COLUMBIA LAW REVIEW

VOL. 106 **DECEMBER 2006** **NO. 8**

ARTICLES

CONSTITUTIONAL TIPPING POINTS: CIVIL RIGHTS, SOCIAL CHANGE, AND FACT-BASED ADJUDICATION

*Suzanne B. Goldberg**

This Article offers an account of how courts respond to social change, with a specific focus on the process by which courts "tip" from one understanding of a social group and its constitutional claims to another. Adjudication of equal protection and due process claims, in particular, requires courts to make normative judgments regarding the effect of traits such as race, sex, sexual orientation, or mental retardation on group members' status and capacity. Yet, Professor Goldberg argues, courts commonly approach decisionmaking by focusing only on the "facts" about a social group, an approach that she terms "fact-based adjudication." Professor Goldberg critiques this approach for its flawed premise that restrictions on social groups can be evaluated based on facts alone and its role in obscuring judicial involvement in selecting among competing norms.

The Article also observes that because fact-based adjudication enables courts to leave norms unacknowledged, it does serve the judiciary's institutional interests by maximizing flexibility for future decisionmaking regarding restrictions on group members' rights. At the same time, however, this approach facilitates inconsistency in theory and outcome by enabling courts to variously embrace and reject traditional rationales for restricting social groups without having to justify the inconsistent treatment of group-related norms. As a possible remedy for these flaws, the Article considers the costs and benefits of greater judicial candor regarding the normative underpin-

* Clinical Professor of Law, Columbia University School of Law. I am especially grateful to Henry Monaghan for ongoing conversation about the issues in this Article as well as to Michelle Adams, Mary Anne Case, Ariela Dubler, William Eskridge, Richard Fallon, Gary Francione, Charles Fried, Richard Goldberg, Lani Guinier, Philip Hamburger, Ian Haney-Lopez, Edward Hartnett, Nan Hunter, Pamela Karlan, Michael Klarman, John Leubsdorf, James Liebman, Tamara Lothian, Michael McConnell, Gillian Metzger, Martha Minow, Rachel Moran, James Gray Pope, Richard Primus, Catherine Sharkey, Peter Strauss, Susan Sturm, Kendall Thomas, Jeremy Waldron, Mark Weiner, and Robin West, and to the participants in the Harvard Constitutional Law Workshop, the faculty workshops at Columbia, Fordham, Brooklyn, Hofstra, and Rutgers-Newark Law Schools, and the LGBT Law Faculty Workshop of Greater New York. My thanks, as well, to Todd Anten and Wilson Meeks for outstanding research assistance, to Rachel Rubenson of the *Columbia Law Review* for editorial suggestions, and to the Dean's Research Fund of Rutgers-Newark Law School for financial support.

ning of decisions. Although Professor Goldberg ultimately advocates only a limited modification to the current fact-based adjudication regime, she concludes that our theories of judicial review will improve, both with respect to descriptive accuracy and normative bite, to the extent they recognize the inevitable judicial involvement in making normative judgments about social groups.

> "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."[1]
>
> — Justice Thurgood Marshall

> "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."[2]
>
> — Justice John Paul Stevens

INTRODUCTION

To paraphrase Alexis de Tocqueville, there is hardly a social conflict in the United States that does not eventually land in court.[3] Consequently, there is hardly a court that can avoid shaping social conflicts. Equal protection and due process claims, in particular, directly solicit judicial intervention in disputes regarding the status of social groups.[4] Judges faced with these claims must then determine what, if anything, justifies singling out group members for legal burdens.

To make this determination, courts evaluate prevailing normative judgments regarding group members' status or capacity. When the norms are largely settled, this aspect of the judicial role tends to go unnoticed. But where longstanding judgments regarding a group have become destabilized and new norms have yet to be settled, courts' involvement in selecting between "old" and "new" norms produces anxieties regarding the judicial role in responding to societal change.

At this moment, these anxieties manifest most prominently in litigation by lesbian and gay couples seeking to marry. The lawsuits maintain that, as a result of societal change, negative views of gay people that once justified discriminatory government action must now be rejected as impermissible and hostility-laden. States defending the exclusion of gay couples from marriage contend, conversely, that the traditional rationales remain valid. Unavoidably, then, courts must revisit longstanding norms regarding same-sex couples to render their decisions.[5]

---

1. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).

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

3. 1 Alexis de Tocqueville, Democracy in America 280 (Phillips Bradley & Francis Bowen eds., Henry Reeve trans., Vintage Books 1990) (1835).

4. See infra note 6 for discussion of the use of the term "social group" here.

5. Some of these judges have found it "eminently rational for the Legislature to postpone making fundamental changes to [the different-sex couple requirement for marriage] until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made." 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) (citing cases from numerous states to

Yet, as this Article will show, when views about a social group are in flux, as is the case for lesbians and gay men today, courts deciding equal protection and due process cases go to great lengths to avoid acknowledging their central role in substantiating either the "old" or the "new" norm. This practice of obfuscating the judicial role in norm selection can be seen as well in cases regarding social groups defined by sex, race, or other characteristics,[6] where courts have had to decide whether socie-

---

demonstrate absence of public consensus favoring marriage rights for same-sex couples), rev'd, No. A-68-05, 2006 N.J. LEXIS 1251 (Oct. 25, 2006); Hernandez v. Robles, 7 N.Y.3d 338, 359 (2006) (stating that legislature could rationally restrict marriage to opposite-sex couples because "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like").

Others, by contrast, have concluded that prohibiting gay couples from marrying "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." *Goodridge*, 798 N.E.2d at 961–63 (majority opinion); see also *Lewis*, 875 A.2d at 289–90 (Collester, J., dissenting) (finding that state's claimed interest in procreation was not rational because same-sex couples' marriages will not reduce birth rate or number of heterosexual couples' marriages); *Hernandez*, 7 N.Y.3d at 394 (Kaye, C.J., dissenting) (citing approvingly amicus briefs noting studies that conclude that "children raised by same-sex parents fare no differently from, and do as well as, those raised by opposite-sex parents in terms of the quality of the parent-child relationship and the mental health, development and social adjustment of the child"); id. at 396 ("[T]his Court cannot avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic.").

The Vermont Supreme Court likewise concluded that same-sex and different-sex couples were similarly situated with respect to their need for security for their children. See Baker v. State, 744 A.2d 864, 867 (Vt. 1999). The legislature did not extend marriage to same-sex couples and instead adopted a civil union statute that provided parity of rights and benefits within Vermont for gay and nongay couples. 2000 Vt. Acts & Resolves 72, 72–88 (codified at Vt. Stat. Ann. tit. 15, §§ 1201–1207 (2002)). 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, 1025–26 (2004).

The New Jersey Supreme Court, by contrast, declined even to consider rationales related to child-rearing that had been advanced by amici. *Lewis*, 2006 N.J. LEXIS 1521, at *29 n.6, *35–*36 & n.7 (noting that state had disclaimed procreation and parenting-related rationales). Yet it, too, indicated its awareness of norm changes as a result of societal change. "Times and attitudes have changed," the court observed, adding that "there has been a developing understanding that discrimination against gays and lesbians is no longer acceptable in this State." Id. at *45–*46.

6. By social group, I mean to encompass individuals who are perceived by others to share a deeply-rooted, identity-defining trait. In some contexts, the contours of social groups extend more broadly to include individuals joined by political opinion, profession or trade, or shared activities. See, e.g., Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985) (defining "particular social group" in asylum law context as comprising persons of "similar background, habits or social status"). Here, however, I am interested in groupings defined by a trait, such as sex, race, sexual orientation, or mental retardation, among others, that is (or historically has been) perceived to affect group members' capacity to participate in or contribute to society. Cf. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (discussing judicial review of classifications based on characteristics that "frequently bear[ ] no relation to ability to perform or contribute to society").

tal change had destabilized once acceptable views regarding group members. These cases, like the marriage cases, turn on the question whether traditional justifications for unequal treatment remain legitimate.

This Article presents a model of fact-based adjudication as an account of how courts intervene in conflicts regarding popular views of social groups and, at times, "tip" from one understanding of a social group and its constitutional claims to another.[7] The model explains how and why courts tend to focus on facts and avoid acknowledging the normative judgments related to those facts when adjudicating equal protection and due process claims that implicate the status of social groups. In addition to the model's immediate significance for courts and advocates enmeshed in civil rights litigation involving social groups, the arguments

---

One could argue that the operative category here should focus not on shared traits but on common conduct, shared sensibilities, or life experiences that differentiate group members from others. On the other hand, because normative judgments about group members tend to inform normative judgments about group members' conduct and capacity, and vice versa, the distinction between popular views about a group and views about issues or conduct related to that group tends to be fuzzy. The tradition of regulating conduct as a means of regulating group members illustrates this lack of clarity. Cf. Lawrence v. Texas, 539 U.S. 558, 575 (2003) (recognizing that Texas's regulation of "homosexual conduct" distinctly affected lesbians and gay men); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (finding that regulation barring individuals residing with other unrelated individuals from receiving food stamps targeted "hippies"). Because group members bear the brunt of regulation—whether the regulation explicitly targets conduct or a trait—I find the social group category, even with its imperfections, the most useful frame for getting at the process by which courts absorb social change related to subpopulations and the issues affiliated with them.

7. The concept of fact-based adjudication developed here is likely to have some application to adjudication involving changes to attitudes, practices, and technology that are not related directly to constitutional claims made by social groups. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–64 (1992) (discussing reliance on shifting conceptions of fact during and after *Lochner* era); see also Alafair S. Burke, Equality, Objectivity, and Neutrality, 103 Mich. L. Rev. 1043, 1048, 1052–53 (2005) (book review) (discussing ways in which normative views of reasonableness shape empirical observations made in Fourth Amendment jurisprudence). In other contexts, including many private law disputes, normative judgments regarding relevant facts tend to be less enmeshed in popular debate, and the analysis that follows, while still relevant, may be of more limited use. See infra note 157 (discussing norm choices underlying conflict related to application of maritime law).

Further, the analysis here regarding the judicial response to social groups' constitutional claims takes place within 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) [hereinafter Calabresi, Common Law] (describing common law courts as "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). Applications of the theories here to these other contexts will be left to another day.

related to it join the theoretical debate[8] over the capacity of courts to assimilate social change without usurping the legislature's prerogative to reflect the people's will.[9]

---

8. These debates, as well as this Article, proceed on the background assumption that courts' decisions remain roughly within parameters acceptable to the surrounding society. See, e.g., Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596, 2606 (2003) ("[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."). But cf. Scott Douglas Gerber, First Principles: The Jurisprudence of Clarence Thomas (1999) (describing Justice Thomas's jurisprudence as rejecting dialectic relationship between courts and society while striving instead to discern and apply framers' original principles).

While the concern with the countermajoritarian difficulty is a perennial one, the relative finality of constitutional adjudication heightens it in ways that statutory interpretation and common law adjudication do not. See, e.g., Calabresi, Common Law, supra note 7, at 4 ("The incremental nature of common law adjudication meant 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) ("Outside the area of constitutional adjudication, state court decisions 'are subject to overrule or alteration by ordinary statute.' . . . 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." (quoting John Hart Ely, Democracy and Distrust 4 (1980))).

9. Within this debate, the relationship between judicial capacity and judicial review is itself contested. For example, popular constitutionalists, including Larry Kramer and Mark Tushnet, have broadly rejected judicial supremacy over constitutional interpretation and 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. See, e.g., Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999); see also Jeremy Waldron, Law and Disagreement (1999); Adrian Vermeule, Judicial Review and Institutional Choice, 43 Wm. & Mary L. Rev. 1557 (2002).

David Strauss's common law approach of "rational traditionalism," on the other hand, recommends that courts act carefully and incrementally rather than with categorical restraint. See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 *passim* (1996). Strauss explains that courts "should think twice about . . . judgments of right and wrong when they are inconsistent with what has gone before," and 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 896–97. His theory provides few specifics, however, and addresses only in general terms how courts gauge whether they are acting with sufficient caution.

Robert Post's invocation of Louis Brandeis to suggest the centrality of "practical tact and judgment" to preserve legal authority also reflects awareness of the tension experienced by courts asked to absorb societal change but similarly does not offer a specific prescription for or a descriptive model of decisionmaking under these circumstances. Post, supra note 8, at 109.

The core claim here is that courts[10] are inescapably involved in absorbing, evaluating, and influencing changes to popular judgments regarding social groups yet have adopted an approach to decisionmaking that obfuscates that role. Particularly when normative judgments about a group are in flux in the surrounding society, judicial review of government burdens on social groups tends to focus exclusively on facts about group members. Through this decisionmaking technique, which I term fact-based adjudication, courts cite facts about the group as the reason either for revising group members' constitutional rights or for affirming the status quo.[11] Normative judgments about group members, which are necessary to make sense of both the stated facts and the legal reasoning, remain unmentioned. Only later, if group-related norms become more settled, do courts acknowledge the normative judgments about group members that were implicit in their earlier decisions.[12]

Brown v. Board of Education[13] provides a striking example of this adjudicative method. While the decision is widely treated as having rejected the negative normative judgments about African Americans that previously had justified racial segregation, the Court's opinion never actually discussed, much less condemned, those norms. Instead, it cited to "modern authority" regarding race discrimination's harmful effects on educational opportunities as the reason for requiring desegregation.[14] Judicial approaches to sex equality in the early 1970s similarly held that "new" or changed facts required a break with the normative view that women were less capable in the public sphere than men—yet the decisions unquestionably forged new normative ground.[15] So, too, the Court framed its invalidation of Colorado's bar on antidiscrimination protections for gay people as fact driven and did not address the normative judgment ("moral disapproval of homosexual conduct") advanced by the dissent to justify Colorado's restriction.[16]

---

10. Although the discussion below focuses heavily on U.S. Supreme Court jurisprudence, with some inclusion of state and lower federal court rulings, much of the analysis applies to all courts charged with adjudicating social change-based claims regarding social groups.

11. 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. See infra notes 23–25 and accompanying text.

12. This analysis rests on the belief that constitutional adjudication in the areas I consider involves a "gradual process of judicial inclusion and exclusion." Davidson v. New Orleans, 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 constitutional adjudication as an evolving process rather than as fixed and determined exclusively by text and/or history is beyond this Article's scope.

13. 347 U.S. 483 (1954).

14. Id. at 494; see also infra notes 81–86 and accompanying text.

15. See infra text accompanying notes 93–96.

16. Romer v. Evans, 517 U.S. 620, 632–36 (1996); id. at 644 (Scalia, J., dissenting). The majority pinned its holding on the lack of factual connection between Colorado's ban

While this fact-based decisionmaking strategy has many appeals, its theoretical foundations are shaky at best. Facts alone do not supply the judgment necessary to decide whether a legal burden on a social group is reasonable. As David Hume famously put the point, an "ought" cannot be derived from an "is."[17] The fact that women tend to have primary childcare responsibilities, for example, does not itself determine whether a law that distinguishes between men and women is reasonable. Instead, courts charged with evaluating sex-based restrictions must make normative judgments about the relevance of gendered childcare roles or other (purported) factual differences between men and women. The same is true for evaluation of restrictions on other social groups. Simply put, the judicial focus on facts and the elision of normative judgments obscures, but does not eliminate, the influence of social norms on both analysis and outcomes.[18]

To be sure, the distinction between norms and facts should not be overstated, even as it provides a useful heuristic for examining the decisionmaking dynamic here.[19] Facts, as well as norms, are inevitably theory-

---

and the government's alleged interests in protecting associational freedom and scarce governmental resources. Id. at 630–31 (majority opinion). For further discussion of *Romer* as an example of fact-based adjudication, see text accompanying infra notes 97–101.

17. David Hume, A Treatise of Human Nature 469–70 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford 2d ed. 1978) (1739).

18. 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, 20–21 (1996) [hereinafter Sunstein, Leaving Things Undecided] (describing "incompletely theorized agreements" as goal of judicial minimalists who "generally try to avoid issues of basic principle").

I do not mean to suggest that courts never articulate norms. They do so in two ways. First, in any constitutional challenge to a restriction on individual rights, courts will state general norms regarding the government's obligation to be reasonable and nonarbitrary. Second, when norms regarding a social group are settled, courts will state those as well. See infra notes 105–109 and accompanying text. My interest here, however, is in the judicial process during periods of norm contestation and, in particular, in the way that courts in these periods avoid articulating the group-related norms that are necessary to their determinations of whether restrictions on group member rights are reasonable.

19. Cf. Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 233 (1985) [hereinafter Monaghan, Constitutional Fact Review] ("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."). For useful and fascinating accounts of the concept of fact, see generally Mary Poovey, A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society (1998); Barbara J. Shapiro, A Culture of Fact: England, 1550–1720 (2000).

Jürgen 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 generally Jürgen Habermas, Between Fact and Norm: Contributions to a Discourse Theory of Law and Democracy (William Rehg trans., MIT Press 1996) (1992).

soaked and socially constructed.[20] The distinction between norms and facts is similar to the much-explored difference between law and fact in that the two "do[ ] not imply the existence of static, polar opposites. Rather, [the two] have a nodal quality; they are points of rest and relative stability on a continuum of experience."[21] Put another way, "because the positions people take reflect and reinforce their cultural worldviews, disputes over [facts] are in essence 'the product of an ongoing debate about the ideal society.'"[22] Consequently, by tracking and interrogating the way that courts reify the boundary between facts and norms, we can begin to demystify and critique the process by which courts absorb societal change.

This Article focuses first on demonstrating the operation of fact-based adjudication and then on theorizing and critiquing the judicial impulse for norm avoidance where the status of a social group is in flux. Part I maps courts' treatment of facts as decisive to adjudication and then deconstructs this approach by showing that norms actually animate social group-related decisionmaking, even if they are left unmentioned. Part II documents the heightened inclination of courts to focus on facts about a social group when norms related to group members are contested. This section also demonstrates the trajectory that leads courts, in some cases, to acknowledge norm shifts openly after the accretion of fact-based decisions reinforcing that norm. Part III explores a separate fiction perpetuated by the fact-based model: that courts can remain apart from the public debate in contested social group cases by affirming the status quo. As the deconstruction of fact-based adjudication shows, courts cannot avoid making nonneutral norm choices when evaluating restrictions on group members' rights.

Against this background, Part IV examines the relationship between fact-based adjudication and extrajudicial influences on societal change. Part V then considers explanations for fact-based adjudication from legal process, legal realist, and socio-psychological schools of thought. This section concludes that, regardless of which theory one embraces, fact-based adjudication also must be understood as serving judicial institu-

---

20. See Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 98–99 (1995) (making this point with respect to 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 occasional recognition by courts of socially constructed nature of facts).

