative arenas, courts are leaving open the possibility that norms will emerge with greater clarity from other, more representative bodies. One could conclude, then, that while it is not fully transparent, a fact-based approach has the significant benefit of minimizing the concerns that typically plague courts as nonmajoritarian bodies. With this point in the balance, the conclusion seems reasonable that complete candor, including regular norm identification, is not fully desirable even if it were possible in adjudication of social group claims.

These latter arguments, including the preservation of freedom to maneuver in future cases and the encouragement of extrajudicial participation in norm determination, strike me as generally desirable.[210] There is a serious problem, however, in that the fact-based decision-making fiction is exploited to excess—courts not only avoid mentioning the normative grounds for their decisions but also allow the fiction to override the need for recognizing connections among cases involving related norms. This is not to say that the norm shift in case 1 must also occur in case 2 involving the same social group but rather that, if the norm shift is refused in case 2, that determination should be reconciled overtly with the decision in case 1.

This dynamic, by which related cases are not treated as such, appears strikingly in the marriage cases with which this article began. In the majority of these cases, courts have rejected the claims of lesbians and gay men seeking to marry. Most often, as discussed earlier, marriage is found to be reserved justifiably for different-sex couples because those couples can, in theory if not reality, procreate without third party

[210] The position impels important questions about whether adjudication that avoids full disclosure and defense of underlying normative choices should ever be tolerated and, further, about the scope and extent of candor that should be expected of judges that are sensitive to the role of norms in their decision-making. In the interests of focusing on the problem at hand, I will set aside the broadest iterations of these questions and concentrate here on their application in the context of claims that courts should integrate societal change.

assistance. One might argue that these rationales concern the essence of marriage rather than anything particular to the social group of gay people. When this reasoning is set against the background of marriage case law, however, it becomes clear that the law of marriage does not now, and has never, treated procreation as essential.[211] Why, then, has procreative capacity emerged as the definitive factual justification for excluding same-sex couples from marriage? Most of the cases do not seek to explain this reasoning by anything other than a glib reference to history and/or to traditional views of marriage.[212] One court has gone further to suggest that marriage is necessary to impose order on heterosexual procreation, something not needed for same-sex couples whose procreation is necessarily more deliberate.[213]

Yet it is somewhat difficult to take seriously, in light of common sense as well as the legislative framework and case law concerning marriage, the suggestion that egg, sperm, and gestation are more fundamental to marriage than the lifetime of parenting responsibilities of the adult partners after childbirth. Indeed, as the fact/norm framework

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[211] Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002). Certainly today, economic interdependence is widely acknowledged as the primary function of civil marriage. Civil marriage has always been an economic relationship between the spouses, although during coverture, the relationship was less about interdependence than about wives' legal status merging into that of their husbands. Emotional interdependence and childrearing are occasionally recognized as important as well, though far more in the public discourse than in domestic relations jurisprudence. Procreation, on the other hand, has been specifically disavowed as a marital requirement, as indicated by the law delineating eligibility for marriage, annulment law, and the constitutional protection for a woman's right, even absent her husband's consent, to terminate a pregnancy. Neither is procreation limited by law to marriage. *Id.*

[212] On history and tradition as justifications for government action, see, e.g., Rebecca Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

[213] Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) ("What does the difference between 'natural' reproduction on the one hand and assisted reproduction and adoption on the other mean for constitutional purposes? It means that it impacts the State of Indiana's clear interest in seeing that children are raised in stable environments. Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the 'protections' of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place. By contrast, procreation by 'natural' reproduction may occur without any thought for the future.")

illustrates, the facts of procreation alone are simply insufficient as explanations for the sex-based restriction in marriage law. They are not evaluative or explanatory; a norm must give meaning to those facts to justify their use to exclude same-sex couples from marriage. This explanatory deficit is particularly striking since many same-sex couples do procreate—albeit with third party assistance.[214]

The challenge, then, is to identify the norms for which the biological facts of procreation stand in. Put another way, we must ask what normative position a court is taking regarding parenting by lesbians and gay men if it sustains a marriage law that excludes gay couples on the grounds of procreative capacity. Most courts have yet to pose these questions, let alone answer them.[215] Instead, they treat procreation as sufficient, without explanation, to sustain different marriage rules for gay and non-gay people.

