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Confronting Supreme Court Fact Finding

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CONFRONTING SUPREME COURT FACT FINDING

Allison Orr Larsen[*]

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MANY of the Supreme Court's most significant decisions turn on questions of fact. These facts are not of the "whodunit" variety concerning what happened between the parties. They are instead more generalized facts about the world: Is a partial-birth abortion ever medically necessary?[1] Can one effectively discharge a

[*] Assistant Professor of Law, The College of William and Mary School of Law. For their helpful comments and insights, I thank Neal Devins, Cara Drinan, Scott Dodson, Brianne Gorod, Linda Greenhouse, Leslie Kendrick, Mike Klarman, Caleb Nelson, Nate Oman, C.J. Peters, Fred Schauer, and Tim Zick. For excellent and tireless research assistance, I thank Alex Conser, Tiffany Ferris, Ben Keele, and Nick Mueller. As always, I thank Drew.

[1] Gonzales v. Carhart, 550 U.S. 124, 165–66 (2007).

locked gun in self-defense?[2] Are African American children stigmatized by segregated schools?[3]

Questions like these are not legal—they do not involve the interpretation of a text, nor do they involve a choice between competing rules that proscribe conduct.[4] But they are also not "facts of the case" in the way we generally use that phrase—the who / what / where / why questions that should ultimately go to a jury or fact finder. Instead, these questions implicate what have come to be known as "legislative facts."[5] A legislative fact gets its name not necessarily because it is found by a legislature, but because it relates to the "legislative function" or policy-making function of a court.[6] The central feature of a legislative fact is that it "tran-

[2] District of Columbia v. Heller, 128 S. Ct. 2783, 2818 (2008).

[3] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 733 (2007); Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954).

[4] I disclaim any attempt to define with precision the line between law and fact. To be sure, there are those who say it is impossible to do. John McGinnis & Charles Mulaney, Judging Facts Like Law, 25 Const. Comment. 69, 71 (2008) ("There is no analytic dichotomy between law and fact."). That difficult inquiry, however, lies outside the scope of this Article. I do note that even if the law-fact division line is fuzzy, it is still a line we expect courts to draw and one with which we often wrestle. See, e.g., John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. Pa. L. Rev. 477, 489–93 (1986) (identifying the division between law and fact and discussing the similarities each has with social science research).

[5] "Legislative fact" and "adjudicative fact" are phrases coined by Kenneth Culp Davis in 1942 to distinguish types of fact finding in administrative agencies. See Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Procedures, 55 Harv. L. Rev. 364, 365–66 (1942). More recently, scholars have refined and further categorized legislative facts—perhaps most notably David Faigman, who has classified what he calls "constitutional facts" into several categories depending on the purpose for which the fact is used. See David Faigman, Constitutional Fictions: A Unified Theory of Constitutional Facts, at xiii (2008); see also John McGinnis & Charles Mulaney, Judging Facts Like Law, 25 Const. Comment. 69, 70 (2008) (discussing confusion surrounding what they call "social facts"); Suzanna Sherry, Foundational Facts and Doctrinal Change, 2011 U. Ill. L. Rev. 145, 146 (2011) (discussing a form of legislative facts she calls "foundational facts" because they consist of the factual assumptions on which legal doctrine is based). All still pay homage, however, to Davis's original articulation of the distinction, and it is therefore his terminology on which I will primarily rely. See Kenneth L. Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 77 n.9 (explaining that "the phrase virtually belongs to Professor Kenneth C. Davis" (citing Kenneth C. Davis, Administrative Law Treatise § 15.03 (1958))).

[6] Brenda C. See, Written in Stone? The Record on Appeal and the Decision-Making Process, 40 Gonz. L. Rev. 157, 191 (2004) (stating that legislative facts are

scend[s] the particular dispute,"[7] and provides descriptive information about the world which judges use as foundational "building blocks" to form and apply legal rules.[8]

To take a controversial example, when the Supreme Court upheld the federal partial-birth abortion statute in 2007, Justice Kennedy relied in part on the factual assertion (one he said could not be measured by reliable data but which "seemed unexceptionable") that many women come to regret their abortions later in their lives.[9] Justice Kennedy was not speaking about the specific plaintiff in that case, but on the emotional consequences of abortions generally—a statement of legislative fact.[10]

So where do the Justices find information that enables them to decide factual questions about the world? The typical answer involves trust in the adversarial system. The basic idea is that "the adversary system is . . . quite practiced at finding facts."[11] If a fact is important to a case's resolution, then the parties (and their amici)[12] can provide the Court with enough information to address it through testimony (at the trial level) and briefing (on appeal). And if one party presents unreliable or flawed evidence to support his

relevant when "the court is in essence 'making law' either by filling a gap in the common law by formulating a rule, construing a statute, or framing a constitutional rule").