21. Monaghan, Constitutional Fact Review, supra note 19, at 233.

22. Dan M. Kahan & Donald Braman, Cultural Cognition and Public Policy, 24 Yale L. & Pol'y Rev. 149, 154 (2006) (citation omitted). Yet, as Kahan and Braman have also observed, "instead of challenging one another's worldviews, those who continue the debate simply challenge one another's honesty and integrity." Dan M. Kahan & Donald Braman, More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions, 151 U. Pa. L. Rev. 1291, 1321 (2003). Within this Article's frame, their point reinforces the argument here that normative conflicts play out in empirical debates.

tional interests because it minimizes constraints on future decisionmaking. By avoiding identification of underlying norms concerning group members, courts issuing fact-based opinions retain freedom to engage with future cases on factual grounds and reduce the likelihood that stare decisis principles will require the norm reflected in earlier decisions to be carried over into new cases.

Part VI assesses whether greater judicial candor regarding normative judgments would be a better approach to adjudication in cases involving the status of social groups. I conclude that while many benefits could flow from pushing courts to address conflicting views about the status and capacity of a given social group, categorical insistence on norm disclosure would exact too high a price. In place of an absolute candor requirement, I explore a modified approach that would require courts to be candid about facts, even if norms remain unspoken, and test this approach using the marriage cases discussed at the outset.

Ultimately, I argue that although courts go to great lengths to avoid acknowledging their role in norm selection, every decision about restrictions on the rights of social group members requires a court to evaluate whether negative judgments regarding group members are sufficient to support the restriction. Consequently, judicial decisions that affirm the status quo must be understood as strengthening the claim of the traditional norm, and not as prudent avoidance of the public debate. While good reasons may exist to affirm tradition in some cases, the argument that nonmajoritarian courts can stay out of the public debate and above the normative fray by rejecting social groups' equal protection and due process claims misconceives the very nature of adjudication in the face of social change.

I. The Pervasive Practice of Fact-Based Adjudication

The fact-based adjudication model both describes the way that courts focus on facts alone when evaluating restrictions on social groups and provides a starting point for interrogating that practice. This section will map the two primary ways courts hold out facts as the basis for their decisions and show that the premise of this adjudication method—that facts alone can supply the judgment necessary to decide cases—is not analytically sound. Yet this analytic flaw does not inhibit courts from making fact-based decisions, as Part II will show, particularly in cases where the status of social group members is contested.

Fact-based decisions in social group cases can be divided roughly into two broad categories: those relying on "thin" facts and others relying on "thick" facts.[23] "Thin" facts, in this schema, are nonevaluative, empiri-

23. Other typologies could be developed to capture courts' treatment of facts that would extend beyond the "thin"/"thick" categories drawn here. For example, additional categories could distinguish among judicial reliance on facts that are a) mistaken; b) true but irrelevant; and c) unclear. I thank Michael Klarman for this observation. For purposes

cal, and largely uncontested.[24] "Thick" facts, by contrast, have a pretense of empiricism but actually contain normative judgments about the status or capacity of social group members. Both types rely on the same fictional premise that facts alone can justify sustaining or invalidating a given restriction.[25] But separating the two gives us a sharper picture of adjudication practices and enables us to see the different effects of societal change on judicial decisionmaking. In particular, as later discussion will show, decisions resting on "thin" facts are more resistant than "thick" fact decisions to pressures to incorporate changing views of social groups.

A. *"Thick" Facts and the Merger of Norm into "Fact"*

"Thick" facts are not "facts" in a conventional, empirical sense but are, instead, normative judgments about group members' capacities presented in the guise of uncontestable data points.[26] Put another way, while they are stated as truths, which would suggest they are subject to observation-based verification, "thick" facts actually contain both description (group X has a particular characteristic) and evaluation (the characteristic limits the status or capacity of group X).[27] Yet courts regularly ignore the contestable evaluation, treating the "thick" assertion as no different for purposes of credibility than "thin" empirical facts.

On their face, "thick" facts can, without more, justify restrictions on social group members precisely because they contain not only empirical information, but also negative judgments about group members. For example, if a court treats as "fact" the declarations that people with mental retardation are "socially inadequate" and "manifestly unfit," as the Court did in *Buck v. Bell*,[28] state-sponsored sterilization may seem a reasonable response. Likewise, the "fact" that women are naturally domestic arguably could justify restrictions on women in the workforce.[29] Courts similarly invoke the "fact" that gay people are less able parents than nongay people to sustain bans on adoption and marriage by lesbians and gay men.[30]

---

of understanding the judicial response to changing views of social groups, however, the "thin"/"thick" binary adequately captures the entanglement of facts and norms.

24. Dissents do not typically accord empirical facts the same centrality as majority opinions. See infra notes 63–69 and accompanying text. For clarity, references to judicial opinions throughout the Article encompass majority and unanimous opinions unless otherwise indicated.

25. 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 nonmembers is the same.

26. Indeed, we might think of them, oxymoronically, as normative facts.

27. See also infra text accompanying note 31.

28. 274 U.S. 200, 207 (1927).

29. See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141–42 (1872) (Bradley, J., concurring).

30. See Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819 (11th Cir. 2004) (characterizing parenting by mother and father as "optimal social structure" for childrearing), reh'g en banc denied, 377 F.3d 1275 (11th Cir. 2004), cert. denied, 543 U.S.

This is not to suggest that courts are always conscious that their factual statements contain normative judgments.[31] To the contrary, judges often appear to be sincere in asserting judgments as fact, frequently characterizing them as "natural" attributes of the social group at issue or as evidenced by common sense and intuition.[32] For many courts (and the surrounding society),[33] the empirical fact of women's greater likelihood to be primary caregivers for children merely reflected the related "fact" that women's naturally ordained place was in the home.[34] From this "thick" fact, courts could then reasonably sustain all sorts of distinctions between men and women.[35]

Early race discrimination cases contain some of the most striking uses of "thick" facts to justify legal burdens on social groups, with norma-

---

1081 (2005); Hernandez v. Robles, 7 N.Y.3d 338, 359 (2006) (finding that state legislature "could rationally believe that it is better . . . for children to grow up with both a mother and a father").

31. Indeed, the judgments embedded in "thick" facts typically do not become apparent until perceptions of the status or capacity of social group members change. See Charles W. Mills, The Racial Polity, *in* Racism and Philosophy 13, 18–19 (Susan E. Babbitt & Sue Campbell eds., 1999) ("[I]f [normative claims] are not explicitly stated and highlighted as integral to the political philosophy, it is often simply because they are part of a conservative, background 'common sense' that its proponents take for granted."). 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 presumptions underlying assertions of women's natural domesticity became clear, and courts could no longer rely on the earlier, "thick" fact without undermining their legitimacy. Thus, because shifts in perceptions of groups can expose "thick" facts as noncredible judgments, legal reasoning based on "thick" facts is relatively susceptible to pressure to incorporate societal change. Others would argue, however, that courts deliberately and strategically deploy norms as facts to avoid the conflict associated with supporting controversial norms. See infra Part VI.

32. Cf. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992) (observing that "the Court's Justices are sometimes able to perceive significant facts . . . that eluded their predecessors").

33. 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).

34. This conversion of a demographic fact into a "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. See, e.g., Laura T. Kessler, The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory, 34 U. Mich. J.L. Reform 371, 389–90 (2001) (arguing that "[j]udicially enforced stereotypes of women as biologically and psychologically unsuited for participation in the paid labor force limited their employment-related constitutional claims" despite the "well-documented" fact that African American women had "always engaged in wage work in large numbers"). Yet courts disregarded these other facts in making determinations about women's capacity.

35. See, e.g., Goesaert v. Cleary, 335 U.S. 464, 465–66 (1948) (validating Michigan's sex-based restrictions for liquor licenses); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141–42 (1872) (Bradley, J., concurring) (stating that "destiny and mission" of woman is to fulfill "offices of wife and mother").

tive judgments about African Americans cited as facts to prove 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."[36] 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 full-blood of either race."[37] 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."[38]

We see the work of "thick" facts, too, in the context of sex-based distinctions, where Justice Bradley's concurring opinion in *Bradwell v. Illinois*[39] is perhaps the most familiar example of judicial reliance on a norm as though it were fact. "The natural and proper timidity and delicacy which belongs to the female sex," Justice Bradley reasoned, justified the conclusion that women were "unfit[ ] . . . for many of the occupations of civil life," including the practice of law.[40] Famously, too, the Supreme Court in *Muller v. Oregon* treated as fact that women lacked, inter alia, "the capacity for long-continued labor, particularly when done standing," and "the self-reliance which enables one to assert full rights."[41] Without identifying, much less defending, the judgments contained in these purported data, the Court treated them as sufficient to support the challenged restrictions on women's labor.[42]

---

36. W. Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 213–14 (1867) (emphasis added) (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").

37. Scott v. State, 39 Ga. 321, 323 (1869).

38. State v. Jackson, 80 Mo. 175, 179 (1883).

39. 83 U.S. (16 Wall.) 130.

40. Id. at 141 (Bradley, J., concurring). 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.

41. 208 U.S. 412, 422 (1908). This analytical move, as Justice O'Connor points out in Nguyen v. INS, 533 U.S. 53, 89–91 (2001) (O'Connor, J., dissenting), takes physical differences between men and women and imputes them impermissibly with normative significance to justify upholding differential sex-based rules. See infra notes 65–67 and accompanying text.

42. *Muller*, 208 U.S. at 422–23. The power of this gender-based "thick" 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 other protective laws in the same time period. See, e.g., Coppage v. Kansas, 236 U.S. 1, 13–14 (1915) (invalidating a federal law that prohibited employers from requiring employees not to join a union on grounds that the law violated freedom to contract protected by Fourteenth Amendment), overruled in part by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Adair v. United States, 208 U.S. 161, 180 (1908) (same), overruled in part by

Buck v. Bell,[43] mentioned above, illustrates the similar operation of "thick" 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 the empirical relationship between mental retardation and intellectual capacity.[44] Instead, for him, the decisional keys were that people with mental retardation were potential "menace[s]," "manifestly unfit," and more prone to crime and dependence on public support than others.[45]

In the context of sexual orientation, the "fact" 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 has become popular with courts as a justification for sexual orientation classifications in family law.[46] The Eleventh Circuit, for example, accepted Florida's iteration of this argument as a sufficient reason to sustain a state ban on adoption by lesbians and gay men.[47] The court concluded that the preference for

---

Phelps, 313 U.S. 177; Lochner v. New York, 198 U.S. 45, 62 (1905) (declaring unconstitutional a New York law that set maximum hours that bakers could work as violating due process clause of the Fourteenth Amendment because law interfered with freedom to contract and did not serve valid police purpose), overruled in part by Ferguson v. Skrupa, 372 U.S. 726 (1963), and Day-Brite Lightning Inc. v. State of Mo., 342 U.S. 421 (1952); Allgeyer v. Louisiana, 165 U.S. 578, 591–93 (1897) (striking down state law that prohibited payments on marine insurance policies issued by out-of-state companies not licensed or approved to do business in the state on grounds that law interfered with freedom to contract protected by due process clause). 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").

43. 274 U.S. 200 (1927).

44. Cf. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 n.9 (1985) (discussing four categories of mental retardation based on IQ scores).

45. *Buck*, 274 U.S. at 206–07. In his opinion in *Cleburne*, Justice Marshall elaborated on the widespread use of normative facts about people with mental retardation to justify severe burdens. 473 U.S. at 462 (Marshall, J., concurring). As part of his historical argument for heightened scrutiny of mental retardation-based classifications, he noted that by the late nineteenth and early twentieth 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.'" Id. (citation omitted). These views then became the "thick" facts that guided the analysis in *Buck v. Bell*. Cf. Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 283, 302 (E.D. Pa. 1972) (invalidating statute premised on assumption "that certain retarded children are uneducable and untrainable").

46. See, e.g., Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819 (11th Cir. 2004), reh'g en banc denied, 377 F.3d 1275 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005).

47. Id. This "fact" has been contested by many experts as well as by the Eleventh Circuit's dissenters from the denial of rehearing en banc. See *Lofton*, 377 F.3d at 1297 (Barkett, J., dissenting) ("The 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

mother-father parental units was "one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action."[48] Similarly, New York's high court relied recently on the "intuition and experience" that children were better off with a mother and father than with two mothers or two fathers to justify excluding same-sex couples from marriage.[49] In terms of our framework, both courts treated these assumptions and intuitions as statements of fact, in effect asserting that the statements should be believed even if they are not susceptible to traditional, evidentiary documentation. The analytic difficulty arises because the relevant evidence and briefing in the cases, as well as other parenting-related legislation, contradicted these negative intuitions.[50] By presenting contestable normative intuitions as fact, albeit not provable, these

---

mothers and fathers.'"); Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter? 66 Am. Soc. Rev. 159, 161 (2001) ("[R]esearch, almost uniformly, reports findings of no notable differences between children reared by heterosexual parents, and those reared by lesbian and gay parents."); see also Gregory M. Herek, Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective, 61 Am. Psychologist 607, 618 (2006) (pointing out "the lack of an empirical basis for assertions that same-sex and heterosexual relationships differ fundamentally in their psychosocial qualities and dynamics and that people in same-sex relationships are deficient in parenting abilities").

48. *Lofton*, 358 F.3d at 819–20. The admission that its rationale depended on gut instinct may have been discomforting to the court. Shortly after acknowledging the absence of proof for its assumption that one mother and one father 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, have [sic] 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.

49. Hernandez v. Robles, 7 N.Y.3d 338, 359–60 (2006). This reasoning was similarly employed by the Washington State Supreme Court a few weeks later. See Andersen v. King County, No. 75934-1, 2006 Wash. LEXIS 598, at *54 (Wash. July 26, 2006) ("[N]o other relationship has the potential to create, without third party involvement, a child biologically related to both parents, and the legislature rationally could decide to limit legal rights and obligations of marriage to opposite-sex couples.").

50. See, e.g., Brief of Amici Curiae American Psychological Ass'n et al. in Support of Plaintiffs-Respondents at 36, *Hernandez*, 7 N.Y.3d 338 (No. 86), 2006 WL 1930166 ("Empirical research over the past two decades has failed to find any meaningful difference in the parenting abilities of lesbian and gay parents compared to hetereosexual parents."); Amicus Curiae Brief of Children's Rights Organizations in Support of Respondents at 11, *Andersen*, 2006 Wash. LEXIS 598 (No. 75934-1) (reviewing array of literature and concluding that "[c]hildren of gay and lesbian parents are found to be no more likely than children of heterosexual parents to manifest problems with separation or individuation; self-concept; moral judgment; and school adjustment").

courts avoided acknowledging, much less defending, the judgments implicit in their decisions.

B. *"Thin" Facts and Unstated Norms*

In contrast to "thick" facts, "thin" empirical facts do not themselves contain social judgments that help determine whether and how the facts might justify the restriction at issue. Yet courts regularly decide cases by holding out "thin" empirical facts as decisive. In *Heller*, for example, the Court cited facts about the timing and diagnosis of mental retardation to justify a lower standard of proof for involuntary commitment of people with mental retardation than people with mental illness.[51] The Court concluded that "Kentucky's basic premise that mental retardation is easier to diagnose than is mental illness has a sufficient basis in fact."[52] Similarly, in *Nguyen v. INS*, the Court relied on the fact that women can give birth to sustain an immigration law that made it easier for U.S. citizen mothers than U.S. citizen fathers to gain citizenship for their foreign-born children.[53] The Court reasoned that the empirical fact of mothers' presence at childbirth[54] rendered mothers more likely than fathers to develop the "real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[55] Likewise, state

---

51. Heller v. Doe ex. rel Doe, 509 U.S. 312, 321–23 (1993).

52. 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." (citation omitted)); 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.

53. 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 that 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.

54. State courts similarly have relied on physical differences between men and women to sustain sex-based rules. The New York Court of Appeals observed, for example, 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, the Supreme Court in the Washington Territory likewise pointed to "the physical constitution of females" as the reason for sustaining an exclusion of women from grand jury duty. Harland v. Territory, 3 Wash. Terr. 131, 140 (1887).

55. *Nguyen*, 533 U.S. at 65. Some might argue that it was reasonable for Congress to assume a special mother/child tie after childbirth because of women's post-birth hormonally driven commitment to their children, and that a normative commitment to equality should not require courts to overlook "real" factual difference. Others would maintain, however, that a methodology that would allow equation of a woman's hormones to a greater capacity for childrearing assumes rather than proves the point in question. Thus, although some might treat the link between hormones and nurturing instinct as a "thin" empirical fact, the link is contestable and, as a result, lacks the credibility-preserving function that "thin" facts bring to judicial analysis. See infra Part V. Courts likewise do not

courts have cited a biological fact of procreation—that only male-female couples can have children without third-party assistance—to sustain the exclusion of gay couples from marriage.[56]

Yet empirical facts, without more, cannot prove that a law is reasonable. Instead, behind-the-scenes social norms supply the connection between the fact about the social group and the legal burden on group members.[57] In *Heller*, for example, something more than differences in information processing skills had to be at issue to sustain the different institutionalization rules; after all, in *City of Cleburne v. Cleburne Living Center*, that same processing difference did not justify the zoning rule that singled out for restriction a group home for people with mental retarda-

---

tend to rely on data regarding "real" ethnic differences as espoused in *The Bell Curve* and similar literature because the "facts" and the methodology that produced them are both highly contested. See Thomas Sowell, Ethnicity and IQ, *in* The Bell Curve Wars: Race, Intelligence, and the Future of America 70, 72 (Steven Fraser ed., 1995) ("Long before *The Bell Curve* was published, the empirical literature showed repeatedly that IQ and other mental tests do not predict a lower subsequent performance for minorities than the performance that in fact emerges. . . . [T]he predictive validity of mental tests is the issue least open to debate."). Compare Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life 276 (1996) (claiming in chapter called "Ethnic Differences in Cognitive Ability" that answer to question "Do Blacks Score Differently from Whites on Standardized Tests of Cognitive Ability?" is "yes for every known test of cognitive ability that meets basic psychometric standards of reliability and validity"), with Jeffrey Rosen & Charles Lane, The Sources of *The Bell Curve*, *in* The Bell Curve Wars: Race, Intelligence, and the Future of America, supra, at 58, 58–61 ("[E]ven a superficial examination of the primary sources [used by the authors of *The Bell Curve*] suggests that some of Murray and Herrnstein's substantive arguments rely on questionable data and hotly contested scholarship, produced by academics whose ideological biases are pronounced."). For a related debate arising from the statements of former Harvard President Lawrence Summers regarding the relationship between sex and scientific aptitude, compare Olivia Judson, Op-Ed., Different but (Probably) Equal, N.Y. Times, Jan. 23, 2005, § 4, at 17 (arguing that question whether average intrinsic cognitive difference exists between men and women should be examined, particularly given vast biological differences found in some species), with W. Michael Cox & Richard Alm, Op-Ed., Scientists Are Made, Not Born, N.Y. Times, Feb. 28, 2005, at A19 (arguing that gains made by women in historically male disciplines over past thirty years demonstrate that scientific ability is not innate but rather developed through education). See also Elizabeth Spelke, Sex Differences in Intrinsic Aptitude for Mathematics and Science? A Critical Review, 60 Am. Psychologist 950, 956 (2005) (reviewing research on cognitive abilities of men and women and concluding that data "does not support the claim that men have a greater intrinsic aptitude for mathematics and science").