Even if we accept the lack of candor regarding the norms underlying procreation, however, a separate question exists as to whether it is also legitimate for the same courts to disregard other cases in which the procreative capacity of gay adults, and gay parents in particular, has not been given a negative normative value. In most of the states in which marriage challenges have been adjudicated, there is ample case law holding that sexual orientation should not be taken into account in making custody and visitation decisions absent some showing of harm to the child.[216] These cases embody and often express directly a normative judgment about the relative equality of gay and non-gay

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[214] Of course, many different-sex couples procreate with third-party assistance as well.

[215] *But see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[216] *See* Patricia M. Logue, *The Facts of Life for Gay and Lesbian Parents*, 25 FAM. ADVOC. 43, 44 (2002) ("The overwhelming trend in custody and visitation cases is not to attach negative presumptions about parenting or conduct to a parent's sexual orientation, but to look at whether there is any evidence of harm to children. . . . A clear majority of states takes this approach. In recent years, even states generally considered socially conservative on issues of homosexuality and parenting have disclaimed any per-se rule restricting custody for lesbian or gay parents on the basis of sexual orientation alone.").

parents. A court wishing to treat gay and non-gay parents as normatively unequal in the marriage context potentially could still do so, perhaps on the ground that the cases embracing contrary norms reflect individualized determinations about parenting rather than broad policy judgments.[217] Complete failure to wrestle with the dissonant normative position in these cases, however, amounts not only to a lack of candor but also to a kind of duplicity through the deliberate disregard of related precedent.[218]

Conceivably, even with strong precedent rejecting legal distinctions between gay and non-gay parents, courts still might hesitate to strike down a marriage law for fear of exerting judicial fiat in the public domain. But this hesitation is either naïve or disingenuous and rests on the same misconceptions that empowers fact-based adjudication. For one, any decision—including a decision to sustain the status quo—reflects a selection among competing norms regarding the social group of gay people, as shown earlier.

Second, the profession that the plaintiffs' challenge must be rejected out of deference to the legislature disregards that the legislature typically *has* spoken to the issue before the court. Domestic relations law in states across the country makes clear, as noted earlier, that a couple's capacity to procreate without assistance is neither necessary nor sufficient as a marriage qualification. But there is more than that. The legislatures in most states where marriage litigation is taking place also have expressed normative judgments about the difference (or lack thereof) between gay and non-gay parents through legislative frameworks regarding adoption, foster care, guardianship and other

[217] I would disagree with this distinction in that decisions on these issues announce principles to be applied beyond the case at bar, but will leave my disagreement at that, for now.

[218] I take this position cognizant of Karl Llewellyn's point that a determined court can distinguish precedent in a variety of ways. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960). Llewellyn assumes, for the most part, that precedent will be distinguished, not ignored. Forcing that exposure on a consistent basis is a check, even if an imperfect one, against judicial duplicity.

mechanisms related to parenting and adult care for children. If the state's view is that gay people do not make as good parents as non-gay people, surely that would be reflected in the law concerning children who are wards of the state.[219] If the state's view is that couples capable of procreating without assistance make better parents than other couples, we would expect that, too, to be reflected in these laws. But such prohibitions exist as outliers, if at all.[220] Even further, courts in many of these states have authorized second-parent adoptions so that both parents in a same-sex couple can establish a legal relationship with the child(ren) they are raising. Yet in none of these states has the legislature acted to overturn a second-parent adoption ruling on the ground that same-sex couples should not be encouraged to parent.

One might object immediately that the federalist system does and should allow precisely this sort of state-by-state experimentation, so that federal equal protection law should not prohibit states from holding differing public policy visions. The question here, however, is not whether experimentation in the abstract remains desirable. Instead, it is whether the justification on which the state relies for its experimentation remains permissible in light of the burden imposed. In addressing this question, judicial review that takes account of societal changes to normative views of social groups even could be characterized as state-respecting, in that its cues regarding the continued legitimacy of these views come from the activities of the states themselves.

The approach proposed here should be even less controversial with respect to state constitutional analysis, given that the restriction on a social group could be

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[219] *See, e.g.,* Lofton v. Sec'y of Dep't of Children and Family Svcs., 358 F.3d 804 (11th Cir. 2004) (sustaining Florida's ban on adoption by lesbian and gay adults), *reh'g en banc denied*, 377 F.3d 1275 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005). For a critique of the 11th Circuit's decision in *Lofton*, see, e.g., Mark Strasser, *Rebellion in the Eleventh Circuit: On* Lawrence*,* Lofton*, and the Best Interests of Children*, 40 TULSA L. REV. 421 (2005).

[220] *See* Strasser, *supra* note 219.

measured against other treatments of that group intrastate.[221] Again, the candor requirement would not mandate a coherent set of norms regarding a group but rather a legitimate explanation for the continued use of the rights-restricting norm when norms are in conflict.