[7] David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. Pa. L. Rev. 541, 552 (1991).

[8] Robert E. Keeton, Legislative Facts and Similar Things: Deciding Disputed Premise Facts, 73 Minn. L. Rev. 1, 11 (1988); see also Sherry, supra note 5.

[9] Gonzales v. Carhart, 550 U.S. 124, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

[10] See Stuart M. Benjamin, Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process, 78 Tex. L. Rev. 269, 273 (2000) ("Judicial opinions are filled with assertions about the state of the world . . . ."); Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Factfinding, 61 Duke L.J. 1, 52 (2011) ("[L]egislative facts often are—and have been—critical to court decisions.").

[11] Wendy M. Rogovin, The Politics of Facts: "The Illusion of Certainty," 46 Hastings L.J. 1723, 1758 (1995); see also Amanda Frost, The Limits of Advocacy, 59 Duke L.J. 447, 449 (2009) (noting the "entrenched norm . . . of party presentation"); Elizabeth G. Thornburg, The Curious Appellate Judge: Ethical Limits on Independent Research, 28 Rev. Litig. 131, 185 (2008).

[12] I assume in this Article that a party's amici count as part of the adversarial process. For discussion of the reasons behind that assumption, see infra note 74 and accompanying text.

factual claim, then we can count on the other party to point this out.[13]

The idea, however, that courts depend only on the adversary system to inform their decisions—even for fact finding—is "more myth than reality."[14] As others have recently observed, judges "reach beyond the four corners of the parties' briefing" when they think the parties have not done enough.[15] With respect to questions of legislative fact, this happens because the importance of the fact did not become apparent until after the case was pending on appeal, or perhaps because the parties do not brief it in enough detail to convince a judge or Justice that he knows all he needs (or wants) to know.[16]

Traditionally, the options facing a judge who wants extra-record information about a legislative fact were limited.[17] This is not due to any procedural bar to independent research.[18] Unlike with adju-

[13] McGinnis & Mulaney, supra note 5, at 71 ("[The judiciary's] salient institutional structure is the adversarial proceeding where each side has incentives to scrutinize relentlessly the factual claims of its opponent.").

[14] Gorod, supra note 10, at 3.

[15] Frost, supra note 11, at 453; see also Gorod, supra note 10, at 4; Frederick Schauer, The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin, 2001 Sup. Ct. Rev. 267, 285 (2001).

[16] Legislative facts are not new by any means, but several commentators have remarked that their centrality to the Supreme Court's decisions is on the rise along with perhaps an increased pressure the Court feels to pepper its opinions with empirical support. Faigman, supra note 7, at 550 ("Increasingly, commentators and litigants are checking the modern Court's fact-finding on the basis of empirical research that only sometimes supports, and often contradicts, the Court's 'best guesses' about the world."); Timothy Zick, Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths, 82 N.C. L. Rev. 115, 118 (2003) (describing and critiquing the increased use of empirical methods and data to decide constitutional cases); see also A. Christopher Bryant, The Empirical Judiciary, 25 Const. Comment. 467, 468 (2008); Gorod, supra note 10, at 28–33 (discussing the role of legislative facts in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007)).

[17] Kenneth Culp Davis, Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court, 71 Minn. L. Rev. 1, 7 (1986) ("[Courts] always have the needed adjudicative facts, that is, the facts about the immediate parties—who did what, where, when, how, and with what motive or intent. But courts often have inadequate legislative facts, that is, the facts that bear on the court's choices about law and policy.").

[18] Bryant, supra note 16, at 472 ("[W]hile the controversy surrounding judicial determination of legislative facts in constitutional cases is an ancient one, the legal profession's understanding of it remains inadequate."); Edward K. Cheng, Independent

dicative facts, courts are free to approach legislative fact questions without the use of experts or witness testimony, and can even go outside the bounds of the record.[19] There is currently no federal law restricting outside evidence of this sort. Indeed, the rule of evidence concerning judicial notice of facts—which would seem the chief candidate for providing uniform guidelines on this question—specifically exempts legislative facts from its scope.[20]

Until recently, however, courts still faced a real institutional disadvantage at gathering information about the world by themselves. Unlike a legislative body, courts (even the Supreme Court) deal with legislative facts without a specialized staff, without an army of lobbyists happy to provide statistics and data to support their causes, and without the ability to subpoena those who may have the information they need to evaluate the question at hand. These institutional weaknesses are well recognized by scholars and members of the judiciary.[21]

Judicial Research in the *Daubert* Age, 56 Duke L.J. 1263, 1290 (2007) ("Judicial notice of legislative facts . . . is basically unregulated.").