56. See, e.g., Lewis v. Harris, 875 A.2d 259, 266–67 (N.J. Super. Ct. App. Div. 2005) (citing approvingly 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"), rev'd, No. A-68-05, 2006 N.J. LEXIS 1521 (N.J. Oct. 25, 2006); see also infra notes 225–226 and accompanying text.

57. 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 so well settled by virtue of earlier opinions or positive law that concerns about judicial overreaching can be avoided or moderated. See infra Part II.B.

tion.[58] Similarly in *Nguyen*, biological and demographic statistics showing that mothers are more likely than fathers to raise their children could not themselves prove that favoring mothers in immigration law was reasonable.[59] Neither "inherent" nor demographic differences between men and women alone can justify sex-based rules, as the Court had recognized just a few years prior.[60] If it were otherwise, then the same biological and demographic facts could justify any distinction between men and women. Likewise, the empirical fact of procreation itself cannot explain the legal distinction between gay and nongay people in marriage law. If it did, we would expect to see legal distinctions based on sexual orientation in all realms; yet these distinctions are relatively rare.

In short, none of these facts, which we conventionally think of as science-based or empirical, automatically generates a conclusion about the reasonableness of restrictions based on intellectual capacity, sex, or sexual orientation. Instead, normative judgments give significance to the empirical facts. That is, they supply us with the information necessary to determine the relationship between the fact and the legal restriction at issue. For example, social norms, not biology, tell us whether and how childbearing should affect women's workforce participation or relationships with children. Yet courts treat biological facts as though they do exactly that, eliding the point that empirical facts and the social meaning ascribed to those facts[61] are actually separate strands of information.[62]

The problem with this elision is that it shields courts from having to expose and defend the norms that shape their decisions. Ordinarily, of course, judicial notice requires transparency in judicial assumptions

---

58. See Heller v. Doe ex rel. Doe, 509 U.S. 312, 321–22 (1993); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450–51 (1985).

59. *Nguyen*, 533 U.S. at 89–91 (O'Connor, J., dissenting).

60. See United States v. Virginia, 518 U.S. 515, 533 (1996) ("'Inherent 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 Mut. Ins. Co., 446 U.S. 142, 152 (1980) (holding that wives' greater financial dependence on their husbands could not justify sex-based workers' compensation rule regarding death benefit eligibility); see also infra text accompanying notes 102–104.

61. For accounts of the process by which society attaches meaning and norms to empirical facts, see, e.g., Poovey, supra note 19, at 236–49 (arguing that an interpretive framework often "help[s] produce the entity it claim[s] to describe" in empirical terms).

62. 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 caregiving relationships with children, others related to valuing partnerships of different-sex couples over partnerships of same-sex couples, 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. See infra Part V.A.

about facts. Fact-based adjudication operates to undermine that obligation.

In part because principles of judicial notice do not have their usual effect, dissents take up the task of challenging the majority's unspoken normative judgments and thereby highlighting the flawed premise that facts alone can guide decisionmaking. 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,"[63] but concluded that the factual differences could not support Kentucky's separate rules. Instead, Justice Souter argued that an impermissible norm, unacknowledged by the majority, enabled these factual differences to be given undeserved significance. It is "difficult," he wrote, "to see [the distinction giving family members greater control over institutionalization of people with mental retardation than people with mental illness] as resting on anything other than the stereotypical assumption that the retarded are 'perpetual children.'"[64]

The dissenters in *Nguyen* similarly stressed that the fact that women give birth to children could not itself explain the sex-based citizenship rule that imposed a lesser burden on mothers than fathers.[65] "The 'physical differences between men and women' . . . do not justify [the statute's] discrimination," Justice O'Connor wrote, observing that "the idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization."[66] The majority could connect the two and sustain the challenged law only by overlaying the uncontested empirical fact of childbirth with

---

63. *Heller*, 509 U.S. at 337 (Souter, J., dissenting). In addition to highlighting the norms that he believed to be at work, Justice Souter disagreed with the majority's account of empirical differences between mental retardation and mental illness. Id. at 342–46 (arguing, based on social science literature, that treatment of people with mental retardation often involves invasive procedures, contrary to 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." (citation and internal quotation marks omitted)).

64. Id. at 348.

65. Nguyen v. INS, 533 U.S. 53, 88–89 (2001) (O'Connor, J., dissenting).

66. Id. at 86–87 (citation and punctuation omitted). Justice O'Connor observed as well that:

> A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms.

Id. To strengthen the case that an impermissible traditional norm had been applied, Justice O'Connor also 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 various debates over legislation at issue as well as numerous state laws to support this view).

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."[67]

And this normative view, Justice O'Connor contended, was impermissible.

Likewise, in *Romer v. Evans*, the majority focused on facts to invalidate Colorado's ban on antidiscrimination protections for lesbians, gay men, and bisexuals, characterizing the measure as "a status-based enactment divorced from any factual context."[68] In response, the dissent chastised the majority for refusing to address a norm underlying the relevant fact—"moral disapproval of homosexual conduct"—that, in its view, supplied a link between the measure's separate political rules for gay and nongay people and the state's alleged interests in preserving associational freedom and scarce resources.[69]

In sum, although courts hold out facts as decisive in both "thin" and "thick" fact cases, those facts actually contribute little to their decisions' reasoning. Instead, the norms embedded in the "thick" facts or associated with the "thin" facts do the explanatory work in adjudication. As will be shown below, only when "new" perceptions of group members reveal and reject the work of those norms are courts likely to experience meaningful pressure to incorporate those changed views.

II. Fact-Based Interventions in Contested Normative Terrain

The model of fact-based adjudication just discussed is particularly useful for its window onto the process by which courts "tip" from one view of a group's constitutional rights or status to another as a result of societal change. This section will describe the role of facts in the tipping process, leaving for later sections a critical examination of courts' use of facts in this way.

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 ("[T]he 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." (citation omitted)).

67. Id. at 88–89 (citations omitted).

68. 517 U.S. 620, 635 (1996).

69. Id. at 644 (Scalia, J., dissenting); id. at 630–31 (majority opinion) (identifying state's purported justifications for the constitutional amendment); see also infra note 100.

Typically, the move from one view of a social group's constitutional rights to another occurs in stages. At the outset, when groups are first contesting restrictions on their rights, traditional rationales have a strong hold, and norm contests at the margins tend to have little effect on either adjudication or outcomes. Tradition thus tends to remain firmly in place.

Once those contests reach the mainstream,[70] however, changing societal perceptions of group members begin to exert a quiet influence on decisionmaking. Rather than offering an all-out embrace (or rejection) of the new trend in thought about the group in question, courts tend to respond to litigation of group members' rights in a circumscribed, fact-focused manner. Courts that tip toward change often will hold that "new" facts or new understandings of facts require rejection of traditional rationales for restricting group members' rights. Although these decisions effectively embrace a new normative judgment about the group's status or capacity, the fact-based adjudication model enables them to avoid acknowledging the norm shift.

Over time, in some cases, these fact-based decisions accrete and begin to reflect a coherent new view of a social group. By stabilizing the new norm, this accretion in turn frees courts to bypass the security of fact-based adjudication in favor of norm declarations that they had avoided in less stable jurisprudential and social environments.

A. *A Prelude to Tipping*

Not all challenges to traditional norms provoke norm shifts.[71] 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.[72] In this naturalized state, norms might be said to be at room temperature, enabling courts to be genuinely unaware of their reliance on them, as the *Nguyen* majority ostensibly was when it tacitly accepted the norm that the

---

70. Of course, not all challenges to traditional norms reach the mainstream or follow with precision the stages of the "tipping" process elaborated here. See infra notes 71–79 and accompanying text.

71. The framework is not intended to suggest that the emergence of new norms is always preferable from the standpoint of either the social group at issue or others in the surrounding society.

72. Much critical legal scholarship has concentrated on exposing the way norms blend into what is perceived as natural. A significant body of feminist scholarship, for example, has concentrated on exposing the male bias in many naturalized norms. See, e.g., Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1, 7–8 (1985) (explaining 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).

act of giving birth itself creates a bond between mothers and their children that cannot be presumed for fathers.[73]

When norms are so deeply integrated into society, whatever contestation has occurred can be deemed too peripheral to have gained traction, and courts can proceed as though nothing has occurred to destabilize the traditionally accepted facts and norms.

We might think of Myra Bradwell's challenge to Illinois's attorney licensing rule[74] or Carrie Buck's challenge to Virginia's sterilization rule[75] in this way. Both cases advanced equality claims at a time when commitments to sex equality and equal treatment of people with mental retardation were all but unthinkable in the broader society.

Consider, too, the first wave of challenges to marriage laws brought by lesbian and gay couples in the 1970s and 1980s.[76] At that time, movements for gay liberation and gay rights had made substantial headway in disrupting the view of gay people as mentally ill[77] and some progress toward dispelling the belief that gay people were inherently inferior to heterosexuals, as evidenced by the passage of antidiscrimination ordinances prohibiting sexual orientation discrimination.[78] 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 quickly dismissed.[79]

B. *Intervention via "New" Facts*

When norm contests spill into the mainstream and courts first take up the invitation to reject traditional norms, the approach shifts markedly. In these cases, in the place of carefree invocation of "thin" or

---

73. Nguyen v. INS, 533 U.S. 53, 66 (2001) (accepting link between "thin" facts about social group (i.e., men cannot give birth) and laws limiting social group members' rights (i.e., fathers must take more steps than mothers to have citizenship conferred on their children even if they are present at birth)).

74. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

75. Buck v. Bell, 274 U.S. 200 (1927).

76. See, e.g., Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (rejecting challenge to marriage law's exclusion of gay couples); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (same), appeal dismissed, 409 U.S. 810 (1972); DeSanto v. Barnsley, 476 A.2d 952, 952 (Pa. Super. Ct. 1984) (same); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (same).

77. See infra note 144 (describing removal of homosexuality from American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders in 1973).

78. See Lisa Keen & Suzanne B. Goldberg, Strangers to the Law: Gay People on Trial 5–6 (1998) (describing political context surrounding passage of early sexual orientation antidiscrimination ordinances).

79. As Mahatma Gandhi observed with respect to social change efforts, "First they ignore you, then they laugh at you, then they fight you, and then you win." The Quotable Rebel 92 (Teishan Latner ed., 2005). At this early contestation stage, courts could be described as ignoring plaintiffs' claims.

"thick" facts to sustain the status quo, courts make statements about "new" facts that require change.[80]

Brown v. Board of Education[81] is perhaps the best-known example of this judicial inclination to use "new" facts to justify new conclusions about previously settled matters while avoiding mention of an underlying norm shift. In reversing *Plessy v. Ferguson*'s[82] 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 modern authority."[83] The Court also pointed to other changed facts to support its analysis; it noted, for example, the changed "status of public education"[84] and the heightened achievements of African Americans in professional and cultural circles.[85] Nowhere in the decision did norms regarding African Americans or racial equality receive mention.[86] Several decades later, the

---

80. 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 notes 163–175 (discussing conflicting perspectives of majority and dissenting opinions on status of norms regarding juvenile death penalty). Further, to be clear, even after a tipping point has been reached, contestation does not disappear entirely. Instead, the reference to a tipping point suggests that a once-natural norm has begun to lose its dominance among the general public.

81. 347 U.S. 483 (1954).

82. 163 U.S. 537 (1896), overruled by *Brown*, 347 U.S. 483.

83. *Brown*, 347 U.S. at 494.

84. 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.").

85. 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.").

86. 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 opinion 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 (1960).

The surrounding global political context, in which the persistence of racial segregation was perceived as undermining the United States's position in the Cold War, also went unmentioned in *Brown*. See generally Mary L. Dudziak, Josephine Baker, Racial Protest, and the Cold War, 81 J. Am. Hist. 543, 544 (1994) ("[T]he United States claimed that democracy was superior to communism . . . particularly in its protection of individual rights and liberties [but] 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 an illustration of state court inclinations to avoid normative declarations that might be subject to contestation, see, e.g., Braschi v. Stahl Assocs., 543 N.E.2d 49, 55 (N.Y. 1989). The court in *Braschi* cited facts about how two gay men lived together as

Court reinforced the notion that changed conceptions of facts, rather than changes to social norms, accounted for *Plessy*'s reversal: "[T]he *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision [in *Brown*] to reexamine *Plessy* was on this ground alone not only justified but required."[87]

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.[88] The factual grounds for racial discrimination in marriage had long been viewed as well settled: "[T]he prohibition of intermarriage . . . prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians."[89] To explain its shift away from these traditionally accepted "facts," the court turned to science: "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."[90] The court also pointed to the absence of "scientific proof that

---

"permanent life partners" to support including them within the statutory term "family" for purposes of succession to a rent-controlled apartment. Id. Yet it did not acknowledge the norm shift embodied in that determination.

87. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992). The Court in *Casey* also recognized that its pattern of fact-based decisionmaking carried over to contexts unrelated to shifting judgments about social groups. Discussing the *Lochner* era and its demise, the Court observed that:

> West Coast Hotel [Co. v. Parrish, 300 U.S. 379 (1937)] . . . rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day . . . had not been able to perceive. As the decisions were thus comprehensible they were also defensible . . . as applications of constitutional principle to facts as they had not been seen by the Court before.

Id. at 863–64.

88. See Perez v. Lippold, 198 P.2d 17, 23–24 (Cal. 1948) (en banc) (dismissing myth of racial superiority because of lack of scientific proof); 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 *Perez* court's ruling as "the first true crack in the courts' monolithic support for the constitutionality of miscegenation statutes"). For examples of state decisions upholding antimiscegenation statutes, see, e.g., Jackson v. State, 72 So. 2d 114, 115 (Ala. Ct. App. 1954) (sustaining Alabama's antimiscegenation statute); Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955) (sustaining Virginia's similar law).

89. *Perez*, 198 P.2d at 23 (paraphrasing the state's justification for antimiscegenation statute); see also 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.").

90. Id. at 23–24.

one race is superior to another in native ability."[91] Once the facts were framed in this way, the rejection of the racial classification necessarily followed.[92]

Early decisions in the contemporary women's rights cases also illustrate this pattern of norm avoidance during periods of social contestation. Beginning with *Reed v. Reed*,[93] numerous fact-based decisions reflected a commitment to women's equality without ever acknowledging the shift from earlier, contrary norms that women were less capable than men in many arenas. In *Reed*, the Court highlighted a fact (women have at least as much experience as men with administering estates) to help explain its determination that Idaho's subordination of wives to husbands in prioritizing estate administrators was arbitrary.[94] The Court 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.[95] By sidestepping the traditionally accepted judgment about men and women and offering up facts instead, the U.S. Supreme Court left the norm confrontation for another day.[96]

Romer v. Evans[97] 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.[98] Thus, for *Romer* to recognize the claim that a state constitutional ban on antidiscrimination protections for gay people violated the

---

91. Id. at 24–25 (footnote omitted) ("The data on which Caucasian superiorty [sic] is based have undergone considerable re-evaluation by social and physical scientists in the past two decades.").

92. To support this analytic move, the court also highlighted Gunnar Myrdal's work linking the earlier normative facts about race to bias in observation. See id. at 25 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. See id. ("'[T]he ordinary white American . . . has made an error in inferring that observed differences were innate and a part of "nature."'" (quoting 1 Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 147–48 (1944))).

93. 404 U.S. 71 (1971).

94. Id. at 76–77.

95. Reed v. Reed, 465 P.2d 635, 638 (Idaho 1970), rev'd, 404 U.S. 71.

96. In Cleveland Board of Education v. LaFleur, 414 U.S 632 (1974), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), 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 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 opinions and the focus was, instead, on the factual support for the challenged rules.

97. 517 U.S. 620 (1996).

98. 478 U.S. 186, 196 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

rights of these individuals, 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. As noted earlier, it instead anchored its invalidation of Colorado's amendment on the ban's factual disconnect with the state's asserted interests.[99] Although Justice Scalia's dissent reasserted that the traditional social norm disapproving of homosexuality sufficed to justify the challenged measure,[100] the *Romer* Court avoided any overt engagement with that moral judgment.[101] In short, as these cases illustrate, when breaking with tradition, the Court has led with facts and left norms aside.

C. *Fact-Based Decisions as the Groundwork for Norm Declarations*

As indicated above, fact-based adjudication is often the first step in a two-step decisionmaking dynamic through which courts tip from one view of a group's constitutional rights to another. The second step occurs after one or more cases have settled the "new" understanding of facts without reference to norms. After this accretion process, the potential controversy associated with judicial intervention in contested normative terrain diminishes. Consequently, courts become willing to declare the new norms explicitly.

The trajectory of women's rights cases nicely illustrates the accretion dynamic. It was not until after *Reed* and several additional fact-intensive opinions sustaining claims for sex equality that a majority of the Court openly embraced 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.*, 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.[102] Although that fact undoubtedly would have been taken to justify the rule in the past—

---

99. *Romer*, 517 U.S. at 635; see also text accompanying supra note 69.

100. "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 people's desire "to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans").

101. *Romer* could be characterized as a "norm" case to the extent it is read to announce (or affirm) a general norm that hostility toward a group of people cannot justify restrictions on the rights of group members. To the extent that *Romer* is understood as signaling a change in the constitutional status of gay people, however, the Court left that normative shift unacknowledged.

102. 446 U.S. 142, 151 (1980) ("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.").

and indeed, was treated as decisive by the lower court[103]—the Court declared the devaluation 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."[104]

The accretion phenomenon also explains the timing of Supreme Court announcements that particular classifications will be subjected to heightened scrutiny. These formal and explicit commitments to prevent the unwitting enforcement of traditional norms about a social group occur only after the accretion of fact-based decisions regarding the social group in question.[105] With these decisions in place, the Court appears to become confident that the social group's equality to its counterpart group will no longer be seriously contested. Heightened scrutiny, in other words, signals the settlement of a "new" general norm (at least from the Court's perspective) that promotes skepticism toward negative judgments about social group members that would have been accepted previously to justify different treatment.[106] This trajectory—fact-based cases

---

103. See Wengler v. Druggists Mut. Ins. Co., 583 S.W.2d 162, 168 (Mo. 1979) ("[T]he substantive difference in the economic standing of working men and women justifies the advantage that [the law] administratively gives to a widow."). For a discussion of earlier norms and their influence on workers' compensation and wrongful death statutes, see generally John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law (2004).

