DEFEERENCE TO LEGISLATIVE FACT DETERMINATIONS IN FIRST AMENDMENT CASES AFTER TURNER BROADCASTING

Twenty-seven years ago, Professor Archibald Cox wrote that "it is hard to divine whether the Justices have developed a philosophy concerning the weight to be given legislative determinations of fact, characterizations, or degree in civil liberties cases." The Supreme Court's recent First Amendment decisions remind us that everything old is new again.

Last Term, in Turner Broadcasting System, Inc. v. FCC, the Court handed down the second in a pair of decisions considering the appropriate level of judicial deference due to legislative findings of fact in First Amendment free expression cases. The Court articulated a standard under which the judiciary would accord deference to legislative fact determinations supported by "substantial evidence" at the time of a bill's passage. As enunciated, this standard appears to constrain significantly the prevailing scope of judicial review of legislative fact findings in free speech cases. At the same time, however, the Court assessed the legislation under review using a fact record, developed by a federal district court, that included evidence that had not been before Congress.

The resulting confusion regarding the appropriate scope of review of legislative fact determinations has significant implications for speech protection. Speech doctrine places great weight on specific findings of fact as tools for applying speech-protective principles in new contexts. When exercising either strict or intermediate scrutiny of government action, for example, courts must make particular findings of fact about the existence and severity of asserted harms, the effect of the action on expression, and the fit between the action and the goals it was meant to achieve. These empirical determinations — based on social scientific, economic, scientific, and technological evidence about the "way the world works" — are often determinative of constitutionality. Thus, the level of deference accorded to fact-finding by the political branches can have a significant impact on the implementation of the First Amendment's Speech and Press Clauses.

This Note provides a framework for judicial review of legislative fact-finding in First Amendment cases, in light of the Turner decisions. Part I explores the doctrinal confusion sown by the recent opinions.

Part II considers the traditional arguments for judicial deference and finds them unpersuasive in the context of broader norms of First Amendment jurisprudence. Part III suggests two factors that may explain the apparent doctrinal disorder and offers a two-part framework for determining the appropriate scope of review in particular cases, consistent both with First Amendment norms and the Court's decisionmaking process in the *Turner* cases.

I. DOCTRINAL CONFUSION REGARDING THE SCOPE OF REVIEW

The recent *Turner* decisions underscore the confusion regarding the scope of judicial review of legislative fact-finding by citing conflicting precedents and competing language within the same opinions. In these opinions, the Supreme Court upheld the constitutionality of "must-carry" provisions, Congressional mandates requiring cable operators to carry a minimum number of broadcast stations.

In *Turner I*, the Court determined that the provisions constituted content-neutral restrictions on speech — subject to intermediate scrutiny under *United States v. O'Brien* — and that the interests asserted by Congress were legitimate. However, citing precedent stating that "[the] Court may not simply assume" the efficacy of a speech-restrictive remedy in promoting legitimate government interests, the Court required the government to establish, as an empirical matter, the existence of the asserted harm and the suitability of the remedy. Specifically, the Court held that the constitutionality of the regulations would necessarily rest on a factual demonstration that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry [regulations]." Because the existing evidence was ambiguous, however, the Court remanded the case to the district court's three-judge panel for the development of a more thorough fact record regarding evidence of risk of financial threat to broadcasters in the absence of the law, the extent to which the new provisions would affect cable programmers' speech, and the availability of less restrictive measures that would achieve the government's goals.

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4 See *Turner I*, 512 U.S. at 661-62.
5 391 U.S. 367 (1968). *O'Brien* requires that a regulation must further an important or substantial government interest unrelated to the suppression of expression, and must be tailored such that the burden on speech is no greater than essential to further the interest. See *id.* at 376-77.
6 See *Turner I*, 512 U.S. at 662-63. Those interests included preserving local broadcast television, "promoting the widespread dissemination of information from a multiplicity of sources," and promoting fair competition in the television programming market. *Id.*
7 *Id.* at 664 (plurality opinion) (quoting City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986)) (internal quotation marks omitted).
8 See *id.* at 664-65.
9 *Id.*
10 See *id.* at 667-68.
In so doing, the Court reaffirmed existing precedent setting forth courts’ authority to review facts independently. The opinion cited caselaw holding that “[d]ecision to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake,” and that the traditional deference due to a legislature’s fact-finding “would not foreclose [the Court’s] independent judgment” of the relevant constitutional facts. Furthermore, by remanding the case to the district court for further development of the fact record, the Court affirmed the power of the judicial branch to exercise independent judgment regarding the legislative facts underlying First Amendment adjudication. Yet other language in Turner I contemplates a significantly more circumscribed review. The decision cites precedent requiring “substantial deference to the predictive judgments of Congress,” even when those judgments have an impact on speech. Indeed, the Court stated, courts do not have “license . . . to replace Congress’ factual predictions with [their] own”; they must simply inquire whether Congress drew “reasonable inferences based on substantial evidence.”