[19] Richard J. Pierce, Jr., Administrative Law Treatise § 10.5 (2002) ("The judicial practice of using extra record facts for deciding questions of law and policy is deeply established. It has been accepted by the legal profession without challenge."); Keeton, supra note 8, at 14 (arguing that the rules for gathering adjudicative facts are largely ignored with respect to legislative facts). This lack of regulation has led one prominent commentator to describe the law governing legislative facts as "chaotic." Faigman, supra note 5, at xii ("[C]onstitutional facts come to the Court's attention haphazardly."); id. at 98.

[20] See Fed. R. Evid. 201(c), (e); see also id. advisory committee's note.

[21] Davis, supra note 17, at 5–6, 14; id. at 8 ("[T]he Court may often be at its worst on policy issues that are dependent upon understanding or instincts about legislative facts."); see also Neal Devins, Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis, 50 Duke L.J. 1169, 1179–81 (2000) (discussing the well-noted weaknesses of the judiciary as to fact finding, although challenging the assumption that Congress will be superior in all instances); Phillip B. Kurland, Toward a Political Supreme Court, 37 U. Chi. L. Rev. 19, 38 (1969) ("[T]he Court . . . lacks machinery for gathering the wide range of facts and opinions that should inform the judgment of a prime policymaker.").

The Justices themselves seem well aware of the weakness. In *Furman v. Georgia*, for example, Justice Blackmun's dissenting opinion specifically asserted that the "case against capital punishment . . . rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes." 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting). Justice Souter provides a more recent example of this judicial candor. In his concurrence in *Washington v. Glucksberg*, Souter doubted the Court's ability to evaluate the factual claim that euthanasia would lead to coerced suicide. 521 U.S. 702, 786–87 (1997).

The classic resort, then, for a reviewing judge who wants more information on a legislative fact is to one of several less than ideal options. She can send the case back to the trial court to take evidence on the question of fact; she can simply assert an emphatic view of the fact with nothing to support the view except for "common experience"; or she can engage in extra-record research searching for an authority to support the facts she needs to bolster her argument.[22]

It is this last option that is the focus of this Article. Independent judicial research of legislative facts is certainly not a new phenomenon. We have all heard the stories of Justice Blackmun holed up in the medical library at the Mayo Clinic during the summer of 1972 studying abortion procedures.[23] But since that time the world has undergone a massive change in the way it obtains information. The digital revolution provides a new tool for members of the judiciary to address legislative facts.

The U.S. Supreme Court provides an accessible and instructive example.[24] Now the Justices (and their clerks and their librarians) are flooded with information literally at their fingertips.[25] Social science studies, raw statistics, and other data are all just a Google search away. If the Justices want more empirical support for a factual dimension of their argument, they can find it easily and without the help of anyone outside of the Supreme Court building.

The impact of this change is quite visible. Justice Breyer, for example, is candid about the fact that the Internet provides him a powerful new tool for gathering factual data, whether or not those data appear in the briefs.[26] It is not uncommon for him to quiz an

[22] Davis, supra note 17, at 9–10; id. at 15 ("The Supreme Court's lawmaking is sometimes based on understanding of the relevant legislative facts and sometimes not. When the Court lacks the needed information, it usually makes guesses.").

[23] Linda Greenhouse, Becoming Justice Blackmun 82–83, 90–91 (2005).

[24] Although the practice of in-house fact finding is relevant to all types of courts, the bulk of this Article will focus on the U.S. Supreme Court for several reasons discussed in more detail below. See infra Section I.B.

[25] Zick, supra note 16, at 120 ("The courts are literally awash in data, and seem constantly to be clamoring for more.").