104. *Wengler*, 446 U.S. at 147; see also 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 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"); 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").

105. Heightened scrutiny, after all, represents a deviation from the Court's ordinary orientation toward norm avoidance, as it reflects an explicit commitment to skepticism toward distinctions based on facts about the protected social group. See Nguyen v. INS, 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting) ("This [rational basis] standard permits a court to hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality."); United States v. Virginia, 518 U.S. 515, 531 (1996) (describing heightened scrutiny as "skeptical . . . of official action denying rights or opportunities based on sex"); Pers. Adm'r v. Feeney, 442 U.S. 256, 272–73 (1979) (identifying suspect classifications as themselves containing "a reason to infer antipathy").

106. This point is somewhat more complicated with respect to racial classifications than with respect to the sex classifications discussed below. For one, courts acknowledged some version of racial equality almost immediately after the passage of the Reconstruction Amendments. See Strauder v. West Virginia, 100 U.S. 303, 303–08 (1879) (overturning criminal conviction by jury from which African Americans had been excluded on grounds that exclusion was "a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others"). 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) ("A statute which implies merely a legal distinction between the white and colored races . . . has no tendency

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.[107]

Once the Court has declared heightened scrutiny, an equality norm begins to reshape consideration of facts about the social group in adjudication. In *United States v. Virginia*, for example, the Court dismissed the relevance of perceived factual differences between men and women, relying on a sex equality norm to invalidate the Virginia Military Institute's sex-based admission policy.[108] Likewise, in *J.E.B. v. Alabama*, the Court recognized that differences might exist between male and female jurors but, through an equality-focused analysis, found that the differences could not justify a sex-based peremptory strike.[109] This is not to suggest that the sex equality norm always carries the day, as *Nguyen* and other cases show.[110] But, as in *Wengler* and *Virginia*, among others, the applica-

---

to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954). 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), it did not begin actual rigorous review of racial classifications for another twenty years. See McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stressing 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) [hereinafter Goldberg, Equality Without Tiers] (analyzing evolution of suspect classification analysis); Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 226–40 (1991) (same).

107. Many scholars have maintained that the Court had been applying heightened scrutiny to sex classifications since *Reed*. See, e.g., 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 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.

108. 518 U.S. 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)).

109. 511 U.S. 127, 138–42 (1994).

110. *Nguyen*, 533 U.S. at 68 (holding "that facilitation of a relationship between parent and child is an important governmental interest" and that "at the moment of birth . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father"); see also Michael M. v. Superior Court, 450 U.S. 464, 470–82 (1981) (holding that state was justified in punishing only men for statutory rape law because "[o]nly women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity" and "[t]he statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe"). One might argue that the accretion phenomenon should have led *Nguyen* to come out differently, given that it was decided relatively late in the evolution of women's rights cases. As noted earlier, however, when general norms regarding social groups come under challenge, some individual judgments regarding group members will retain greater force than others. See supra note

tion of heightened scrutiny illustrates the Court's willingness to engage in overt norm-based adjudication in a way that does not happen when the Court perceives the norms 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 development from *Bowers v. Hardwick*[111] to *Romer v. Evans*[112] and *Lawrence v. Texas*[113] through this lens.[114] 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 so that they could be stated, without more, as the justification for Georgia's sodomy law.[115] Then in *Romer*, the Court focused on the lack of factual support for Colorado's antigay ban and struck down the measure without mentioning the *Bowers*-approved norm regarding gay people.[116] *Romer* thus served as the fact-based, norm-avoidant precursor for *Lawrence*'s outright rejection of the moral disapproval norm.[117]

Of course, a host of other explanations could account for the different adjudicative approaches of *Romer* and *Lawrence*, including the differ-

---

62. *Nguyen*'s holding can be understood as reflecting either the Court's heightened deference to Congress because of the citizenship benefit at issue or the Court's intention to cut back on the expansive characterization of equal protection in *Virginia*, 518 U.S. 515. But, in my view, the decision also reflects the distinctive sticking power of norms regarding procreation and childbirth relative to other sex-related norms. I plan to develop this argument at length in a future work.

111. 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

112. 517 U.S. 620 (1996).

113. 539 U.S. 558.

114. Arguments to subject sexual orientation classifications to heightened scrutiny continue to be made by advocates. See, e.g., Brief of the Human Rights Campaign Fund, et al., as Amici Curiae in Support of Respondents, *Romer*, 517 U.S. 620 (No. 94-1039), 1995 WL 17008436 (showing why classifications that burden lesbians and gay men should be treated as suspect based on Court's traditional criteria for heightened review). The Supreme Court has not yet explicitly addressed the application of heightened scrutiny in this context. See, e.g., *Romer*, 517 U.S. at 623–36 (invalidating classification based on sexual orientation under rational basis review without addressing heightened scrutiny claims).

115. *Bowers*, 478 U.S. at 196 (acknowledging "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." *Lawrence*, 539 U.S. at 575–78 (citing criticism of *Bowers*).

116. *Romer*, 517 U.S. at 635.

117. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) ("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 *Lawrence* majority's limited engagement with the state's moral disapproval rationale).

ent doctrinal foundations of the two decisions, with *Romer* focused on equal protection and *Lawrence* on due process.[118] In addition, moral disapproval was the lead justification for the law proffered by the state in *Lawrence,* while the state had advanced several other rationales more prominently in *Romer*.[119] And, certainly, the outlier status of the Texas Homosexual Conduct Law as only one of a handful of such laws in the nation[120] made the norm declaration relatively safe in *Lawrence*. But none of these factors fully explains why the *Romer* majority did not touch the moral norm advanced so forcefully by the dissent and why *Lawrence* ultimately did. The judicial inclination toward norm avoidance when the normative waters appear to be unsettled provides at least some of that explanation.

III. The Rhetoric of Fact-Based Adjudication and the Misleading Appearance of Neutrality

Courts' deep-seated disinclination to be seen as norm selectors carries over to the self-conscious way in which courts characterize their decisions. Whether or not they affirm the status quo, courts deciding cases in which social norms are contested often go to great lengths to frame their decisions as following, rather than intervening in, the public debate. Yet this pretense of neutrality rests on the same fictional premise that underlies fact-based adjudication—that courts can avoid choosing among norms in social group cases.

The marriage cases discussed in the Introduction nicely illustrate the point.[121] Centrally at issue is whether the rationales traditionally accepted for excluding same-sex couples from marriage have been undermined by changed norms regarding gay people. Yet, almost universally, courts deciding these cases will not acknowledge that they are passing judgment on these norms; rather, they maintain that they are merely following society's will.[122]

---

118. Compare *Romer*, 517 U.S. at 631–35 (invalidating 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").

119. See *Lawrence*, 539 U.S. at 571–73 (analyzing morals-based government interest); *Romer*, 517 U.S. at 635–36 (addressing government interests related to associational freedom and scarce resources).

120. *Lawrence*, 539 U.S. at 573 (stating that only four states at that time enforced sodomy laws targeted specifically at sexual conduct of same-sex couples).

121. See supra note 5.

122. Courts in these cases also deploy references to norm contestation when analyzing fundamental rights claims by same-sex couples. See, e.g., Standhardt v. Superior Court, 77 P.3d 451, 459 (Ariz. Ct. App. 2003) ("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 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

At one end of the spectrum, courts suggest that by affirming the status quo, they are staying out of the debate. A New Jersey trial court, for example, recognized that "[g]reat strides have already been made in protecting same-sex partners in New Jersey," but concluded that "difficult social issues" and the need for "vital debate and delicate political negotiations" required it to sustain "the traditional understanding of marriage."[123] The Arizona Court of Appeals likewise concluded that "although many traditional views of homosexuality have been recast over time," the court should leave it to "the people of Arizona, through their elected representatives . . . to decide whether to permit same-sex marriages."[124]

At the other end of the spectrum, courts that reject traditional rationales for discrimination in marriage suggest that they, too, are not making independent norm selections, but rather are enforcing the people's already-established will. The Supreme Judicial Court of Massachusetts, for example, concluded that changed state policies and jurisprudence

---

Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161 *passim* (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 typically 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., 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 . . . ."); 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. Ct. App. Div. 2005), rev'd, No. A-68-05, 2006 N.J. LEXIS 1521 (N.J. Oct. 25, 2006); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *1 (Wash. Super. Ct. Aug. 4, 2004) ("[Same-sex marriage] is [an issue] 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."), rev'd, No. 75934-1, 2006 Wash. LEXIS 598 (Wash. July 26, 2006).

123. *Lewis*, 2003 WL 23191114, at *23–*26. Noting that "[s]ocial change of the type sought by plaintiffs is properly accomplished in the legislative arena," id. at *23, 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 Seymour v. Holcomb, 790 N.Y.S.2d 858, 866 (Sup. Ct. 2005) ("The decision to extend any or all of the benefits associated with marriage is a task for the Legislature . . . . 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."), aff'd, 811 N.Y.S.2d 134 (App. Div. 2006), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006); Shields v. Madigan, 783 N.Y.S.2d 270, 277 (Sup. Ct. 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."), aff'd, 820 N.Y.S.2d 890 (2006).

124. *Standhardt*, 77 P.3d at 465; see also *Hernandez*, 7 N.Y.3d at 361 ("[A]ny expansion of the traditional definition of marriage should come from the Legislature.").

demonstrated that the exclusion of lesbian and gay couples from marriage reflected impermissible "prejudices against persons who are . . . homosexual."[125] In doing so, the court repudiated a once-popular view "that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect" as nothing more than a "destructive stereotype."[126] With the problem framed in this way, the court then could characterize its role in rejecting the discriminatory marriage rule not as unrestrained activism, but rather as the fulfillment of its duty as the "last instance" protector of constitutional rights.[127] Similarly, the New Jersey Supreme Court relied on state statutes and jurisprudence mandating equality regardless of sexual orientation to conclude that same- and different-sex couples must be accorded equal rights and benefits.[128] "Over the last three decades," the Court wrote, "through judicial decisions and comprehensive legislative enactments, this State, step by step, has protected gay and lesbian individuals from discrimination on account of their sexual orientation."[129]

One of several New York Supreme Court rulings on the state's marriage law, which was later reversed by the state's high court, likewise treated the norm contest regarding the legal significance of sexual orientation differences as essentially over.[130] The decision characterized its invalidation of the state's different-sex requirement for marriage not as staking out new normative territory, but 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."[131] Again, by characterizing the norm

125. *Goodridge*, 798 N.E.2d at 968.

126. Id. at 962 (footnote omitted); see also id. at 968 (finding that no rational basis existed to justify 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. On this point, the court wrote, "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." Id. at 965.

127. Id. at 966.

128. Lewis v. Harris, No. A-68-05, 2006 N.J. LEXIS 1521, at *57 (N.J. Oct. 25, 2006).

129. Id.; see also id. at *65 ("[T]his State's decisional law and sweeping legislative enactments, which protect gays and lesbians from sexual orientation discrimination in all its virulent forms, provide committed same-sex couples with a strong interest in equality of treatment relative to comparable heterosexual couples.").

130. Hernandez v. Robles, 794 N.Y.S.2d 579, 597–607 (Sup. Ct. 2005), rev'd, 805 N.Y.S.2d 354 (App. Div. 2005), aff'd, 7 N.Y.3d 338 (2006).

131. Id. at 607. Two other state supreme court justices, as well as the New York Court of Appeals, 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 5.

contest as over, the court positioned itself as having avoided undue intervention. Any other course, according to the court, would have contradicted the now-settled norm changes.

The popular intuition is that these latter decisions implicate courts in norm selection while those that affirm the status quo do not. Hence the vilification of the Massachusetts Supreme Judicial Court following its decision in *Goodridge*, which has been less focused on flaws in the court's reasoning than on the view that the court overstepped its bounds by finding for the plaintiffs.[132]

Yet the intuition is not correct, as the earlier discussion of the fact-based adjudication model shows. The premise that courts can abstain from shaping social norms and instead simply rely on facts about gay people to evaluate laws excluding same-sex couples from marriage is badly misconceived. Affirming the "old" view of a social group represents as much a selection among norms as affirming the "new" one. Put another way, adherence to the status quo, however it is framed, does not neutralize either a court's decisionmaking agency or the decision's role in strengthening one norm over the other.

Some might argue that even if norm selection is implicated in both types of decisions, affirming the traditional norm is less intrusive because it leaves the legislature room to act. But careful consideration shows that decisions affirming the status quo can have a profound effect on the legislative process. Even decisions that refrain from explicitly reinforcing traditional normative preferences for heterosexual couples strengthen those norms by supplying legislators with reasons to block marriage rights for same-sex couples. They provide opponents of equal marriage rights with additional ballast for their claims that marriage by same-sex couples

---

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.

In re Coordination Proceeding, Marriage Cases, Tentative Ruling, No. 4365, 2005 WL 583129, at *4 (Cal. Super. Ct. Mar. 14, 2005), rev'd, No. A110449, 2006 WL 2838121 (Cal. App. Oct. 5, 2006); see also Baker v. State, 744 A.2d 864, 885 (Vt. 1999) ("In light of [the state's] express policy choices [equalizing treatment of gay and nongay parents], the state's arguments that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies are patently without substance.").

132. See Michael J. Klarman, *Brown* and *Lawrence* (and *Goodridge*), 104 Mich. L. Rev. 431, 475–76 (2005) (noting that individuals such as Kenneth Starr, Karl Rove, and openly gay commentator Andrew Sullivan criticized *Goodridge* as "the handiwork of arrogant 'activist judges' defying the will of the people" since "it was a court decision, rather than a reform adopted by voters or popularly elected legislators").

is not appropriate, which in turn increases pressure on legislators to reject claims for equal marriage rights. Further, to the extent that the trajectory of legislative and other jurisprudential change is toward rejecting distinctions based on sexual orientation, a decision affirming the traditional norm may derail or at least dampen that trend. Indeed, where legislative and public policy shifts have eliminated most or all longstanding legal burdens on lesbians and gay men, courts that affirm the traditional negative norm in the marriage context arguably disrespect and disrupt the democratic process.[133]

IV. The Influence of Social Science and Social Movements on Judicial Incorporation of Social Change—Some Insights from Fact-Based Adjudication

In addition to exposing the superstructure that facilitates obfuscation of the judicial role as norm selector, the fact-based adjudication model also focuses attention on how courts are influenced to revisit traditional "facts" about social groups and to contemplate tipping from one view of a group to another. This section will first explore the significant role of social scientists and social movements in shaping how courts perceive the reliability of "thick" facts and then turn to these extrajudicial actors' lesser role in reshaping views of "thin" facts.[134]

---

133. See infra notes 232–236 and accompanying text. A related, additional argument suggests that where all barriers related to sexual orientation have been removed except in marriage, a process deficiency, rather than rational judgment, has led to the retention of discriminatory marriage rules. Cf. John Hart Ely, Democracy and Distrust 4–5 (1980) (arguing that role of courts is to correct malfunctions in our political system). In this situation, judicial actions that, on their surface, may appear antidemocratic because courts are involved in overruling legislators are actually efforts to bring outlier legislation in line with other legislative and jurisprudential commitments regarding the social group at issue.

By the same token, courts that reject the traditional norm and harmonize marriage law with more recent developments rejecting distinctions based on sexual orientation 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.

134. While movement advocates typically support the abolition of restrictions, social scientists can often be found on opposing sides of cases. Some offer studies to justify views that members of a social group are less able than their counterparts, and others seek to show that traditional grounds for burdening members of the social group lack scientific support. See, e.g., Brief of Amici Curiae American Psychological Ass'n et al. in Support of Plaintiffs-Respondents, supra note 50, at *2–*4 ("Empirical research has consistently shown that lesbian and gay parents do not differ from heterosexuals in their parenting skills, and their children do not show any deficits compared to children raised by heterosexual parents."); Brief of Amici Curiae James Q. Wilson, et al., Legal & Family Scholars in Support of Defendants-Respondents at *1–*2, *Hernandez*, 7 N.Y.3d 338 (No. 86), 2006 WL 1930158 (claiming that "relatively little is known from a scientific standpoint about how children fare [when] raised by same-sex couples from birth, compared to [when raised in] other family structures"); Brief of Dr. Paul McHugh, M.D. & Dr. M. Gawain Wells, Ph.D. as Amicus Curiae in Support of Defendants-Respondents at *1–*2, *Hernandez*,

A. *Social Scientists and "Thick" Facts*

At the height of its influence, social science research can destabilize traditional views of social groups in two primary ways: first by providing information to show that perceived facts are inaccurate, and second by showing that bias has led to widespread acceptance of inaccurate facts and skewed perceptions of group members' status and capacity. The first use is the classical one. Parties and amici submit studies to show the court the "truth" about a group and courts use the information to bring a fresh analysis to earlier views. The Court's opinion in *Taylor v. Louisiana*, for example, invoked Labor Department studies showing women's heavy workforce participation to support its decision to invalidate an automatic jury service exemption for women, where similar exemptions had been sustained in the past on grounds of women's natural domesticity.[135]

Yet, as dissenters and scholars have argued, this familiar synergy between researchers and courts is also the most dubious because there is little to prevent courts from randomly selecting data to support a given conclusion and using that information out of context.[136] Indeed, fact-based adjudication facilitates the instrumental invocation of social science by enabling courts to rely upon facts without acknowledging or defending the normative and methodological assumptions of the cited studies.

Beyond simply supplying data, social scientists may influence judicial absorption of social change by identifying and explaining how bias and misplaced normative judgments have distorted popular perceptions of group members' status and capacity.[137] For example, heuristic devices of

---

7 N.Y.3d 338 (No. 86), 2006 WL 1930159 ("[T]here is no scientific consensus that homosexuality is exclusively or primarily genetic in origin.").

135. 419 U.S. 522, 535 n.17 (1975).

136. See infra notes 166–175 and accompanying text (discussing critiques posed by dissenters in Roper v. Simmons, 543 U.S. 551 (2005), and Atkins v. Virginia, 536 U.S. 304 (2002), regarding process by which majority moved from fact to constitutional judgment without acknowledgment of norms that shaped interpretation of evidence). See generally John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. Pa. L. Rev. 477 (1986) (identifying problems caused by courts' treatment of social science materials as fact and proposing ways for courts to evaluate research); Rachael N. Pine, Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights, 136 U. Pa. L. Rev. 655 (1988) (arguing that facts should inform constitutional analysis but noting risks posed by courts' use of facts).

137. 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 for the Massachusetts Psychiatric Society et al. as Amici Curiae, Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003) (No. 08860).