Upon revisiting the issue in Turner II after the proceedings on remand, the Court adopted more singularly deferential language. Turner II makes no mention of courts’ independent judgment and proclaims instead that the judiciary’s “sole obligation” is to determine whether “Congress has drawn reasonable inferences based on substantial evidence.” Paradoxically, however, in determining the reasonableness of Congress’s action, the Court also relied on evidence developed by the district court. Its consideration of data relating to developments that occurred after passage of the legislative provisions directly undermines the articulated standard of review and suggests that there is room for independent judicial consideration of legislative facts even after the Turner decisions.

Amidst the confusion, lower courts have adopted hybrid articulations of the appropriate standard; some emphasize required deference, others the duty of independent judgment. The Fourth Circuit has adopted an unusually deferential standard.

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14 Id. at 666.
17 See, e.g., Excalibur Group, Inc. v. Minneapolis, 116 F.3d 1216, 1221 (8th Cir. 1997).
18 See, e.g., Moser v. FCC, 46 F.3d 970, 974 (9th Cir. 1995).
facts," it ruled, "the substance of which cannot be trumped by the fact finding apparatus of a single court." 19

II. ARGUMENTS FOR DEFERENCE VS. FIRST AMENDMENT NORMS

The Turner II opinion incorporates traditional justifications for judicial deference to legislative determinations. These arguments focus on the institutional "competence" of different branches of government, encompassing both their legitimate role in the constitutional structure and their institutional capacity for fact-finding. However, the practice of adjudicating free expression claims embodies norms unique to First Amendment doctrine that shift traditional assumptions, and renders traditional arguments for deference inapposite in the speech context.

A. Traditional Justifications for Judicial Deference

1. Institutional Roles. — Two related arguments regarding the comparative roles of the legislative and judicial branches are commonly invoked to justify courts' deference to legislative findings. The first focuses on the structural separation of powers established by the Constitution and the appropriate functional division of tasks between the two branches. The judicial role is limited to the resolution of cases and controversies governed by standing and injury requirements; judicial discretion is cabined by interpretations of existing law and precedent. In contrast, legislative bodies enjoy wide latitude in choosing which issues to address and which policy choices to pursue. According to this analysis, legislatures, rather than courts, should make the factual determinations underlying policymaking. Indeed, noted the Turner II Court, "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." 20 Thus, other courts have argued, independent judicial judgment over both questions of law and the facts underlying legislative determinations "would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other." 21 This distinction between the two branches underlies the doctrine of deference in constitutional law, which "holds that a court should declare a law unconstitutional, not when it thinks that the law in question runs afool of its own reasonable interpretation of the Constitution, but only when the law falls outside the range where reasonable people may differ." 22

20 Turner II, 117 S. Ct. at 1191.
21 Anheuser-Busch, 63 F.3d at 1312.
22 Stanley C. Brubaker, The Court as Astigmatic Schoolmarm: A Case for the Clear-Sighted Citizen, in The Supreme Court and American Constitutionalism 69, 80 (Bradford P.
The second argument appeals to the comparative legitimacy of lawmaking by the various branches and bases deference on the democratic authority of elected legislatures, in contrast to the counter-majoritarian nature of judicial decisionmaking. One commentator asks: "In a republic, why should courts give deeper or more authentic expression [of the Constitution] than the people's representatives?" In this vein, the *Turner II* Court held that "[w]e owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power."

2. Institutional Capacity. — A second strain of argument favoring judicial deference to legislative fact-finding contends that the legislature's superior institutional capacity to collect evidence makes it the appropriate branch to make fact determinations. This superior capacity derives from the significant resources available to legislatures, notably their committee staffs, systems of legislative hearings, and, at the federal level, the Congressional Research Service and Budget Office. Indeed, in *Turner II*, the Court rested its articulated deference to congressional findings in part on its assessment of the comparative fact-finding capabilities of the legislative and judicial branches. Congress, the Court found, "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." Such considerations of resources and expertise have long informed arguments about the relative capabilities of the legislative and judicial branches.

B. First Amendment Norms

In speech cases, traditional justifications for judicial deference to legislative fact-finding must be assessed with reference to a framework of norms reflected in First Amendment doctrine. This combination of doctrinal imperatives entrusts the continued vitality of First Amendment values to courts by affording primacy to the judicial branch in making constitutional determinations when potential speech restrictions exist, urging courts to anchor decisions on explicitly empirical de-
terminations, and adding safeguards to ensure the accuracy of facts upon which courts base First Amendment decisions.