Justice Scalia would object, as he did in his *Lawrence* dissent, that by looking to norms reflected in legislation as well as in judicial precedent, courts would impose an unduly burdensome requirement that legislatures act on consistent principles rather than moving incrementally.[222] But this concern is not as grave as it might appear. The proposal here is not that courts invalidate legislation unless it is in lockstep with principles reflected in similar laws.[223] Indeed, such a proposal would be futile given that legislatures typically do not work so coherently, and that laws often reflect a diversity of norms regarding social groups.[224] Also, courts retain the authority to decide whether and how far to carry a norm from one context to another. The additional argument that this flexibility allows courts too much discretion merely restates the discretion that is characteristic of judicial decision making. Relating one context to another has long been the essence of judicial practice.

The objection that courts ought to affirm the traditional view of a social group and "leave change to the legislature" in the interest of minimizing their invasiveness in public

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[221] *See* Kaye, *supra* note 9, at 16 (recognizing that state courts' "use of the common law to define rights at times has been preferable in that it has allowed both courts and legislatures room to adapt principles to changed circumstances" and observing that federal courts lack "that same flexibility" because of their limited powers to create common law).

[222] *See supra* text accompanying notes 197-199.

[223] Indeed, courts need not look to legislation at all. While legislation, like case law, may provide useful insight into the settling of norms that are related directly to the rationale being considered by a court, the candor requirement conceivably could be limited to case law.

[224] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 129 (1971) ("I'm skeptical that a method of forcing articulation of purposes [by legislatures] can be developed that will be both workable and helpful."); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222, 233-35 (1976) (arguing that the natural of the lawmaking process renders legislative intent difficult to discern).

debates similarly is misconceived. Because legislation tends to respond more quickly to societal change than common law or constitutional law, "new" views regarding social groups ordinarily will be reflected in statutes well before courts begin adjudicating constitutional claims. Indeed, in the area of gay rights, one might see the marriage exclusion as the outlier case that requires judicial correction because the political process has failed to eradicate a norm disapproving gay parents that has been rejected in many other contexts. Affirming traditional disapproval for gay parents, therefore, is not a neutral move but instead runs counter to other legislative expression on the same issue. Judicial support for the status quo gives renewed legal force to a norm that has been either affirmatively disavowed or left unembraced by the majoritarian legislature.

Further, if all other sexual orientation-based distinctions have been removed from statutes and case law, their retention in marriage law arguably has occurred because it is not politically tenable for the legislature to clean up the last vestiges of longstanding hostility toward the social group at issue.[225] From this perspective, courts seem particularly well-suited, as enforcers of equal protection and other constitutional guarantees, to identify the occurrence of process failure. Of course, it is also possible that the exclusionary law's survival in the face of other changes demonstrates not that process failure has occurred but rather than the interaction of marriage and same-sex couples is somehow different from all other law related to sexual orientation. But if that is the claim, it ought to be defended. To the extent the contemporary approach of fact-based adjudication safeguards courts from that pressure to defend, it presents not merely a

[225] *See* ELY, *supra* note 224. Consider, for example, the refusal of some legislatures to repeal sodomy prohibitions even after judicial invalidation. *See, e.g.*, Cassandra M. DeLaMothe, Note, Liberta *Revisited: A Call to Repeal the Marital Exemption for All Sex Offenses in New York's Penal Law*, 23 FORDHAM URB. L.J. 857, 894 (1996) (noting that "in 1980, the New York Court of Appeals declared [New York's law criminalizing non-commercial sexual conduct between consenting adults] unconstitutional as a violation of the right to privacy in *People v. Onofre*. To date, the statute remains on the books.") (citation omitted).

pragmatic mode of analysis but a cover for result-oriented decision-making that should be removed.

Conclusion

Wherever one comes out on the ultimate question of how much account courts should take of societal change, the constant involvement of courts in assessing social norms cannot reasonably be ignored. Courts evaluate and select among competing norms related to the status and capacity of social groups on a regular basis, even when those norms are contested and even when their normative choices go unacknowledged. Consequently, the presumption made by many courts, elected officials and commentators that courts avoid influencing norm contests when they reject social change-based claims is misconceived. It is the fiction of fact-based adjudication, not a unique aptitude of courts to make decisions without normative choices, that enables judgments to be made without mention of norms. Our theories of judicial review will be better off, both with respect to descriptive accuracy and normative bite, to the extent they embrace, rather than overlook, this reality.