Moreover, as numerous scholars have noted, more or "better" information does not necessarily lead people to change their views. See, e.g., Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology, 49 UCLA L. Rev. 1241, 1252–54 (2002) ("A general awareness of our frail rationality, however, is not sufficient."); Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 438 (1999) ("When

cognitive psychology may be useful in showing 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.[138] The California Supreme Court deployed social science research in this way when it concluded that perceived facts about racial differences, which had undergirded the state's interracial marriage ban, rested on "irrational fears."[139] Similarly, as discussed more fully below, cognitive psychology may assist analysis of the claim that heterosexual parents are preferable for children by raising questions about biased anchoring, cognitive dissonance in the evaluation of research data, and other methodological flaws.[140]

B. *Social Movements and "Thick" Facts*

Social movements likewise may destabilize "thick" facts by showing the dissonance between perceived facts and the reality of individual group members' capacities.[141] Indeed, providing realistic portrayals of group members is a first-order task for many social movements, as eradication of legal barriers to equality is virtually impossible when ill treatment of group members can be justified by negative "thick" facts about the group.[142] If it is widely believed that African Americans are intellec-

---

asked to evaluate conflicting empirical studies, subjects credit those that confirm their prior beliefs and dismiss those that conflict with them.").

Questions have been raised separately regarding the utility of cognitive psychology as it relates, 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 *passim* (2002).

138. See, e.g., David Hirshleifer, The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades, *in* The New Economics of Human Behavior 188, 193–200 (Mariano Tommasi & Kathryn Ieruli eds., 1995) (explaining biased anchoring, cascade effects, and related phenomena).

Social science also may serve as a check on factual perceptions held by the general public as well as by other researchers. Its potential revelatory benefit separately motivates arguments in the employment discrimination context that decisionmakers' 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, 1174–75 (1995) (arguing that changes in jurisprudential conclusions on causes of discrimination parallel and were likely influenced by evolving views of psychologists).

139. See Perez v. Lippold, 198 P.2d 17, 26 (Cal. 1948); see also supra text accompanying notes 88–92 (discussing *Perez*).

140. See, e.g., Stacey & Biblarz, supra note 47 (discussing and critiquing studies); see 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 *passim* (2004) (criticizing use of social science to make determinations of child welfare in discourse and adjudication regarding marriage rights for same-sex couples).

141. 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.

142. Since the rise of NAACP Legal Defense Fund in the 1930s and other identity-based legal groups in the 1970s, groups have sought directly to have courts invalidate laws that rest on flawed beliefs about group members. See, e.g., Patricia A. Cain, Rainbow

tually inferior or that women are not physically capable of full-time workforce participation,[143] for example, regardless of empirical data to the contrary, courts will be likely to sustain classifications drawn based on race or sex.

Movement advocates thus have a special role in working with professional organizations and other elite opinion setters to show that negative norm-laden "facts" are untrue. 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 the Diagnostic and Statistical Manual of Mental Disorders.[144] Absent that change, most challenges to government action distinguishing between gay and nongay people would have been destined to lose because the "fact" of mental illness could justify innumerable restrictions on gay people's lives. Organizations that advocate on behalf of people with mental retardation likewise have worked strenuously to counter mainstream skepticism about the capacity of their constituents that, in turn, has been relied upon by courts to sustain legal burdens.[145] Similarly, the "facts"

Rights: The Role of Lawyers and Courts in the Lesbian and Gay Civil Rights Movement (2000); Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (1994). 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 former, see, e.g., Michael J. 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); Tomiko Brown-Nagin, Elites, Social Movements, and the Law: The Case of Affirmative Action, 105 Colum. L. Rev. 1436, 1490–1511 (2005); William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. Pa. L. Rev. 419 (2001).

143. While this view was associated with the capacity of white, middle- and upper-class women, in particular, courts that sustained sex-based classifications based on "facts" related to women's capacity did not acknowledge this distinction.

144. See Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1582–83 (1993) ("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 (2002) (stating that "[t]he elimination of the stigma of mental disease has had a significant influence" on "recognizing the legal rights of homosexuals"); Nancy J. Knauer, Science, Identity, and the Construction of the Gay Political Narrative, 12 Law & Sexuality 1, 26–27 (2003) (describing "the elimination of diagnosis" of homosexuality as mental disorder as "a necessary step to secure equal rights for gay men and lesbians").

145. See, e.g., Brief of the American Ass'n on Mental Retardation et al. as Amici Curiae in Support of Respondents at 12, Heller v. Doe ex rel. Doe, 509 U.S. 312 (1993) (No. 92-351) ("The stereotype of individuals with mental retardation as 'perpetual children' has long been part of the justification for what this Court has recognized as a 'grotesque' history of mistreatment."); Brief of Voice of the Retarded (VOR) et al. as Amici Curiae in Support of Petitioner at 17, *Heller*, 509 U.S. 312 (No. 92-351) ("By failing to recognize the great differences . . . between mental illness and mental retardation and between those subgroups of people within each category and by failing to address the

referred to above regarding the limitations of African Americans and women had to be destabilized before equality claims could succeed.

In the current social climate, the assertion that gay people are less suitable role models for children than nongay people presents this issue yet again. To the extent that the assertion is treated as "fact," governments can restrict gay people from adopting or marrying (if marriage is treated as the state's preferred foundation for childrearing). While social scientists undertake studies to show that this view reflects a norm, not a fact, social movement leaders organize public education campaigns, conduct media outreach, and advocate within professional, expert organizations to raise awareness of the lives of gay people in general and gay parents in particular.[146] As with the mental illness delisting, efforts at law reform in this area can be successful only if the negative "facts" about gay parents are denaturalized and discredited.

A movement that successfully publicizes a "new" view of a social group may, in addition, prompt social scientists and others to investigate standing views within their professions, thereby fostering synergies between social movements and researchers. A recent report by the American Academy of Pediatrics, for example, which concluded that marriage by same-sex couples serves, rather than undermines, children's best interests,[147] would not likely have been produced absent societal changes sparked by the social movement for marriage equality. These new facts and the Academy's related position feed back into the adjudication process by encouraging judges to revisit previously accepted "thick" facts.

C. *Extrajudicial Actors and "Thin" Facts*

Even if social scientists and social movements can disprove "thick" norm-laden facts to the point where courts cannot credibly cite them, they have considerably less ability to destabilize the association between "thin" empirical facts and their associated norms. This is in part because the facts themselves matter little in these cases. The facts, instead, stand in for unspoken, typically negative, judgments about group members' status or capacity. Those judgments, because they exert their influence in the guise of "soft" norms rather than "hard" "thick" facts, remain both more elusive to identify and harder to challenge.

Justice O'Connor made this point in *Nguyen*—the different roles of men and women in childbirth relied on by the majority were standing in for a traditional, debunked belief that women were better nurturers of their children than men and thus more likely to cultivate loyal American

---

sharply different support requirements for each group and subgroup . . . lower courts demonstrate a misunderstanding of developmental disabled people and their needs.").

146. See, e.g., Nancy Polikoff, Raising Children: Lesbian and Gay Parents Face the Public and the Courts, *in* Creating Change: Sexuality, Public Policy, and Civil Rights 305–07 (John D'Emilio et al. eds., 2000).

147. See James G. Pawelski et al., The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children, 118 Pediatrics 349 (2006).

citizens.[148] Likewise, today, many courts may be reluctant to cite the widely debunked "fact" that gay people are harmful to children.[149] Yet these courts will rely upon empirical facts regarding the comparative procreative capacities of gay and nongay couples to do the same normative work of enshrining a preference for heterosexuality.[150] Because the normative judgments hover around the "thin" facts but are not integrated into them, as is the case with "thick" facts, they are less susceptible to evidentiary challenges and rational arguments by researchers and advocates.

This is not to suggest that scientists and movement advocates have no influence on "thin" fact-based adjudication; rather, their effect on judicial integration of social change will be more attenuated. Instead of exerting influence directly by exposing flaws in factual perceptions, as can be done for "thick" facts, the best that social scientists and movement advocates can do in these cases is engage in broader, society-wide efforts to discredit the negative norms associated with "thin" facts. Yet the challenges to normative judgments can begin to gain traction only after "thick" facts have been displaced. Consequently, the norm challenges may be understood best as a second-order task of social movements or social scientists to follow the first-order task of correcting misperceptions. Similarly, research and advocacy that discredit "facts" may well create space for courts to

148. Nguyen v. INS, 533 U.S. 53, 88–89 (2001) (O'Connor, J., dissenting) ("The claim that [the statute] substantially relates to the achievement of the goal of a 'real, practical relationship' thus 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.'" (citation omitted)).

149. Twenty years ago, courts were far more likely to take this position. See, e.g., Pascarella v. Pascarella, 512 A.2d 715, 717 (Pa. Super. Ct. 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)); 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.").

150. While the New York Court of Appeals did accept as legitimate a preference for heterosexual parents over different-sex couples as parents, it identified the "thin" fact of procreative capacity as an independently sufficient rationale for the law's classification. Hernandez v. Robles, 7 N.Y.3d 338, 359–60 (2006). The Washington State Supreme Court made the same move in Andersen v. King County, No. 75934-1, 2006 Wash. LEXIS 598, at *54 (Wash. July 26, 2006).

This reliance on empirical rather than contested "thick" 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 disavowed the position of disapproving of gay people as parents. Brief for the Appellant at 45, Hernandez v. Robles, 811 N.Y.S.2d 134 (App. Div. 2006) (No. 103434/2004). As shown earlier, since procreative capacity alone cannot explain the law's different treatment of gay and nongay 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. Id. at 45–46.

reconsider traditional norms that rested on those "facts," while arguments focused on challenging the norms themselves are less likely to tip a court from one position to another.

V. Theorizing Judicial Norm Avoidance

This section considers the pragmatic and theoretical conditions that lead judges to write opinions as though facts alone could possibly explain decisions about restrictions on social groups when we know that normative judgments are necessary to make sense of relevant facts.[151] Legal process legitimacy concerns,[152] legal realist outcome-oriented goals, and the peculiarities of the human mind are all, to varying degrees, consistent with a preference for fact-based adjudication.

In addition, I suggest that regardless of which theory one embraces, an overarching institutional interest in maximizing flexibility for future decisionmaking must be counted as an additional factor contributing to the judicial preference for fact-based decisions when the status of a social group is in contest. This section will consider the deep link between fact-based adjudication and this core institutional interest. Part VI will then work from this foundation to evaluate the risks and gains of displacing fact-based decisions with greater candor regarding norm choices.

A. *Fact-Based Adjudication and Theories of Judicial Review and Decisionmaking*

Legal process, legal realist, and socio-psychological theories can each largely, but not completely, explain why courts resort to a decisionmaking

---

151. For legal realist-oriented analyses, 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 (1988). Not all of these statements are critical of the underlying judgment; cf. Black, supra note 86, at 430 ("Opinions . . . may leave much to be desired . . . . But the judgments, in law and in fact, are as right and true as any that ever was uttered.").

152. 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, "only issues that can be resolved by [reasoned argument] are appropriate for judicial resolution. When courts go beyond this role, they endanger their legitimacy as legal institutions [by asserting] an unjustifiable claim to political superiority, and [acting] beyond their area of competence" (footnote omitted)); see also G. Edward White, The Path of American Jurisprudence, 124 U. Pa. 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., Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. Rev. 875, 895–96, 925–35 (2003) (arguing that process theory "highlights but does not resolve the indeterminacy problem" because "extramajoritarian mechanisms for setting the ground rules" rely on same "controversial moral judgments" that process theory is meant to avoid); Rubin, supra, at 1398–1401, 1412–13 (describing critical legal studies and law and economics critiques of legal process theory, particularly as related to claims about relationship of judicial and political branches).

approach that lacks a well-reasoned premise.[153] This subsection explores the strengths and limitations first of process theory and then, more briefly, of legal realist and socio-psychological theories as explanations for fact-based adjudication.

1. *Legal Process-Based Explanations.* — If we accept the assumption of legal process theory that courts act with awareness of their limited capacity and genuine concern for their legitimacy (either in the eyes of the general public or their elite peers), fact-based adjudication makes a good deal of sense. First, norms are more difficult to identify than facts. Second, norm choices are typically more contestable than fact choices. And third, courts are less vulnerable to criticism of overstepping if they make decisions based on relatively uncontested facts and avoid staking out positions among competing norms. I will address each point in turn, illustrating the ways that capacity and legitimacy concerns interact synergistically to reinforce the preference for facts over norms.

For courts sensitive to their limited capacity to ascertain social trends, the project of identifying norms and norm changes has an amorphous, 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 notoriously ill-suited from a legal process perspective.[154] For example, when *Brown* presented the Court with the option of evaluating either the facts or the prevailing norm related to school segregation (or both), the Court opted exclusively for the former.[155] Likewise, in *Reed v. Reed*, the Court never even addressed the normative preference for men embraced by the Idaho Supreme Court and focused only on facts regarding women's experience administering estates.[156] Instead of a heartfelt discussion of the challenges of norm identification, the Court favored a quick, lean reference to established facts.

The focus on judicial capacity limitations triggers concerns not only about identifying norms at a general level, but also about the challenges of reaching agreement on a norm's precise contours. Was the norm underlying *Brown* the understanding that differences between African

153. See infra Parts V.A.1 & V.A.2.

154. Justice Scalia made much of this judicial capacity issue in his *Roper v. Simmons* dissent, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting). For further discussion of this critique, see infra text accompanying notes 169–171.

The development and use of juries could be said to reinforce this point, even with their focus on adjudicative rather than legislative facts, 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 fact that the use of juries has dropped off dramatically might be read to suggest that courts have become more adept at assessing norms. See generally William L. Dwyer, In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles and Future in American Democracy (2001).

155. See supra text accompanying notes 81–86.

156. See supra text accompanying notes 93–96.

Americans and whites in public education were irrelevant? Or was it a commitment to the irrelevance of racial differences across all races and contexts? If the norm related specifically to changed views of African Americans, then did the new norm reflect a belief that African Americans and whites had equal capacities? Or did it reflect a belief that real differences existed but should not be reinforced by law? Even to the extent individual justices believed they had properly identified the norm, law lacks the tools of anthropology or political science that might enable the (somewhat) effective measurement of one norm's popularity vis-à-vis another. Cohering on a vision of facts is a far simpler task.

Legitimacy concerns reinforce these capacity-driven intuitions in several ways. First, because facts are more measurable, more easily established, and more subject to testing and verification than norms, accepting "thick" facts that are obviously untrue risks damaging a court's credibility. If the observable evidence belies the "thick" fact that children of interracial couples are incapable of reproducing, for example, reliance on that reproductive "fact" will undermine the court's authority as factfinder.[157] Concerns with legitimacy thus not only reinforce judicial inclinations to embrace societal changes, but also pressure courts to abandon portrayals of social groups that differ substantially from broadly accepted perceptions.[158] This may be true even if the portrayal is a longstanding one

---

157. A recent case assessing the scope of maritime jurisdiction, Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14 (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 25 (quoting Thomas J. Schoenbaum, 1 Admiralty & Maritime Law 589 (4th ed. 2004)). The Court wrote:

> 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. 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 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 the Court seemed to conclude that the norms did not require mention as part of its decision to abandon one set of facts for another.

158. 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 do not have empirical support, yet the law has not transformed in ways that are more responsive to known facts. See, e.g., Bryan A. Liang, Shortcuts to "Truth": The Legal Mythology of Dying Declarations, 35 Am. Crim. L. Rev. 229, 259 (1998) (observing that "[n]one of the[ ] considerations" that support dying declaration exception to hearsay rule "rest on any relevant empirical evidence or study of the matter"). Because evidence law is a subject that tends to be accessible and of interest mainly to litigators, criminal defendants, and other parties to litigation, its factually inaccurate assumptions are less likely to become known by the general public, and are, therefore, less likely to raise doubts about judicial capacity than incorrect characterizations of social groups.

and the subject of the "new" fact is unpopular in the surrounding society.[159]

Declaration of norms raises legitimacy concerns that mirror those just discussed. Because norm shifts are not verifiable in the same ways as are changes to facts, a court that declares a norm, whether old or new, runs a greater risk of criticism that it has declared the norm incorrectly than when it relies on facts that are either uncontested or not yet widely seen as contestable. Selecting an accepted fact, whether "thick" or "thin," to stand in for its norm choice seems on the surface to be a good strategy for courts to avoid or at least minimize this problem.

Moreover, norm declarations raise potential problems regarding the court's role relative to that of the legislature. A court that explicitly rejects the dominant norm risks accusations that it has substituted its normative preferences for those of the people, a disfavored countermajoritarian move. Although courts that openly affirm dominant norms might intuitively appear to escape this problem, they run related legitimacy risks as well. If the traditional norm has been destabilized, then a court's overt embrace of it could be cast as driven not by reasoned analysis but rather by individual judges' desires to stem the tides of change. Affirmation of the popular norm might also threaten legitimacy if the court appears to be categorically accepting majoritarian preferences rather than conducting meaningful judicial review.[160] Much of the vigorous criticism directed at the Court's overt reliance on majoritarian normative preferences in *Bowers v. Hardwick*, for example, makes these points.[161] In this light, fact-based decisionmaking appears to offer a welcome escape.

---

159. If a community remained invested deeply in a traditional "thick" fact, then a court would not necessarily be compelled to embrace the "new" knowledge, even if that information 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) (Carter, J., concurring)). 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.

160. This is true even under the limited scope of rational basis review.

161. See, e.g., Anne B. Goldstein, Comment, History, Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers v. Hardwick*, 97 Yale L.J. 1073, 1096–97 (1988) (criticizing Justice White for relying on "'the presumed belief of a majority of the Georgia electorate that homosexual sodomy is immoral and unacceptable'" without "attempt[ing] to identify any harm caused by consensual adult sodomy" (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003))).

Death penalty cases can help illuminate the legal process-related risks of norm declarations because the governing Eighth Amendment doctrine, which requires that the Court measure the death penalty against the nation's "evolving standards of decency,"[162] makes norm declaration unavoidable. In the cases considered here, *Roper v. Simmons* and *Atkins v. Virginia*, dissenters and commentators advanced blistering critiques regarding the Court's capacity and legitimacy in connection with its alleged failure to discern and apply the correct norm.

In *Roper v. Simmons*, the majority declared a "national consensus against the death penalty for juveniles."[163] It hinged that declaration on "objective indicia," including "the rejection of the juvenile death penalty in the majority of the States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice."[164] The Court found, too, that social science evidence of juveniles' "diminished culpability" relative to adults reinforced this position.[165] With this approach, the Court implied that the facts, and not the Justices' personal preferences, mandated the decision.