1. The Judicial Primacy Norm. — The most fundamental norm of First Amendment jurisprudence is the primacy accorded to the judicial branch in the assessment of free expression claims; this is based on the understanding that the Bill of Rights sought to remove decisions about free expression from the political arena. Indeed, in recent years "virtually everyone" has reached agreement on the dominant role of courts in reviewing impediments to free speech, and with the reliance on Supreme Court review as the ultimate antidote to abuse. This privileged status is reflected in the heightened level of judicial scrutiny mandated in the First Amendment context. Both strict and intermediate scrutiny require courts to conduct searching review of asserted government interests, make exacting distinctions between protected and unprotected speech, and determine the existence of government interests and the effects of state action.

This reliance on searching judicial review reflects an alteration in the usual balance between the coordinate branches of government. In most contexts, legal doctrine reflects significant respect for constitutional determinations made by all branches; legal and factual determinations by the political branches are presumptively constitutional. Yet because expressive rights are so central to effective democratic government, protection of these "representation-re-enforcing" rights is entrusted to the independent judiciary, rather than the political branches. Thus, the presumptions regarding the constitutionality of legislation are shifted in First Amendment doctrine, as they are in other contexts triggering heightened scrutiny; in these cases, the government faces the burden of proving the constitutionality of state action infringing speech.

2. The Accurate Decisionmaking Norm. — In addition to placing responsibility for protecting speech rights on the judiciary, First Amendment jurisprudence embodies a particular doctrinal imperative of accurate factual determinations regarding claims that state action infringes speech, because the constitutional stakes are raised when speech is in jeopardy.

28 See Cox, supra note 1, at 220.
31 See, e.g., New York State Club Ass'n v. City of New York, 487 U.S. 1, 17 (1988) ("Legislative classifications ... are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party.").
32 See ELY, supra note 29, at 73-104.
The requirement of accuracy is rooted in the fact-based structure of First Amendment doctrine. Although free speech jurisprudence sometimes recognizes the intrinsic value of free expression,\(^35\) it often rests instead on the furtherance of instrumentalist or consequentialist goals, the realization of which may be assessed empirically: promoting a robust "marketplace of ideas;"\(^36\) enabling self-governance and political participation;\(^37\) or serving as a check on the processes of government.\(^38\) Speech doctrine similarly requires courts to make empirical assessments of facts in order to weigh competing interests. First Amendment balancing tests — most notably the O'Brien test — require courts to assess the severity of social harms and the importance of legitimate government interests, as well as to predict potential burdens on speech.\(^39\) Overbreadth challenges and sensitivity to "chilling effects" require courts to determine whether state action "may inhibit the constitutionally protected speech of third parties."\(^40\) And despite the near-absolute proscription on prior restraints, some form of prior restraint may be allowed based on contextual assessments of the degree of harm that would be suffered.\(^41\) Even when reviewing content-based restrictions, courts must make fact determinations regarding the existence of compelling state interests\(^42\) and the fit between these interests and the government's response.\(^43\) The Brandenburg\(^44\) gloss on the "clear and present danger" rule defining incitement requires determinations of "imminence" and "danger."\(^45\) Professor Nimmer has demonstrated that even categorical rules regarding expression require meas-

\(^{35}\) See, e.g., Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).


\(^{39}\) See supra note 5. O'Brien's "intermediate scrutiny" balancing test similarly governs content-neutral time, place, and manner restrictions. See, e.g., Clark, 468 U.S. at 288, 298.

\(^{40}\) Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984). Professor Richard Fallon notes: [In New York Times Co. v. Sullivan and Gertz v. Robert Welch, Inc.,] the Court had also to make more concrete, empirical, and predictive assessments about the relative proximity of the press to engage in self-censorship under alternative liability regimes; about the proportion of truthful and untruthful assertions that would be chilled by such regimes; about the harms that would be done by false speech and the benefits of truthful speech that would be forgone under various imaginable rules. . . .


\(^{41}\) See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1050 (2d ed. 1988).

\(^{42}\) See Cox, supra note 1, at 214 (noting the role of "judicial investigation, characterization, and appraisal of the facts to see whether the state's justification is indeed compelling").

\(^{43}\) See, e.g., Reno v. ACLU, 117 S. Ct. 2336, 2349 (1997).


\(^{45}\) See id. at 447.
ures of "definitional" balancing. Thus, in both the strict and inter­
mediate scrutiny contexts, findings of fact are often determinative of
the constitutionality of government action.