But facts alone cannot demonstrate consensus, as the dissents illustrate (and as we know from analysis of the fact-based adjudication model). Judges must make normative judgments regarding the significance (i.e., relevance and weight) given to any particular fact. Justice O'Connor, for example, accused the majority of misreading the facts and deriving the wrong norm. The majority's facts, she wrote, "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.[166] She characterized the pace of change as "halting" rather than consistent[167] and found the majority's analysis of the culpability of juvenile offenders to "def[y] common sense."[168] Justice Scalia,

---

162. Eighth Amendment jurisprudence commands the Court to identify social norms in the form of decency standards against which particular applications of the death penalty must be weighed. See Roper v. Simmons, 543 U.S. 551, 561–63 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)) (discussing "[t]he inquiry into our society's evolving standards of decency"); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (quoting *Trop*, 356 U.S. at 101) (agreeing that Eighth Amendment claims must be judged by this standard).

163. *Roper*, 543 U.S. at 564. These indicia, the Court found, "provide sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" Id. at 567 (quoting *Atkins*, 536 U.S. at 316).

164. Id. at 564. The Court has said that enactments of legislatures are "[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 348 (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." (quoting id. at 312 (majority opinion))).

165. *Roper*, 543 U.S. at 571.

166. Id. at 588 (O'Connor, J., dissenting).

167. Id. at 597.

168. Id. at 602.

also dissenting, declared the majority's use of facts to identify a norm change to be "implausible."[169] Since the Court's earlier ruling on the issue, Justice Scalia pointed out that a "number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year-old offenders."[170] Going further, he questioned the legitimacy of the Court's decision, directly accusing the majority of deciding the case 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."[171]

A similar dynamic undergirded *Atkins v. Virginia*.[172] For the *Atkins* majority, a consensus against the use of capital punishment for people with mental retardation had emerged among "the American public, legislators, scholars, and judges."[173] Justice Scalia, in dissent, declared the majority's identification of a norm based on those sources to be "empty talk"[174] and charged that the majority had relied instead on its "*feelings* and *intuition*."[175]

While *Roper* and *Atkins* do not prove conclusively that a desire to avoid legal process-oriented criticism drives courts' preference for facts, imagine, counterfactually, that these were equal protection cases in which no norm declaration was required. Under the fact-based adjudication model, the majority could have held simply that empirical studies regarding culpability justified banning the death penalty in these contexts. In this scenario, any criticism of the majority's legitimacy or capacity to draw that conclusion from the studies first would have to show that the studies themselves did not generate the Court's conclusion, but rather that the majority had exercised its own normative judgment in evaluating them. By contrast, where norm declaration is required, as in the death penalty cases, critics do not have the burden of showing the norm choices for which the facts are standing in and can move directly to a legal process-style condemnation of the Court's norm selection.

Legal process concerns with institutional constraints thus seem, at least superficially, to provide a neat and comprehensive explanation for fact-based decisionmaking. Because fact-based reasoning places an extra barrier that must be overcome before would-be detractors can criticize a

---

169. Id. at 610 (Scalia, J., dissenting).

170. Id. at 613.

171. Id. at 617; see also Jeffrey Rosen, Juvenile Logic, New Republic, Mar. 21, 2005, at 11, 11–12 (criticizing majority's conclusion that international norms almost universally oppose application of death penalty to juveniles).

172. 536 U.S. 304 (2002).

173. Id. at 307, 316. 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.").

174. Id. at 348 (Scalia, J., dissenting).

175. Id. 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).

court's legitimacy and capacity, courts are less vulnerable to criticism of overstepping by hinging decisions on relatively uncontested facts and avoiding overt selection among competing norms.[176]

On the other hand, fact-based adjudication of contested social group cases has not fooled the critics, who typically step quickly past whatever facts the courts cite and focus instead on decisions' normative moves. To the extent the public pays attention to the Supreme Court's actions, it reacts to holdings, not reasoning.[177] Likewise, fact-based decisions have not insulated majorities from stiff challenges by those in academia, the judiciary, or the bar. Critics regularly recognize norm shifts and often rest their rebukes for those shifts on concerns about judicial capacity and legitimacy.[178] It is hard to imagine, for example, that the criticism aimed at *Brown* and *Romer* would have diminished had the Court acknowledged the decisions' normative underpinnings. In short, while legal process theory goes a long way toward explaining the attraction of fact-based adjudication, it does not provide a complete story.

2. *Explanations from Legal Realism.* — Legal realism's explanation for fact-based adjudication is far less complex than that of legal process theory. Simply put, to the extent that reliance on facts is more defensible than reliance on norms, fact-based decisions reduce pressure on courts to explain their reasoning. This, in turn, provides strong cover for outcome-oriented judges who are concerned less with fine-tuning their legal analysis than with reaching a preferred result and protecting that result from reversal on appeal.

The cover-up theory, however, also does not tell a complete story. As just noted, in controversial cases, the public pays attention to outcomes,

---

176. There is little evidence that courts actually believe themselves to be incapable of discerning norms. The Eighth Amendment cases discussed above illustrate that the conflict on the Court is not at all about whether judges are capable of discerning norms, but rather about the norms that are chosen. See supra notes 162–175 and accompanying text. Indeed, there is no shortage of cases outside the Eighth Amendment context in which courts declare norms and treat them as decisive, as shown above. The phenomenon through which fact-based decisions precede norm declarations illustrates a judicial preference for delaying explicit norm selection until the court perceives the norms have been settled, but not for avoiding such questions altogether.

177. See Erwin Chemerinsky, The Rhetoric of Constitutional Law, 100 Mich. L. Rev. 2008, 2028–30 (2002) (describing how Supreme Court decisions are usually disseminated through summaries in media reports).

178. For example, despite the Court's reliance on facts to support its decision in *Brown*, commentators, both approving and disapproving, treated the decision as evidence of a normative shift regarding the legal treatment of African Americans. Compare Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 32–34 (1959) (arguing that cases depended upon categorical judgment that segregation is inherently discriminatory and expressing reservations about that proposition), with Black, supra note 86, at 421, 424–29 (approving notion that cases depended upon determination that segregation, as implemented, violated equality guarantee). Separately, Cass Sunstein has argued that the Court often leaves underlying principles unacknowledged and instead offers decisions that are "minimalist" instead of "more deeply theorized." Sunstein, Leaving Things Undecided, supra note 18, at 63–64 (using *Romer* as example).

not reasoning. If it is inclined to believe that a judge followed his or her personal preferences, then an opinion's focus on facts will not alleviate that concern. Legal analysts and dissenters, too, look beyond the stated reasons for a ruling and, in contested cases, often conclude that judicial opinions are nothing more than poor masks for judges' ideological preferences.[179]

Under this theory, therefore, fact-based adjudication does not succeed as a strategy for insulating courts from criticisms of outcome orientation in cases involving the status of contested social groups, much like it does not insulate courts from capacity- and legitimacy-based critiques when decisions result in norm shifts.

This is not to suggest that institutional constraints and outcome-related aims have no effect on adjudicators. Judges may, at times, issue fact-based decisions precisely because those 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 since neither theory fully explains why courts embrace a decisionmaking approach that rests on a fictional premise that facts alone can resolve cases, we must consider whether the judicial impulse toward fact-oriented resolution reflects not so much an instrumental strategic choice as the limitations of the human psyche.

3. *Social Psychology and Cognitive Science.* — Cognitive science suggests that fact-based intervention neither reflects institutional constraints nor functions as a mask for result orientation, but instead corresponds to the way that human beings, including judges, change their views about social groups.[180] Most often, popular judgments about a disdained group shift when group members' successful workforce participation or societal contribution becomes widely known.[181] Only later do people become cognizant that the "new" information has reshaped their normative judgments about group members' status or capacity.[182] In other words, time often

179. See supra notes 61–69, 177–178 and accompanying text.

180. See generally Krieger, supra note 138 (arguing that discrimination is often not intentional, but emerges naturally from normal cognitive functioning); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987) (asserting that racism is often unintentional and results from socialization). Cf. Cynthia Estlund, Working Together: How Workplace Bonds Strengthen a Diverse Democracy 60–101 (2003) (addressing ways in which workplace interactions shape views of racial and gender differences).

181. For a description of the cognitive resistance to change, see Anthony Page, *Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge, 85 B.U. L. Rev. 155, 202 (2005) ("[L]earned patterns prove remarkably resistant to change. Once the unconscious has detected an initial correlation, a person will continue to behave as though the correlation exists long after it has disappeared. . . . [A] person cannot consciously articulate the reasons for his behavior." (footnotes omitted)).

182. Blasi, supra note 137, at 1279 ("[T]here is evidence that stereotype change can result from exposure to 'people who moderately disconfirm perceivers' stereotypes of their group.' Cognitive social psychologists attribute the decline in stereotypes about Irish Americans, for example, to the effects of these processes over time." (footnote omitted)

lags between the public's awareness that the true facts about a group differ from what once was believed and changes to norms that arose from those now-debunked facts. This would suggest that some judges genuinely may believe that facts alone can explain their judgments and that fact-based adjudication is not just a strategic, instrumental mechanism for minimizing criticism or respecting individual constraints. Instead, on this theory, fact-based adjudication is a byproduct of people's ability to absorb new factual information more quickly than they can reshape their underlying conceptions to correspond to the new information.[183]

But while the "nature of social change" theory may explain why some judges cannot see that their reasoning reflects outdated norms,[184] surely courts are often well aware of their rulings' normative dimensions. To return to *Brown* and *Romer*, for a moment, there can be little question that the Court was well aware of those decisions' normative dimensions given the intensity of public opinion about race discrimination at the time of *Brown* and gay rights at the time of *Romer*.

Even if fact-based adjudication does not stem solely from the way in which the unconscious mind adapts to change, it arguably reflects the cognitive constraints that lead people to prefer fact comparisons to the psychologically more complex and anxiety-producing work of norm analysis. Because they are observable or measurable, as noted earlier, facts appear relatively easier to compare and contrast. Norms, on the other hand, are less than ideal comparators because of their amorphous, if not incommensurable, nature. The preference for fact-based adjudication can thus be traced to the greater human capacity for factual comparisons as opposed to norm comparisons.

The power of this theory, however, rests partly on our being unaware of our cognitive preferences. Yet a significant body of cognitive psychological literature focuses on developing ways to expedite the revelation of biases and minimize their effect on decisionmaking.[185] In setting out the

---

(quoting Ziva Kunda, Social Cognition: Making Sense of People 390 (1990))). *Brown* arguably illustrates how the Justices are subject to this phenomenon. See Brown v. Bd. of Educ., 347 U.S. 483, 489–90 (1954) (observing that stereotypes about African Americans at time of *Plessy v. Ferguson* existed in large part because laws forbade their education, while now, "many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world" (footnote omitted)).

183. See Blasi, supra note 137, at 1256–57 ("If we store social categories in our heads by means of prototypes or exemplars rather than statistics, then our basic cognitive mechanisms not only predispose us to stereotypes . . . but also limit the potentially curative effect of information.").

184. In *Nguyen*, for example, the majority expressed seemingly authentic disbelief at being called sexist by the dissent. Nguyen v. INS, 533 U.S. 53, 73 (2001). Although one could argue that the majority was willfully ignoring the dissent's point, I read the majority's response as failing to take issue with the dissent's claim of sex-based bias because it simply does not grasp or find credible the dissent's point. Cf. Page, supra note 181, at 229–35 (describing common lack of self-awareness with regard to reliance upon stereotypes).

185. See, e.g., Jerry Kang, Trojan Horses of Race, 118 Harv. L. Rev. 1489, 1507–14 (2005) (discussing various ways psychologists measure implicit biases).

many ways in which cognitive processes shape our reactions to information, this work reinforces the deep flaw in the premise that facts alone can decide cases. Thus, while resorting to facts may be a natural instinct, research suggests that we should, in effect, know better than to continue to accept the widespread use of fact-based adjudication.

B. *Fact-Based Adjudication in the Service of Institutional Interest: A Methodology That Preserves Judicial Flexibility*

While each of the theories just discussed helps explain the operation of fact-based adjudication, a theory focusing on the courts' institutional interest in preserving flexibility for future decisionmaking fills in some of the gaps noted above.[186] This theory claims that avoiding norm declarations where the status of a social group is contested minimizes the risk of having to reverse course in later cases as the dominant norm evolves or settles.[187] Because norms typically express views about a social group's status or capacity that extend beyond the confines of an individual case, courts must either follow or distinguish between them when deciding cases involving that group's members. But, especially where norms are in flux, a court might want to reject a norm in one context, but not necessarily in another. Focusing on the facts presents an attractive solution in these contexts because a fact-intensive decision can curtail the reach of stare decisis considerations.[188]

Decisions that openly declare norm shifts thus not only expose courts to criticism for inappropriate and inept interventions in cultural debates, but also limit judicial freedom to maneuver in future cases. Consider *Reed v. Reed*, discussed above, in which the Court never mentioned its rejection of the Idaho Supreme Court's normative judgment that natural differences[189] between men and women justified an estate administration law subordinating wives to husbands.[190] If the U.S. Supreme Court had unraveled norm from fact and overtly declared the natural domesticity norm to be impermissible, the Court would have disabled, or at least severely limited, the use of "natural" sex differences to justify government action in other cases. This is a position the Court was, and still remains,

---

186. See supra notes 177–179.

187. Cf. Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 304 (1979) (observing that judicial restraint can best be explained by "the relationships among courts over time" and desirability of practices that prevent early courts from "t[ying] the hands of subsequent ones").

188. The literature on judicial minimalism illustrates the existence of this approach, but does not explore the particular incentives courts have to make minimalist decisions in the context considered here. See, e.g., Sunstein, Leavings Things Undecided, supra note 18, at 89–101 (arguing that Court should avoid "broad ruling[s]" on several contentious issues, including marriage for same-sex couples).

189. Reed v. Reed, 465 P.2d 635, 638 (Idaho 1970).

190. 404 U.S. 71, 76–77 (1971).

unwilling to take.[191] Thus, apart from generating legal process concerns, overt rejection of traditional judgments about women's natural inclinations would create a new doctrinal barrier to sex-based rules. While courts could surmount the barrier, they would need to address it in all future cases. By contrast, it would be relatively easy for a future court to isolate and distinguish a fact-based decision as a context-specific judgment.

Even rejecting "natural" differences in the narrow context of sex-based estate administration rules would have been risky compared to an analysis hinged on "thin" facts. The recognition of a norm change, however limited, would trigger the question in future cases whether "natural" differences could ever justify sex-based distinctions.[192] By not acknowledging its rejection of the norm, the Court enabled itself and lower courts to deal with the relevance of "natural" differences on a case by case basis.

As illustrated by the *Reed* counterfactual described above, adjudicators who reject a group-related norm in one context make it difficult, at best, to resuscitate that norm in a related case. In this respect, majoritarian bodies are not similarly situated because they do not face the pressure for consistency imposed by stare decisis principles. As Justice Scalia observed in *Lawrence*,

> [T]he 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 homosex-

---

191. See, e.g., Nguyen v. INS, 533 U.S. 53, 73 (2001) (acknowledging that "[t]he difference between men and women in relation to the birth process is a real one"); Michael M. v. Superior Court, 450 U.S. 464, 471–73 (1981) (upholding statute that subjected only men to criminal liability for statutory rape).

192. While the way in which a court articulates its standard for reviewing certain classifications also can be more or less constraining (i.e., a norm of skepticism via heightened scrutiny will be more limiting to future decisionmaking than a norm that social group-based distinctions can survive if they are reasonable), my focus here is on whether courts constrain themselves by the way they evaluate government interests, whatever the applicable standard of review. As we have seen, whether under heightened or rational basis review, the Court has tended toward fact-based decisions whenever a particular normative judgment about a social group appeared to be in contest, and, even under the highest levels of review, government reliance on the protected trait sometimes is sustained. See supra note 110 and accompanying text. Further, as Justice Scalia pointed out, the explicit rejection of the moral disapproval norm in *Lawrence* will make it far more difficult for the Court to resuscitate that norm to sustain a distinction based on sexual orientation in a future case, notwithstanding that rational basis review may be applied. Lawrence v. Texas, 539 U.S. 558, 589–90 (2003) (Scalia, J., dissenting). While we may see efforts to cabin *Lawrence* and reassert acceptance of the moral disapproval norm, my guess is that we are more likely to see decisions relying either on other normative judgments about gay people or on fact-based distinctions, such as those related to the procreative capacity of same- and different-sex couples. The recent opinions by state courts in marriage cases bear this out, with morality left largely unmentioned while procreative facts and normative support for tradition serve as widely accepted justifications. See supra notes 49, 150 and accompanying text.

> ual 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 . . . .[193]

Whether or not he was correct that the majority had impeded the Court's ability to sustain sexual orientation discrimination in marriage or the military by rejecting the purported immorality of gay people as a legitimate rationale for government action,[194] Justice Scalia's broader point regarding the limiting effect of norm declarations is well taken.[195]

The institutional interest theory thus shows how the stare decisis regime encourages fact-based decisions in contexts where norms are unstable. Notably, this theory has force whether one subscribes to the legal process, legal realist, or cognitive psychological view of adjudication (or all three, for that matter). A decisionmaking approach that discourages sweeping rulings can be understood, for example, to reflect a self-consciously narrow view of judicial power, consistent with legal process theory's concerns about the limited capacity of courts. Limited decisions also protect courts from legitimacy-threatening accusations that they have overstepped their bounds.

An approach geared toward maximizing flexibility for future decisionmaking likewise fits with the legal realist view that courts are primarily interested in reaching preferred outcomes. Indeed, the flexibility highlighted by the institutional interest theory dovetails precisely with the interests identified by legal realists. By rendering decisions that focus on facts rather than norms, courts face reduced pressure to recognize and reconcile conflicting treatments of the same group across contexts.[196]

Yet the institutional interest theory has several potential weaknesses that also warrant consideration. For one, it does not appear to explain why courts would ever declare norms, if to do so would restrict power. The theory also arguably overstates the restrictive effect of norm declarations on future exercises of judicial power. The Supreme Court has regularly distinguished away stated normative commitments to the equal treatment of social groups, for example, on the ground that specific facts related to the group supported the imposition of legal burdens in a par-

---

193. 539 U.S. at 604 (Scalia, J., dissenting).

194. Id. at 589–90.

195. Id. at 605 ("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.").

196. The operation of fact-based adjudication and the institutional interest theory thus add a new layer to our understanding of judicial review. Typically, legal process, legal realist, and cognitive psychological approaches to adjudication are seen as having little in common. See, e.g., Jeffrey W. Stempel, Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism, 19 Ohio St. J. on Disp. Resol. 757, 832–40 (2004) (discussing critical legal studies, Hart and Sacks's legal process approach, and cognitive theory approaches as different intellectual trends). To the extent these approaches are all operationalized via fact-based adjudication, however, their shared preference to preserve as much future decisionmaking authority as possible becomes legible.

ticular context.[197] Conversely, one could argue that fact-based decisionmaking reduces rather than preserves judicial power because these types of decisions can be read more narrowly than norm declarations.

As to the first point, the two-step dynamic set out above in which fact-based decisions lay the groundwork for later norm declarations[198] shows that norm declarations tend to restrict future decisionmaking only when a group's status is in flux. Once there is general agreement regarding a social group, courts no longer need the flexibility provided by fact-based adjudication to sustain burdens in some contexts but not others. The institutional interest theory thus corresponds to and arguably predicts the judicial practice of dropping a relatively light anchor that allows for ease of movement in the future when the normative sea is unfamiliar or contested. Over time, through the accretion of fact-based decisions, courts gain greater experience with the terrain related to the social group in question and become better able to gauge the likely effects of a norm declaration. At that point, but not before, courts may become sufficiently confident to drop the heavier anchor by stating the underlying norm. Of course, additional interests, such as a concern with legitimacy, may delay or inhibit norm declarations even when a court otherwise might be ready to drop anchor.

In response to the second criticism that the theory overstates the risks of norm declaration, the point is not that norm declarations absolutely foreclose courts from deciding cases that go against the stated norm. Rather, decisions that distinguish the stated norm risk being criticized for their overt conflict with prior norm-declaring decisions. Arguable inconsistencies in fact-based decisions, on the other hand, are more easily distinguished on context alone. The point behind the institutional interest theory is thus not that norm declarations are absolutely restrictive, but rather that they restrict future decisionmaking to a greater degree than fact-based decisions.

The third critique maintains that the institutional interest theory misreads fact-based adjudication when it assumes that reliance on facts expands judicial power. On this view, fact-based decisions should be understood to limit judicial power precisely because they do not hold themselves out as covering ground much beyond the case before the court. The intuitive appeal of this view, however, gives way when we recall that all decisions regarding burdens on social groups endorse norms regarding group members. Fact-based decisionmaking simply covers the underlying norm choices, thereby enabling courts to embrace traditional

197. See, e.g., Nguyen v. INS, 533 U.S. 53, 62–68 (2001) (discussing government interest in requiring fathers to take more steps than mothers to have their citizenship conferred upon their children); cf. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (distinguishing restrictions on gay people in marriage and military from restrictions related to sexual intimacy by implying that greater factual support exists for state interests related to national security and marriage).

198. See supra Part II.B.

group-related norms in one case without explaining away the related decisions that, in effect, reject the same norms. In this sense, fact-based adjudication helps secure and preserve the decisionmaker's power to change the analytic rules applicable to a social group without acknowledging or explaining those changes.

The institutional interest theory thus helps supplement the decisionmaking theories advanced by legal process, legal realist, and socio-psychological schools of thought as an account for the strong pull of fact-based adjudication. It helps, as well, to set a foundation for the evaluation of alternate models in Part VI.

VI. Alternatives to Fact-Based Adjudication

The flawed premise of fact-based adjudication—that norms can remain outside the decisionmaking process—begs the question whether greater candor in adjudication might be better.[199] As the discussion below shows, candor is double edged; it brings the appeal of transparency, but it also brings the challenges associated with having courts identify and declare norms. Yet the current carte blanche for fact-based adjudication has a double edge as well: it frees courts from explaining how their treatment of a social group in one case relates to different and contradictory treatment of the same group in another.

This section suggests that a middle-ground approach might soften these edges while remaining realistic about the entrenched nature of the current fact-oriented model and the unduly high costs of a full candor requirement. Under this approach, decisions regarding social groups that run contrary to treatment of group members in other case law and legislation would both acknowledge and distinguish the conflicting decisions.[200] Courts would not be required, however, to state and defend their norm choices. Instead, this approach would tolerate fact-based explanations for decisions that sustain apparently conflicting rules regarding group members, reflecting both the institutional interests identified in Part V and the concern with the particularly elevated costs of candor in social group litigation that I develop below. After canvassing the costs and benefits of candor in decisionmaking as a general matter, I consider how a candor-based decisionmaking model might operate and then apply

---

199. I discuss alternate definitions of candor in infra notes 205–206 and accompanying text. My aim here is to explore alternate expository modes of decisionmaking rather than to cast aspersion on courts that embrace fact-based adjudication. Within legal scholarship, this type of analysis is typically situated in considerations of candor, which is why I use that term here even though it does not fit precisely with the analysis presented.

200. The approach is developed at greater length in infra notes 222–223 and accompanying text. This proposal has close parallels to the way in which courts are expected to decide cases generally—by analogizing to and distinguishing related precedent. As shown earlier, however, the fact-based adjudication model frees courts to avoid engaging with cases that reflect conflicting views regarding the ways those same facts affect group members' status and capacity.

the model to the marriage cases with which the Article began. I conclude that limited modification to the current regime could curtail, although not resolve fully, some of the problems associated with approaches at either extreme.

A. *The Costs and Benefits of Candor*

The literature on judicial candor is itself in conflict regarding the desirability of candor. At one end is the argument that candor is always, or almost always, preferable.[201] 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.[202] On the other side is the argument that candor, in the sense of introspection by judges regarding the genuine reasons for their decisions, actually might harm the adjudication process by weakening judges' internalized sense that they are constrained from following personal preferences.[203] In between these positions are pragmatic, instrumental arguments suggesting that political and

---

201. See generally Jerome Frank, Law and the Modern Mind (1930) (arguing that judges should be understood as having biases and prejudices that influence their decisions); Martin Shapiro, Law and Politics in the Supreme Court 251–52 (1964) (describing "a reputation for candor" as Supreme Court's "precious political asset"); Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307 (1995) (proposing modified candor requirement); Robert A. Leflar, Honest Judicial Opinions, 74 Nw. U. L. Rev. 721 (1979) (arguing that judges should reveal actual grounds of their decisions); Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich. L. Rev. 827 (1988) (same); David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731 (1987) [hereinafter Shapiro, Judicial Candor] (asserting that lack of candor results in public distrust of judges and prevents public debate over true reasons motivating decisions).

202. Henry P. Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 25 (1979) (maintaining that judges are governed by a duty to state their justifications such that "[i]f justifications cannot be stated in the opinion, they should not be relied upon in entering the judgment" and disagreeing with other scholars' acceptance of the need for "occasional sacrifice" of this principle); cf. Calabresi, supra note 7, at 178–81 (advocating candor but acknowledging that judges experience different constraints than scholars, while also recognizing that "impossible perfection" in statements of controlling principles is not required); Chad M. Oldfather, Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide, 94 Geo. L.J. 121, 155–60 (2006) (discussing literature on judicial candor within broader analysis of courts' adjudicative responsibilities).

203. See generally Scott Altman, Beyond Candor, 89 Mich. L. Rev. 296 (1990) (arguing that misguided judges make better decisions than judges with clear understanding); Kathleen M. Sullivan, The Candor of Justice Marshall, 6 Harv. BlackLetter L.J. 83 (1989) (exploring Justice Marshall's influence in bringing candor to the Court); Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 Stan. L. Rev. 213, 249–57 (1983) (critiquing Calabresi's call for judicial candor). For a critique of Altman's argument, see Gail Heriot, Way Beyond Candor, 89 Mich. L. Rev. 1945, 1945–49 (1991).

other constraints render candor, even if preferable as a matter of principle, an unrealistic aim.[204]

In evaluating the desirability of a candor requirement for social group litigation, I work with a relatively strong definition of candor. While discussions of candor all focus on "the declarant's state of mind,"[205] much of the literature expresses the "weak" view that a candor requirement would be satisfied so long as a judge does not intend to deceive others.[206] Self-deception is treated as a separate issue. The analysis here, however, considers the effects of a strong candor requirement for courts to articulate all group-related norms implicated by a decision, whether they are embedded in "thick" facts or associated with "thin" facts. This would not only foreclose deliberate deception of others, but also inhibit self-deception by courts lulled into treating facts as sufficient to explain judgments. Through this approach, I thus mean to reach not only the cases in which courts deliberately avoid addressing norms, but also those in which norms are deeply naturalized and seen as inseparable from fact, as in decisions based on the "natural" ordering of race or sex.

This strong conception of candor assumes that judges are capable of stating the reasons that underlie their decisions, even if they ordinarily avoid doing so. Although I observed earlier that norms are often more difficult to identify than facts and may not be susceptible to precise description,[207] I expect nonetheless that courts could, if pressed, articulate important features of whatever norm governs. Dissenting opinions' regular exposure and criticism of norms allegedly ignored by the majority reinforce that the hurdle of norm identification is not insuperable.[208] Indeed, even the literature that counsels against a move toward greater candor expects that judges would be able to be more open about the reasons for their decisions if necessary.

By reining in the relatively unfettered discretion that comes with fact-based adjudication, a strong candor requirement could potentially bring significant benefits to social group litigation beyond satisfying a moral or intuitive preference for honesty.[209] First, greater transparency regarding decisions' normative underpinnings likely would result in more fully the-

---

204. See Shapiro, Judicial Candor, supra note 201, at 742.

205. Id. at 732.

206. See Altman, supra note 203, at 297 (suggesting 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 analysis of value of judicial candor). Earlier literature, such as that of the legal realists, treated the two as more closely aligned. See Altman, supra note 203, at 297–98 ("Realists urged judges to recognize and to disclose the motivations that the judges deny . . . .").

207. See supra Part V.A.1.

208. See supra Part I.B; see also supra note 176.

209. Cf. Sissela Bok, Lying: Moral Choice in Public and Private Life (1978) (considering relationship between lying and morality and effects of lying on individuals and society).

orized decisions. Because the current fact-based model enables courts to sidestep stare decisis constraints, the case law regarding a given social group often appears to have a random quality, with no overarching theory to explain why burdens are sustained in some areas but not in others. Courts sustain marriage rules that discriminate against lesbians and gay men, for example, without reconciling the rest of their jurisprudence that treats sexual orientation as a nonmaterial difference between people.[210] Courts likewise often treat physical differences related to sex and intellectual differences related to mental retardation as significant in some cases and not in others with a cursory explanation, at best, for the different treatment of the same characteristics.[211] A candor requirement would pressure courts to recognize and justify these types of divergent trends in the treatment of social groups from one case to another. To the extent

---

210. Compare Hernandez v. Robles, 7 N.Y.3d 338, 359 (2006) (dismissing state constitutional claim to same-sex marriage because "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like"), with In re Jacob, 660 N.E.2d 397, 398–99 (N.Y. 1995) (holding that biological mother's partner can become child's second parent through adoption because adoptions would be "fully consistent with the adoption statute" and in "child's best interest"). For the same inconsistency in Indiana law, compare In re Infant Girl W., 845 N.E.2d 229, 243 (Ind. Ct. App. 2006) (holding that Indiana Adoption Act permits any unmarried couple, regardless of sexual orientation, to file joint petition for adoption), transfer denied, In re Adoption of M.W., 851 N.E.2d 961 (Ind. 2006), with Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) ("The State . . . may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse.").

211. Compare City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449–50 (1985) ("It is true that [the mentally retarded] suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. . . . [R]equiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . ."), with Heller v. Doe ex rel. Doe, 509 U.S. 312, 321–24 (1993) (finding that differences between people with mental retardation and mental illness justify government's different treatment of two). Justice Souter pointed out this contradiction in his dissent in *Heller*, arguing that "Kentucky is being allowed to draw a distinction that is difficult to see as resting on anything other than the stereotypical assumption that the retarded are 'perpetual children,' an assumption that has historically been taken to justify the disrespect and 'grotesque mistreatment' to which the retarded have been subjected." Id. (Souter, J., dissenting) (citing *Cleburne*, 473 U.S. at 454). In the context of gender differences, compare United States. v. Virginia, 518 U.S. 515, 541 (1996) ("State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'" (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 728, 725 (1982))), with Nguyen v. INS, 533 U.S. 53, 66 (2001) ("Facts demonstrate the critical importance of the Government's interest in ensuring some opportunity for a tie between citizen father and foreign born child which is a reasonable substitute for the opportunity manifest between mother and child at the time of birth.").

that theoretical consistency is desirable,[212] a candor requirement would also bring us closer to that goal.

Insistence on greater transparency might function as well to limit judges' otherwise relatively unconstrained ability to exercise result-oriented preferences. One can argue that this constraint is more imagined than real, in that courts could offer "acceptable" norms to mask the "unacceptable" ones that actually inform a decision just as they cite selectively to facts. But in some cases, drumming up a passable norm to justify burdening a particular social group may be either too difficult or not worth the risk to judicial credibility. For example, as suggested in Part I.B, the Court in *Nguyen* might have hesitated to sustain the immigration rule's preference for mothers over fathers had it faced pressure to identify and defend the contestable normative link between childbirth and parenting abilities.[213]

Openness regarding norms also could enable litigation to proceed with greater precision. Under current practice, advocates faced with "thin" factual rationales for discrimination have to first establish that the "thin" fact stands in for a negative norm and then challenge the norm's legitimacy. A candor requirement would put the norms out in the open, allowing future litigation to focus specifically on the contested norm. This openness could also provide social change advocates with greater clarity regarding the norms that are impeding litigation success, which in turn could prompt more targeted social change efforts.

On the other hand, the arguable gains from candor would come at the arguably higher cost of reducing the prospects for judicial responsiveness to societal change and diminishing the role of majoritarian bodies in norm selection. With respect to the integration of social change, greater candor regarding norms would likely inhibit courts in two interrelated ways. First, while "thick" facts can be discredited as inaccurate, norms and intuitions are not typically treated as falsifiable. As a result, they are not similarly susceptible to disproof or to arguments that reliance on them is unreasonable or illogical. Explicitly norm-based decisions, in other words, would be less vulnerable than fact-based decisions to criticism on grounds of inaccuracy. For example, the "thick" fact that gay people are less able parents than nongay people can be challenged with an array of relevant studies. While challenges to "thin" facts are more difficult, for the reasons discussed above, even "thin" fact-based claims can be met with arguments that the same "thin" facts do not justify legal burdens on the targeted group in other settings. For example, reliance on the fact that same-sex couples cannot procreate without third-party assistance as a rationale for excluding same-sex couples from marriage or adoption can be challenged as illogical when the same fact is not used to

212. But see Sunstein, Leaving Things Undecided, supra note 18, at 20–21 (questioning benefits of fully theorized decisions).

213. See supra text accompanying notes 65–67.

justify different treatment of gay people elsewhere in the law, including in family law. To be sure, an argument that reliance on "thin" facts is unreasonable is easier to make than to win, given the great deference with which rational basis review is often applied.[214] But even greater deference is accorded to intuitions, which are typically not expected to be either as logical or as consistently deployed as facts. Ironically, then, lack of candor regarding norms may create greater opportunities than candid, norm-declaring decisions for successful, or at least powerful, challenges to restrictions on group members' rights.[215]

To the extent courts are concerned with legitimacy and capacity constraints, a regime requiring discussion of norm choices might also lead to a decrease in decisions embracing societal change. In part, courts concerned with institutional constraints may fear that by acknowledging their role in norm selection, they will heighten their exposure to charges of judicial activism, particularly so when their decisions result in norm shifts. These charges would be misplaced, of course, since all decisionmaking regarding social groups involves courts in norm selection. But for courts sensitive to public perceptions, a requirement of candor regarding norms will almost certainly chill any inclination to upset the status quo.[216]

Moreover, as noted earlier, reaching consensus on the specifics of a norm governing treatment of a social group whose status is in flux may not be possible either because of substantive or rhetorical disagreement regarding the characterization of that norm. Consequently, a court poised to rule for a social group in a fact-based decision that elides these difficulties might opt to sustain the status quo if norm identification is required. While decisions that overtly reject negative norms about a social group might be ideal both because they are transparent and because they create greater possibilities for consistency in the treatment of social group members, some judicial absorption of societal change, even through a narrow, fact-based ruling, is arguably preferable to having courts deliberately insulate themselves from the surrounding society to ward off accusations of judicial overstepping.[217]

---

214. See, e.g., *Heller*, 509 U.S. at 320 (holding that burden is on one attacking legislative enactment to negate every conceivable basis that might support law, regardless of whether basis has foundation in legislative record); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 820 (11th Cir. 2004) (applying *Heller*'s articulation of rational basis standard in adjudication of challenge to Florida's ban on adoption by gay prospective parents), reh'g en banc denied, 377 F.3d 1275 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005).

215. 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.

216. Although, as noted earlier, the public tends to focus on outcomes, not reasoning, courts' explanations for their norm choices are more likely to seep into the public outcry than courts' fact-based analyses.

217. The separate question whether courts should insulate themselves from societal change, at least until the point that new norms have been well settled by nonjudicial actors, is of course an important one, but it lies beyond this Article's inquiry, which focuses on the

From an institutional design standpoint, a candor requirement also may undesirably limit extrajudicial conversation regarding norms related to social groups by both the public and other branches of government. A judicial norm declaration necessarily limits the scope of future legislative activity because it specifically bars government action based on certain views of group members.[218] Fact-based decisions, by contrast, leave greater room for public debate and legislative action to engage with and shape the governing norms regarding a group. Simply put, norm declaration closes doors more definitively than does norm avoidance. Much like common law decisions are more easily adjustable than constitutional ones (although neither are fixed absolutely),[219] fact-based decisions allow greater room for future movement than norm-based decisions. In this way, when making fact-based decisions, particularly in contested normative arenas, courts leave open the possibility that norms will emerge with greater clarity (and popular acceptance) from other, more representative bodies.

Related to this point is the idea that, as a society, our commitment to pluralism extends to norms regarding social groups.[220] A certain amount

---

actual practices of courts in response to social change-based claims. For debate on this point, see, e.g., Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 7–18 (1996) (questioning judiciary's countermajoritarian reputation); Mark D. Rosen, Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: *Lawrence*, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires, 90 Minn. L. Rev. 915, 928 (2006) ("[W]hen the Court seeks to situate itself at the vanguard of cultural change, it can interrupt the process by which society arrives at a consensus on its own . . . . Constitutionalizing a matter, and thereby removing it from democratic politics, also can serve to radicalize opponents."); Keith E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses, 80 N.C. L. Rev. 773, 827–44 (2002) (discussing interaction between judicial actors and popular opinion); Paul Finkelman, Civil Rights in Historical Context: In Defense of *Brown*, 118 Harv. L. Rev. 973 *passim* (2005) (book review) (debating judicial insulation in context of *Brown v. Board of Education*).

218. Judicial affirmation of a traditional norm also raises political risks for a majoritarian legislature that is inclined to reject that norm by strengthening the claim of the traditional norm's defenders that the legislature intends to act based on personal preferences rather than in response to 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.