Because empirical assessment is central to First Amendment deci­
sionmaking, the Supreme Court has developed, in a number of doc­
trinal contexts, what might be thought of as a "norm of accuracy." This norm is perhaps best illustrated by the Supreme Court's imposi­
tion, in *Bose Corp. v. Consumers Union of United States, Inc.* and its
progeny, of a constitutional "duty" on appellate courts hearing speech
cases to conduct an independent review of fact records developed by
federal or state courts and administrative agencies. This "independ­
ent judgment rule" is "grounded entirely upon concerns assertedly pec­
uliar to the first amendment." Indeed, "the reaches of the First
Amendment are ultimately defined by the facts it is held to embrace." These facts must be reviewed independently, "to be sure that
the speech in question actually falls within the unprotected category
and to confine the perimeters of any unprotected category within ac­
ceptably narrow limits."

First Amendment doctrine further requires exacting and accurate
adjudication by imposing stringent restrictions on the procedures that
govern First Amendment litigation. The Supreme Court has held
that in First Amendment cases, "the procedures by which the facts of
the case are determined assume an importance fully as great as the
validity of the substantive rule of law." "[T]he possibility of mis­
taken factfinding ... create[s] the danger that the legitimate utterance
will be penalized." The desire to maximize procedural safeguards
provides the rationale for having courts, rather than administrative
agencies, evaluate First Amendment claims, and the preference for
using criminal prosecution to adjudicate obscenity claims. Indeed,

46 *See Tribe, supra note 41, at 792; Melville B. Nimmer, The Right to Speak From Times to
Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 CAL. L. REV. 935,
942 (1968).*
47 *466 U.S. 485 (1984).*
48 *See id. at 498-511; see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515
U.S. 557, 566-68 (1995) (independently reviewing a state court judgment); Jacobellis v. Ohio, 378
U.S. 184, 190 n.6 (1964) ("Even in judicial review of administrative agency determinations, ques­
tions of 'constitutional fact' have been held to require de novo review.")).
50 *Hurley, 515 U.S. at 567.*
51 *Bose, 466 U.S. at 505.*
52 *See Henry P. Monaghan, First Amendment "Due Process," 83 HARV. L. REV. 518, 520-26
(1970).*
53 *Speiser v. Randall, 357 U.S. 513, 520 (1958).*
54 *Id. at 526.*
55 *See Freedman v. Maryland, 380 U.S. 51, 58 (1965).*
56 *See Monaghan, supra note 52, at 543 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58,
69-70 (1963)).*
fact determinations have such importance in First Amendment doctrine that one commentator argues that, in the absence of accurate empirical assessment, judicial decisions will appropriately protect speech only by "happenstance." 57

C. The Inapplicability of Deference Arguments in Speech Cases

In light of the underlying First Amendment norms, neither strain of the traditional argument convincingly establishes the need for judicial deference in free expression cases. Separation of powers arguments fail to reflect the shift that occurs in the traditional balance of powers when courts adjudicate claims under the First Amendment, which provides an explicit textual bar on congressional action. 58 The doctrinal imperative of accurate speech protection privileges judicial review over constitutional determinations by the political branches. This privilege is undermined, and judicial review circumvented, if courts must accept legislative findings of fact that are determinative of constitutional rulings. 59

First Amendment doctrinal norms also prevail over arguments based on democratic legitimacy and the usual limits on the scope of judicial action. In light of the centrality of expressive rights to the democratic process, and the special sensitivity to governmental intrusion that these rights require, the advantages of a countermajoritarian judiciary that remains relatively insulated from political pressures

An accuracy norm also underlies procedures allowing judicial consideration of the speech rights of third parties. One scholar has noted that the relaxation of traditional jus tertii standing rules to allow "overbreadth" challenges results in a requirement of "regulatory precision." Henry Paul Monaghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3. The same might also be said of judge-made prophylactic rules, such as those against "chilling effects," that extend protection to speech not covered by the "real' first amendment" in order to protect covered speech most accurately. David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. CHI. L. Rev. 190, 198 (1988).

Commentators have argued that the impact of First Amendment litigation on non-parties places a heightened burden on courts to look beyond the facts presented by the parties. See Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 105-06; Note, Social and Economic Facts — Appraisal of Suggested Techniques for Presenting Them to the Courts, 61 Harv. L. Rev. 692, 700 (1948).

The nearly absolute bar on prior restraint, see, e.g., Near v. Minnesota, 283 U.S. 697, 713, 718-20 (1931), similarly reflects the accuracy norm. The doctrine has been traced to the desire to avoid "adjudication in the abstract" so that communication can be judged according to its "actual consequences or public reception," and by an adjudicative assessment of "speech value versus social harm." Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 49, 93 (1981).

57 See Nagel, supra note 29, at 303, 323-24.
58 See U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press.").
59 See Henry Wolf Biklé, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6, 19 (1925) ("It is clear that the legislative finding as to the fact upon which the validity of the legislation depends cannot be allowed to be binding on the courts, since this would furnish a simple means of preventing judicial review of such legislation in this class of cases.").
militate against deference to the legislative determinations of facts underlying speech decisions. Independent judgment allows for the necessary searching review, and provides for more appropriate constitutional limits on governmental infringements on speech.