219. See Kaye, supra note 8, at 16 ("Outside the area of constitutional adjudication, state court decisions 'are subject to overrule or alteration by ordinary statute.' . . . 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." (quoting Ely, supra note 133, at 4)).

220. See, e.g., Brown-Nagin, supra note 142, at 1466 (describing American democracy as "pluralist in character"); James Jennings, The International Convention on the Elimination of All Forms of Racial Discrimination: Implications for Challenging Racial Hierarchy, 40 How. L.J. 597, 613 (1997) (observing that "responses to racial discrimination in the United States reflect a strong commitment to the idea of pluralism"); Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 Minn. L. Rev. 269, 366 n.529 (1992) (linking "America's vibrant cultural pluralism" to "core principles of representative government").

of muddiness in that regard reflects not only the instrumental difficulty inherent in norm identification, but also the desirability of preserving and encouraging diverse perspectives on social groups and other topics. Pressure to articulate clear, definitive norms, even in adjudication, would run contrary to this overarching political and jurisprudential commitment.

Given these costs, a strict candor requirement is ill-suited to replace the fact-based adjudication model, even with that model's serious flaws.[221] The question then is whether another approach might bring to adjudication some of the benefits of the candor requirement without all of its shortcomings.

B. *Candid Fact-Based Adjudication as a Decisionmaking Model*

Although fact-based adjudication appears to be the lesser of two evils relative to a full candor requirement, the question remains whether the current approach can be adjusted to constrain judges from freely disregarding connections among social group cases involving related norms.[222] This subsection offers an alternate model of candid fact-based adjudication that tries to achieve some middle ground. It then applies the model to cases involving marriage recognition claims by same-sex couples both to gauge its effectiveness and to identify potential risks and problems associated with its use.

1. *The Contours of Candid Fact-Based Adjudication.* — In a nutshell, the model proposed here would require courts to recognize the connections among cases involving the same social group, drawing from a candor model. At the same time, drawing from fact-based adjudication, the model would leave in place the current leeway for courts to reconcile or distinguish related cases by reference to facts rather than to the norms that inform the valuation of the facts. Put another way, a norm shift embodied in a decision in one case (Case A) would not require the next case involving the same social group (Case B) to make the same norm shift. However, a court deciding Case B could not elide Case A's treatment of

---

221. 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 who are sensitive to the role of norms in their decisionmaking. 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.

222. Indeed, complete and deliberate failure to wrestle with dissonant positions regarding a social group in related cases arguably amounts to duplicity rather than benign neglect. 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 75–76 (1960). Llewellyn assumes, for the most part, that precedent will be distinguished, not ignored. See id. Forcing exposure to related precedent on a consistent basis is a check, even if an imperfect one, against judicial duplicity. See id.

social group facts. Instead, if the court in Case B reaches a different conclusion than Case A about whether social group facts can justify a legal burden, the proposed model would require the court to explain the different valuation of the facts from one setting to another.

This requirement would be triggered in any instance that a court identifies facts about the social group as a reason for sustaining a legal restriction. It would also be triggered when Case A invalidates a restriction on group members, thereby indicating that no group-related facts justify imposition of legal burdens, and Case B relies on group-related facts as a basis for upholding a discriminatory rule.[223] I describe this model as requiring fact-based candor because reliance on facts is permitted, but different treatment of the same facts in similar cases must be acknowledged and defended.

2. *Implications of a Fact-Based Candor Requirement.* — Predicting the effect, if any, of the fact-based candor approach is, of course, a challenging task. Conceivably, the proposed approach, like a complete candor requirement, could dissuade some courts from rejecting traditional rationales regarding a social group because they would have to expose inconsistencies between the new holdings and prior rulings. On the other hand, like many legal rules, it may have little effect on the actual decision-making process even as it influences the way opinions are written. If, for example, a judge has always relied on a Karl Llewellyn-style situation sense[224] to distinguish one setting from another, the model's insistence on engagement with conflicting norms may alter a decision's text but not the underlying reasoning.

Likewise, we might conclude that having courts recognize and explain conflicting views regarding the same social group's status or capacity will undermine norm pluralism. Alternately, we might find that this approach strengthens and fosters pluralism by acknowledging that competing views regarding a group may both be valid. Judicial recognition of diverse views also may create additional incentives for the public and its

---

223. The converse assumption would not necessarily be true. If the court in Case A sustained a restriction based on particular facts, the court also might have had in mind additional facts about the social group that justified the burden imposed, but did not need to articulate them because the stated facts were sufficient to support the outcome.

224. That sense, although not defined specifically in Llewellyn's own work, has been well described as a "'process of thinking' that considers 'the implications of various legal rules, matched up against reasonably intricate models of social situations, and brought together in light of the force of all the claims to be made.'" Jon Hanson & David Yosifon, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture, 152 U. Pa. L. Rev. 129, 293 n.573 (2003) (quoting Todd D. Rakoff, The Implied Terms of Contracts of "Default Rules" and "Situation Sense," *in* Good Faith and Fault in Contract Law 191, 214 (Jack Beatson & Daniel Friedmann eds., 1995)). On Llewellyn's situation sense, see also Susan D. Carle, Theorizing Agency, 55 Am. U. L. Rev. 307, 373 n.347 (2005); David Charny, The New Formalism in Contract, 66 U. Chi. L. Rev. 842, 842–46 (1999). For an extensive critique, see Hanson & Yosifon, supra, at 293–99.

representatives to debate the relative merits of conflicting positions in extrajudicial settings.

Because the marriage cases brought by same-sex couples make claims based on societal change and arise against a backdrop of other decisions and legislation involving the social group of lesbians and gay men, they can usefully illuminate the fact-based candor model's effects on and implications for adjudication. In particular, the cases let us test how evaluation of the "procreation" rationale for exclusionary marriage laws might be affected by a modified candor requirement.[225] This rationale, which has been accepted by numerous courts as discussed earlier, holds that marriage may be limited to different-sex couples because those couples can, in theory if not always in reality, procreate without third-party assistance.[226]

---

225. For examples of state rationales that implicate procreation, see, e.g., Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) ("The department posits three legislative rationales for prohibiting same-sex couples from marrying: (1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing . . . define[d] as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."); Baker v. State, 744 A.2d 864, 881 (Vt. 1999) ("[W]e must identify the governmental purpose or purposes to be served by the statutory classification. The principal purpose the State advances in support of the excluding [sic] same-sex couples from the legal benefits of marriage is the government's interest in 'furthering the link between procreation and child rearing.'").

226. Courts often characterize the procreation rationale as reflecting the essence of marriage rather than as expressing a view about the social group of gay people. When the procreation rationale is set against the background of marriage case law and statutes, however, it becomes clear that the law of marriage does not now, and has never, treated procreation as an essential element. See Laurence Drew Borten, Note, Sex, Procreation, and the State Interest in Marriage, 102 Colum. L. Rev. 1089, 1108–19 (2002).

Several courts have 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. See, e.g., Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) (opining that couples who invest time and money in adoption or assisted reproduction do not need marriage because they already have "high level of financial and emotional commitment" toward their children, while "procreation by 'natural' reproduction may occur without any thought for the future"); Hernandez v. Robles, 7 N.Y.3d 338, 359 (2006) (concluding that risk of accidental procreation justifies providing marriage to different-sex couples, but not same-sex couples, to ensure children's welfare).

Today, economic interdependence is widely acknowledged as the primary function of civil marriage. In fact, civil marriage has always been an economic relationship between the spouses, although during coverture, the relationship entailed the merger of a married woman's legal identity into the identity of her husband. Emotional interdependence and childrearing are also occasionally recognized as important in the public discourse and, at times, in domestic relations jurisprudence. Procreation, on the other hand, has been specifically disavowed as a marital requirement, as indicated by marriage eligibility rules, annulment law, and constitutional protections for a woman's right to terminate a pregnancy, even absent her husband's consent. And, of course, procreation outside of marriage has been given strong constitutional protection. Borten, supra, at 1108–19; see also Suzanne B. Goldberg, A Historical Guide to the Future of Marriage for Same-Sex Couples, 15 Colum. J. Gender & L. 249, 252 (2006).

The fact-based adjudication model allows courts to hold out procreation as a stand-alone rationale, notwithstanding that the "thin" biological facts regarding procreative capacity cannot, without more, explain the law's preference for heterosexual relationships over same-sex partnerships.[227] The proposed model likewise would not require courts to define the norms for which the procreation rationale stands in. Courts also would not have to provide a normative account for why the facts of procreation would be significant with respect to marriage even as they are not relied on to justify distinctions based on sexual orientation in other contexts.[228] The proposed model would, however, require a court that intended to cite these "thin" facts as a basis for upholding the marriage law to acknowledge that procreative capacity had not previously been found to support distinctions between gay and nongay adults generally, or parents in particular.[229]

These past rulings would not automatically preclude the court from relying on procreative capacity to justify the marriage exclusion, but they would require a court to explain, whether by reference to facts or norms, the relevance of the different capacity for procreation of same- and different-sex couples to marriage given its irrelevance to other contexts.[230]

---

227. It is difficult to take seriously, in light of common sense as well as the legislative framework and case law concerning marriage, the suggestion that the way in which egg and sperm meet is more fundamental to marriage than the lifetime of parenting responsibilities of the adult partners after childbirth. Even if we do treat the claim, arguendo, as a serious one, the biological facts of procreation do not themselves explain the limitation of marriage to couples who may be able to procreate together without third-party assistance. Instead, this type of procreative capacity must be judged to be "better" than or preferable to other techniques for having children (or, alternately, worse for children, as the "accidental reproduction" argument suggests) if it is to be treated as a legitimate reason to exclude from marriage a subset of otherwise eligible adult couples.

228. See infra note 235 and accompanying text.

229. For example, in cases involving custody or visitation, courts in most states have held that a parent's sexual orientation matters only when there is evidence that the parent's behavior is causing harm to the children. See Patricia M. Logue, The Facts of Life for Gay and Lesbian Parents: Compelling Equal Treatment Under the Law, Fam. Advoc., Fall 2002, at 43, 44 ("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.").

230. As discussed in supra note 226, some courts have tried to do this by arguing that heterosexuals are less likely to be responsible parents because they are more likely to procreate accidentally. This argument fails standard equal protection review, which asks not whether there is good reason to include the protected group but rather whether a legitimate reason exists to exclude the burdened group, but this error in legal reasoning is outside our scope here. For further discussion of this type of flawed equal protection analysis, see generally Goldberg, Equality Without Tiers, supra note 106.

A court alternately might determine, as some courts have, that the reason for the different treatment is not procreative capacity per se, but rather the preferable childrearing environment provided by heterosexual couples. Again, however, the court would have to explain why the household headed by a heterosexual couple is preferable to the household headed by a lesbian or gay couple when, in the context of custody and

Objections might be made that the proposed model would do little more than require courts to gesture generally at why a fact like procreative capacity means something different for the status of gay people in relation to marriage than it does in many other contexts. Pointing to superficial differences between marriage and other contexts would arguably be an easy way to escape the model's insistence that different treatment of the same facts be explained. But, in the model's defense, the insistence that courts acknowledge the variable treatment of the same social group-related facts provides more discipline than the current fact-based adjudication approach, which permits the different treatment to go entirely unmentioned. Moreover, in some cases, forcing exposure even of the fact-related reasoning potentially may cause courts to rethink their analysis.

Another objection to the proposal would be that even an insistence on minimal candor will tip courts away from embracing "new" facts about social groups if they have to show that their use of a fact deviates from previous uses. In practice, however, the model's proposal that courts candidly acknowledge their different treatment of social-group facts parallels the way that courts typically highlight "new" understandings of facts when tipping from one view of a social group's capacity to another. If anything, the proposed model would intensify scrutiny of courts that adhere to "old" facts about a social group that have not been found sufficient to justify legal burdens on group members in related contexts.

C. *Candid Fact-Based Adjudication and Institutional Design*

The candid fact-based adjudication model also may bear on a separate set of concerns regarding the judiciary's role as a nonmajoritarian body engaged in adjudicating cases involving profound social conflicts. Often, this concern is advanced through a "leave it to the legislature" argument, which maintains that courts should not displace a traditional rule regarding a social group when views about group members are in the midst of public debate.[231] The fact-based adjudication model leaves courts free to disregard the flux in society's treatment of group members and focus narrowly on facts related to the rule in question. The proposed

---

visitation jurisprudence, sexual orientation is deemed irrelevant to parenting ability. See Logue, supra note 229, at 44–45.

231. See, e.g., Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) ("[I]t is for the people of Arizona, through their elected representatives or by using the initiative process, rather than this court, to decide whether to permit same-sex marriages."); Brief for Respondents State of New York & Department of Health & for Attorney General as Intervenor in *Hernandez* at 2, *Hernandez*, 7 N.Y.3d 338 (No. 86), 2006 WL 1930167 ("The formulation of social policy regarding same-sex marriage should be preceded by the kind of debate that is the very hallmark of the legislative process."). For decisions that have adopted this argument to dismiss calls for marriage rights for same-sex couples, see supra note 5.

model, in contrast, suggests that courts consider the rule and its rationales in the context of the broader body of legislation and public policy that also speaks to the status of the social group. Again, the marriage cases aid in crystallizing the competing views of institutional design embodied in the two approaches.

In every state where marriage litigation has been brought, the legislature has not only expressed views about the relevance of procreative capacity to marriage generally,[232] but also about the relevance of sexual orientation to parenting. Legislative frameworks regarding adoption, foster care, guardianship, and other parental-type relationships all consider intently the qualities that adults must have to care for children under the state's control or supervision. If the state believed that certain facts caused gay adults to be undesirable as parents, then surely we would expect to see restrictions on their ability to parent in these arenas.[233] Indeed, if the state's view is that couples capable of procreating without assistance make better parents than other couples, then we would expect that, too, to be reflected in these laws. But procreation-focused prohibitions do not exist and restrictions on gay adults as foster or adoptive parents exist only as outliers.[234] Moreover, 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 children they are raising.[235] And in none of these states has the legislature acted to over-

232. Domestic relations law in states across the country makes clear that a couple's capacity to procreate without assistance is neither necessary nor sufficient as a marriage qualification. See supra note 226.

233. For an example of one of the few states with law on this issue, see, e.g., Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 827 (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, 543 U.S. 1081 (2005). For a critique of the Eleventh 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 *passim* (2005) (arguing that Eleventh Circuit failed to account for Supreme Court's decision in *Lawrence v. Texas*).

We might also expect to see prohibitions on gay adults serving as role models for children, whether as teachers, coaches, or leaders of youth organizations, yet no state has in place anything of the kind.

234. See Logue, supra note 229, at 44; see also supra note 233.

235. See, e.g., In re Adoption of K.S.P., 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004) ("Allowing continuation of the rights of both the biological and adoptive parent, where compelled by the best interests of the child, is the only rational result."); In re the Adoption of Two Children by H.N.R., 666 A.2d 535, 540 (N.J. Super. Ct. App. Div. 1995) ("'[T]his Court finds a child who has all of the above benefits and two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason . . . to obstruct such a favorable situation.'" (quoting In re the Adoption of a Child Whose First Name Is Evan, 583 N.Y.S.2d 997, 1002 (Sup. Ct. 1992))); In re Jacob, 660 N.E.2d 397, 399 (N.Y. 1995) ("This policy [of promoting child's best interest] would certainly be advanced in situations like those presented here by allowing the *two* adults who actually function as a child's parents to become the child's legal parents.").

turn a second-parent adoption ruling on the ground that same-sex couples should not be encouraged to parent.[236]

If courts are pressed to acknowledge conflicting legislative as well as case law-based views of social groups, then any decision upholding a distinction based on sexual orientation, including in marriage, for example, must identify and explain why no other rules treat sexual orientation-related differences as material.

Of course, an approach that requires legislative consistency—or at least the ability to provide credible explanations for different legislative rules—is in tension with the widely held view that legislatures need freedom to move incrementally, which necessarily means that they need not act with complete consistency, as Justice Scalia observed in his *Lawrence* dissent.[237] But a requirement that courts acknowledge conflicting treatment of social group members in legislation is not a requirement that legislatures must act in lockstep or be rebuked by courts for failing to do so.[238] In the marriage cases, then, if all other distinctions based on sexual orientation have been removed from statutes and case law, their retention in marriage law can be seen as the final vestiges of longstanding hostility toward the social group at issue.[239] Such a proposal would be futile since laws often reflect a diversity of norms regarding social groups and legislatures typically do not focus coherent attention on a social group across issues.[240]

Also, under the proposed model, courts would retain the authority to decide whether and how far to carry a norm from one context to another. The point here is simply that if social group characteristics are treated as relevant in one setting and not in another, courts must acknowledge and explain the different treatment.

Moreover, because legislatures tend to respond more quickly to societal change than courts, "new" views regarding social groups ordinarily

---

236. Jane S. Schacter, Sexual Orientation, Social Change, and the Courts, 54 Drake L. Rev. 861, 877 (2006) (finding it "striking that the second-parent adoption cases have produced nothing like the opposition that has greeted same-sex marriage decisions").

237. See supra text accompanying notes 192–193.

238. 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.

239. Cf. Lewis v. Harris, No. A-68-05, 2006 N.J. LEXIS 1521, at *60 (N.J. Oct. 25, 2006) ("New Jersey's Legislature has been at the forefront of combating sexual orientation discrimination and advancing equality of treatment toward gays and lesbians.").

240. Ely, supra note 133, at 129 ("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, 233–35 (1976) (arguing that nature of lawmaking process renders legislative intent difficult to discern).

will be reflected in statutes well before courts begin adjudicating constitutional claims. In the marriage cases, then, if all other distinctions based on sexual orientation have been removed from statutes and case law, their retention in marriage law can be seen as the final vestiges of long-standing hostility toward the social group at issue. From this perspective, courts seem particularly well suited, as enforcers of equal protection and other constitutional guarantees, to identify and prohibit discriminatory rules that rest on animus, arbitrariness, or other impermissible purposes.[241]

Of course, it is also possible that the exclusionary law's survival in the face of other changes demonstrates not that some failure requiring judicial intervention has occurred, but rather that 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 that the contemporary approach of fact-based adjudication safeguards courts from the demand to defend, it presents not merely a pragmatic mode of analysis, but also a cover for result-oriented decision-making that should not be countenanced.

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 courts' 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

241. See, e.g., Romer v. Evans, 517 U.S. 620, 633–35 (1996) (identifying animus as impermissible purpose for government action); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that dislike or disapproval of politically unpopular group could not justify legislative classification); cf. Ely, supra note 133, at 73–104 (discussing need for judicial review to protect against legislature's failures to adequately represent groups lacking majoritarian support). 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, 885 n.173 (1996) ("[I]n 1980, the New York Court of Appeals declared [New York's law criminalizing certain noncommercial 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)).

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.