Institutional capacity arguments fail in the First Amendment context. First, it must be noted that the relative institutional capacities are far from categorical; each branch demonstrates both strengths and weaknesses in its fact-finding ability. The judicial branch is far from "incapable" of amassing empirical evidence. Courts often conduct significant fact-finding through testimony and the briefs of litigants and amici. Judges have taken advantage of their unconstrained ability to take judicial notice of legislative facts, as described by the Advisory Note to Federal Rule of Evidence 201, by availing themselves of electronic research and special masters. Consistent with the Advisory Note, scholars have even pointed to the possibility of establishing a judicial research service, similar to those available to legislatures. Gathering data in a number of ways, the Supreme Court, at least, has increasingly included citations to extra-legal sources in its decisions.

In contrast, although legislatures — especially Congress — can claim superior fact-finding resources, the availability of such resources is offset by political factors that hinder accurate fact-finding. The fact that legislatures derive their legitimacy from democratic authority, rather than from their objectivity — the very attribute responsible for traditional deference to legislative determinations of both law and fact — is in tension with the First Amendment doctrinal requirement that the government provide reliable data to support action that infringes speech. In general, to enact legislation legitimately, Congress need not

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60 See Thomas I. Emerson, The System of Freedom of Expression 13 (1970). Even Judge Learned Hand, while advocating increased legislative authority, recognized that courts are less likely to repress "what ought to be free." Learned Hand, The Bill of Rights 69 (1962).
62 See id.
63 See Fed. R. Evid. 201 advisory committee's note (describing a judge's latitude to notice legislative facts as "unrestricted in his investigation and conclusion. . . . He may make an independent search for persuasive data or rest content with what he has or what the parties present." (quoting Edmund M. Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 270-71 (1944)) (internal quotation marks omitted)).
64 See Frederick Schauer & Virginia J. Wise, Legal Positivism as Legal Information, 82 Cornell L. Rev. 1080, 1083 (1997).
66 See Rosemary J. Erickson & Rita J. Simon, The Use of Social Science Data in Supreme Court Decisions 149, 155 (1998); Schauer & Wise, supra note 64, at 1109.
prepare any factual record, articulate any reasons for its decisions, or even have any such reasons.

Furthermore, even if legislative findings of fact are made, they may be unreliable. Recent public choice scholarship has demonstrated the susceptibility of legislatures to interest group influence, which weakens the ability of political branches to protect individual rights and to accomplish accurate fact-finding. When a factual record is assembled, the legislature as a whole is unlikely to pay detailed attention to the minutia of legislative findings. Thus, information from a variety of formal and informal sources — including lobbyists supporting or opposing legislation — can make its way into the record. Legislative hearings involve planned coordination of witnesses by a bill's supporters, and additional information is included in the record after the fact. The accuracy of fact-finding may be further compromised in state or local legislative bodies, which may possess significantly fewer fact-finding resources, and may have no provision for recording legislative history.

Simply stated, then, a rule of deference to the legislative record in the First Amendment context conflicts with the norm of accurate judicial decisionmaking because, as the Turner I Court recognized, legislatures are "not obligated, when enacting [their] statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." Legislatures may choose to engage in accurate fact-finding, or they may not. They may choose to include a variety of viewpoints, or only a single one. They may choose to compile a complete record, or none at all. Thus, judicial deference to legislative fact-finding might well result in what one scholar has termed

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69 See Sable Communications, Inc. v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring) ("Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.").
70 See, e.g., William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequence of Judicial Deference to Legislatures, 74 VA. L. REV. 373, 374-75 (1988) ("Our detailed examination of this theory ... shows that legislatures cannot be relied upon to protect citizens' rights in any area.").
75 See Note, supra note 73, at 1017.
76 Turner I, 512 U.S. 622, 666 (1994) (plurality opinion).
the "circular buck-pass": "Congress passes the problem over to the Court with the happy assumption that the Court somewhere is going to examine the matter closely and come to a decision; and the Court passes it back again and says that Congress has decided all the relevant factual issues, hence we can stamp it through."77 In short, the Court has recognized that "[w]e cannot, because of modest estimates of our competence . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed."78

III. RECONCILING Turner-DEFERENCE WITH SPEECH DOCTRINE

How then can Turner be reconciled with the priorities of broader First Amendment doctrine? If traditional institutional competence arguments fail to justify judicial deference to legislative fact-finding, do any justifications remain for such deference? The answer is yes, but only if such deference furthers accurate judicial assessment of speech claims in accordance with the applicable heightened standards of review.

With this possible functional justification in mind, this Part suggests a framework for discerning the types of cases in which legislative fact-finding might promote adjudicative accuracy sufficient to warrant some deference by courts, while remaining consistent with First Amendment doctrine's emphasis on the primacy of the judiciary in making determinations in speech cases. The analysis suggests that the apparent doctrinal confusion reflected in the Turner opinions can be explained by two factors not explicitly explored by the Supreme Court: the applicable level of judicial scrutiny, which affects the norm of judicial primacy, and the quality of the legislative fact record, which affects the accuracy norm. This Part then suggests a framework for assessing legislative fact determinations in intermediate scrutiny free expression cases in light of the Court's actions in Turner II.

A. Factor 1: The Standard of Review

Speech decisions have not elaborated the appropriate relationship between the level of judicial scrutiny and the level of deference due to legislative fact-finding. Yet the rationales underlying the application of these different levels of review indicate that, although independent judicial judgment about factual determinations is often considered a component of strict scrutiny,79 reliable legislative fact-finding might justify some degree of deference in intermediate scrutiny cases. These rationales provide one way to reconcile Turner, an intermediate scru-

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tiny case, with *Reno v. ACLU,* a strict scrutiny case decided several months later that did not consider deference to legislative findings. They also suggest that *Turner's* amalgam of standards represents an early effort to craft a standard for judicial deference particular to the intermediate scrutiny context.

Deference to factual determinations underlying legislation would conflict with the rationales underlying strict scrutiny in speech cases. Strict scrutiny is triggered when government "singles out" expression for "control or penalty" based on its content. Such restriction receives an especially strong presumption of unconstitutionality, and is almost always illegitimate. Commentators have understood the nearly absolute application of this "forbidden-content" test as a surrogate for an inquiry into whether government actors are furthering "forbidden purposes." Consequently, both the content-based act and the motives of the actors are constitutionally suspect. In this context, it makes no sense for courts to accord any deference to the determinations made by those actors.

The same arguments for completely independent judicial judgment do not apply in the intermediate scrutiny context. Intermediate scrutiny is paradigmatically applied to cases involving "content-neutral" government restrictions aimed at the noncommunicative impact of acts, such as time, place, and manner restrictions, or regulation of conduct that "incidentally" burdens expression, such as the legislation at issue in *Turner.* "Content-neutral" lawmaking, then, involves legislative action that embodies legitimate purposes, but may run afoul of the Constitution because of its effects. Moreover, intermediate scrutiny doctrine allows for some degree of governmental discretion; legislatures may act in any number of ways, as long as a "regulation promotes a substantial government interest that would be achieved less

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81 *Reno* asserted "an 'over-arching commitment' to make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech,'" *id.* at 2347 (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996)), and cited District Court findings to demonstrate "incorrect factual premises" relied upon by Congress, *id.*
82 *TRIBE,* supra note 41, at 789, 791–92.
83 See *id.* at 790–91.
85 See *Turner I,* 512 U.S. 622, 641 (1994) ("Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.").
86 See *TRIBE,* supra note 41, at 792.
87 See *Turner II,* 117 S. Ct. 1174, 1184 (1997).
88 See *TRIBE,* supra note 41, at 819 (discussing the Court's rejection of a "motive inquiry" in the intermediate scrutiny context).
89 See *Turner II,* 117 S. Ct. at 1198.
effectively absent the regulation, and a "substantial portion of the burden on speech does not serve to advance [government] goals."

In sum, the purposes of strict scrutiny doctrine render suspect any claim that some degree of deference to legislative fact determinations would increase the accuracy of First Amendment decisions. However, deference would not be inconsistent with the demands of intermediate scrutiny if reliance on legislative findings would promote precise adjudication.

B. Factor 2: The Quality of the Legislative Record

Speech decisions have also lacked systematic discussion of the impact of the comprehensiveness of the legislative record on the scope of review. Yet such considerations seem to explain many apparent inconsistencies in Supreme Court decisions.

Courts may receive fact records of varying quality because of the latitude accorded to legislatures in decisionmaking, the political and special-interest forces at work in the legislative process, and the ultimate fact that legislatures need not produce any evidence of fact-finding. Legislatures are able to create records that are comprehensive and procedurally sound, like the one in Turner, when they avail themselves of their considerable fact-finding capacity. Such records include significant evidence supported by documentation, studies from independent sources, testimony by representatives of various interested groups, and assessments undertaken by Congress itself. When legislators fail to consider the speech implications of their actions, and therefore do not make findings of fact regarding the fit between their enactments and perceived problems, the resulting records are less comprehensive. Other records contain limited findings, or unsubstantiated conclusions, either dressed up as "fact-finding" in the legislative history or included in an enactment's prefatory language.

The variance in quality of records goes a long way toward explaining conflicting precedents regarding judicial review of legislative fact-finding. Turner II, the principal Supreme Court case articulating a deferential standard, emphasized both the process by which Congress made its findings, and the comprehensiveness of the record it produced. Noting that "the dissent criticizes our reliance on evidence provided to Congress by parties that are private appellees here," the Court emphasized that legislative hearings had included all parties, and relevant testimony "was supported by verifiable information and

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91 Id.
92 See General Media Communications, Inc. v. Cohen, 131 F.3d 273, 294 (2d Cir. 1997) (Parker, J., dissenting) (noting that "the only evidence the government offers in support of its arguments is the title of [the Military Honor and Decency] Act"); infra p. 2326.
citation to independent sources. The Court further noted the "years of testimony," the "volumes of documentary evidence and studies offered by both sides," and Congress's background expertise in this area of regulatory policy in support of its conclusion that "we must give considerable deference, in examining the evidence, to Congress' findings and conclusions."

In contrast, the Supreme Court's rulings rejecting judicial deference have all occurred in cases involving weak legislative records. Landmark Communications, Inc. v. Virginia, which initially articulated the clear "independent judgment" standard, noted that the state statute at issue was devoid of "actual facts" and contained only a "legislative declaration" of clear and present danger. In Sable Communications, Inc. v. FCC, which reaffirmed that standard, the Supreme Court expressed even greater misgivings about the legislative record before it. Regarding the substance of the "facts" found, the Court noted that "aside from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings ... the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be." Concerning the process, it concluded that, "[n]o Congressman or Senator purported to present a considered judgment with respect to how often or to what extent the putative harm would occur. Just last Term, the Court cited Sable for its "lack of legislative attention to the statute at issue."

C. Suggestions for Judicially Manageable Standards

When considered in light of the two factors that seem to track the Court's jurisprudence in this area, the Turner II Court's actions suggest a two-part framework for reviewing legislative fact determinations in intermediate scrutiny cases.

93 Turner II, 117 S. Ct. at 1191.
94 Id. at 1189 (citing Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 103 (1973), which advised, in the First Amendment context, that the Court "pay careful attention to how the other branches of Government have addressed the same problem").
95 Id.
97 Id. at 843.
99 Id. at 130–39.
100 Id. at 130; see also Reno v. ACLU, 117 S. Ct. 2529, 2538 n.24 (1997) (citing Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action, Hearing on S. 892 before the Senate Committee on the Judiciary, 104th Cong. 7–8 (1995) ("The Senate went in willy-nilly, passed legislation, and never once had a hearing; never once had a discussion other than an hour or so on the floor." (remarks of Sen. Leahy))).
101 Reno v. ACLU, 117 S. Ct. 2547 n.41 (1997). These types of shortcomings are even more likely to accompany enactments by state or local governments, which may not even have procedures for keeping legislative history or other comparable records.
I. The "Turner Threshold." — The relationship between the character of the legislative fact-finding and the scope of judicial review suggests that there is a threshold beyond which fact records are so comprehensive that they should receive some judicial deference.\(^{102}\) Thus, to be consistent with the First Amendment's accuracy norm, courts hearing speech claims should first inquire as to the fact-finding capacity of the legislative body being challenged, and then ask whether that body actually made its fact determinations in light of a comprehensive legislative record.

*Turner II* suggests that this threshold inquiry has three components, each related to the issue of accuracy and reliability of legislative fact-findings: a *procedural* component,\(^{103}\) requiring the legislature to spend considerable time and resources on assembling the fact record and to afford opponents and proponents of legislation an opportunity to be heard before findings of fact are made; a *substantive* component, considering whether the record is substantial and whether it addresses all of the empirical First Amendment issues raised; and a *qualitative* component, assessing whether the facts at issue are of the type over which Congress has a demonstrated substantive expertise, perhaps as part of ongoing regulation. When records fail to meet this threshold, legislative findings should command no special weight because they would fail to meet the only legitimate justification for deference: aiding accurate judicial decisionmaking. When the *Turner* threshold is satisfied, the reviewing court should assess the reasonableness of the legislature's findings under the "substantial evidence" scope of review articulated in *Turner II*.

A requirement that legislatures meet such a threshold makes particular sense in light of that scope of review. The Court borrowed this standard from administrative law doctrine; it is applied in that arena only in judicial review of formal adjudication or rulemaking "on the record."\(^{104}\) Such procedures require notice\(^{105}\) and rights to cross-examination "as may be required for a full and true disclosure of the facts,"\(^{106}\) and involve staff investigation and some degree of rights of

\(^{102}\) Certainly, the initial characterization of a legislative record as "factual" rests on the thorny distinction between "fact" and "policy" questions; yet courts must often make such distinctions. See, e.g., *Allentown Mack Sales & Serv., Inc. v. NLRB*, 118 S. Ct. 818, 828 (1998) ("An agency should not be able to impede judicial review ... by disguising its policymaking as factfinding.").


\(^{104}\) This standard is articulated in the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1994).

\(^{105}\) See id. § 554(b).

\(^{106}\) Id. § 556(d).
participation by interested parties and public interest groups. The ultimate determination must appear in writing and include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." Under substantial evidence review, such a complete record is particularly necessary because reviewing courts are required to consider the "whole record," including all relevant evidence supporting and conflicting with the agency's findings.

At least one lower court, the Eighth Circuit in *Carver v. Nixon,* seems to have understood the *Turner* decisions as establishing some sort of a threshold for deference. Referring to the elements that *Turner I* "would require that we consider to justify according deference," including legislative committee studies and hearings, the court found the legislative record lacking, and held the statute at issue unconstitutional.

2. Independent Judicial Reassessment. — The *Turner II* Court suggested a standard by which statutes should be upheld if legislative decisions rest on "substantial evidence" of constitutionality. Yet, in light of First Amendment doctrine's emphasis on searching and accurate judicial scrutiny — and in light of the failure of institutional competence arguments in the free speech context — it seems troubling that legislation should be assessed under an entirely different scope of review merely because Congress has assembled a reliable fact record.

Despite their statement of the "substantial evidence" test, the *Turner* decisions also reflect an implicit rejection of this standard. Equipped with evidence from the legislative record, the *Turner I* Court nevertheless engaged in what might be called "independent judicial reassessment": it remanded the case for further judicial factual development. Similarly, the *Turner II* Court, having established the existence of "substantial evidence" before Congress, reassessed that evidence in light of the augmented factual record, and determined that "Congress' conclusion was borne out by the evidence on remand."

The *Turner* Courts' actions thus suggest an additional component to the simple "substantial evidence" formula articulated in *Turner II,* a component that furthers both the judicial primacy and accuracy.

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110 72 F.3d 633 (8th Cir. 1995).

111 Id. at 644-45; see also Excalibur Group, Inc. v. Minneapolis, 116 F.3d 1216, 1221 (8th Cir. 1997) (applying the *Turner* "substantial evidence" standard after considering the depth of the record and evidence from hearings).

norms. It might therefore be better to understand legislative records passing the "Turner threshold" as creating only a presumption that the government has proven the factual underpinnings of its argument. Understood in this way, the existence of legislative facts does not disrupt the burdens imposed by First Amendment doctrine. The government still must demonstrate the constitutionality of its action; Congress has simply done much of the work in advance. The presumption, however, can be rebutted by facts raised by the parties, by amici, and by independent judicial research. Thus, judicial supremacy essential to the protection of free speech is preserved; the burdens on government to establish the constitutionality of its actions are maintained; changes in the underlying social facts can be considered; and the accuracy of free speech decisions is maximized.

IV. CONCLUSION

As the poster children of free expression — the soapbox speaker on one hand and the political leafleteer on the other — fade into relative historical obscurity, First Amendment doctrine emphasizes empirical determinations as a means for ensuring fidelity to underlying constitutional principles in the face of economic, social, and technological changes that affect the means and methods of communication. A patchwork doctrine for determining the level of deference due to legislative fact determinations threatens that fidelity, as does Turner II's articulated rule of deference based on traditional arguments about institutional competence from outside the speech context.

This Note instead suggests a framework of analysis that acknowledges a legislature's ability to construct a reliable fact record without capitulating to mere assertions that it has done so. By determining the appropriate level of deference in each case based on the level of scrutiny, the characteristics of the legislative record, and additional facts raised in court, judges can promote both the First Amendment accuracy norm and the role of courts as protectors of speech.

113 This additional judicial check ensures that the legislative fact-finding is robust in substance as well as in form, see John O. McGinnis, The Once and Future Property-Based Vision of the First Amendment, 63 U. CHI. L. REV. 49, 117 n.286 (1996) ("[I]nterest groups have an incentive to make use of the judiciary's putative institutional incapacity for fact finding by obtaining factual findings from the legislature that insulate their preferred legislation from constitutional attacks in court."); and enables decisions to accurately represent changes in the underlying facts, see Transcript of Oral Argument, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511), available in 1997 WL 136253, at *49 (Mar. 19, 1997) ("Is it possible that this statute is unconstitutional today, or was unconstitutional 2 years ago when it was examined on the basis of a record done about 2 years ago, but will be constitutional next week? ... Or next year or in two years?" (questions of Justice Scalia)).

114 See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 196 (1973) (Brennan, J., dissenting) ("[M]odern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually obsolete.").