[26] Linda Greenhouse, The Breyer Project: "Why Couldn't You Work This Thing Out?," 4 Charleston L. Rev. 37, 37 (2010) ("Breyer is the quintessential Enlightenment Supreme Court Justice. He believes in evidence and in expertise and in the power of both facts and experts to persuade."); Linda Greenhouse, A Supreme Court

advocate at oral argument with extra-record statistics which he openly admits were gathered through an in-chambers Google search.[27] And in last term's decision striking down a law which restricted the sale of violent video games to minors,[28] Justice Breyer, "with the assistance of the Supreme Court library," compiled an appendix to his dissent of academic journals weighing in on the debate that violent video games cause psychological harm to children.[29] Citing a YouTube video, he explained that filters on these video games are easy to evade since "it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls."[30] Much of this research was not in the record and did not come from any of the briefs.[31]

Justice Breyer is not apologetic for his independent research and he is not alone. Justice Alito, who concurred in the result of the case but disagreed with affording First Amendment protection to these video games, peppered his opinion with citations to websites (like slashgear.com and popularmechanics.com), touting the "astounding" violence, "antisocial theme," and "interactive nature" of these video games.[32] His opinion, in fact, prompted Justice Scalia to criticize Alito for his "considerable independent research."[33]

And not to be outdone, Justice Thomas's dissent in the same case cites fifty-nine sources to establish the fact that the Founding generation believed parents had complete authority over their children's development.[34] Fifty-seven of those sources cannot be

Scorecard, N.Y. Times, July 13, 2011, 9:30 PM, http://opinionator.blogs.nytimes.com/2011/07/13/a-supreme-court-scorecard/.

[27] See, e.g., Transcript of Oral Argument at 41, Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007) (Nos. 06-84, 06-100) (Breyer, J., questioning) ("So I looked up on the Internet approximately what percent of the people have the best credit score and that's about 1 percent.").

[28] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011).

[29] Id. at 2771 (Breyer, J., dissenting).

[30] Id. at 2770–71 (Breyer, J., dissenting).

[31] Id. at 2739 n.8 (majority opinion) ("The vast preponderance of [Justice Breyer's] research is outside the record . . . .").

[32] Id. at 2748 nn.7–10, 2749 nn.11–14 & 2750 nn.15–18 (Alito, J., concurring) (citing extra-record research).

[33] Id. at 2738 (majority opinion).

[34] Id. at 2751–58 (Thomas, J., dissenting).

found in the briefs—party briefs or amicus briefs—and were thus the product of in-house research.[35]

This Article will explore how the modern change in access to information has and will affect the Court's approach to legislative facts. This important question has largely evaded scholarly attention, perhaps reflecting the erroneous assumption that independent factual research at the Court is the exception and not the rule.[36] I will demonstrate that in the last decade or so, questions of legislative fact are being researched "in house"—that is, without reliance on the parties or amici—at an astonishing rate. While surely some in-house research by the Justices and their staff has always occurred, the Internet makes it easier, faster, and more convenient. I will argue that this new approach to fact finding is troubling and requires us to rethink our entire process for judicial evaluation of legislative facts.

My research reveals over one hundred examples of Supreme Court opinions from the last fifteen years that make assertions of legislative fact supported by an authority never mentioned in any of the briefs.[37] And, of the 120 cases from 2000 to 2010 that political scientists label the "most salient Supreme Court decisions"—largely measured by whether they appear on the front pages of newspapers[38]—fifty-six percent of them contain at least one assertion of legislative fact supported by sources found "in house."

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[35] Id.

[36] Only a handful of scholars have recognized this new reality. See Richard B. Cappalli, Bringing Internet Information to Court: Of "Legislative Facts", 75 Temp. L. Rev. 99, 103 (2002); Judge Cathy Cochran, Surfing the Web for a Brandeis Brief, 70 Tex. B.J. 780 (2007); Lee F. Peoples, The Citation of Wikipedia in Judicial Opinions, 12 Yale J.L. & Tech. 1 (2009). Most recently and most on point, Brianne Gorod has asked some very important questions about how appellate courts treat legislative facts generally. See Gorod, supra note 10.

[37] All examples are listed in an appendix on file with the Virginia Law Review Association. As explained below, I do not claim this represents an exhaustive list.

[38] As will be described infra, two indexes were used to generate the most salient (or more visible) Supreme Court decisions from each term. The first one (from Professors Epstein and Segal) measures salience by whether the opinion made the front page of *The New York Times*. The second one, the CQ guide, uses a more subjective measurement from journalists and commentators. Both indexes are popular among political scientists. See, e.g., Theodore S. Arrington & Saul Brenner, Strategic Voting for Damage Control on the Supreme Court, 57 Pol. Res. Q. 565, 571–72 (2004); Saul Brenner & Theodore S. Arrington, Measuring Salience on the Supreme Court: A Research Note, 43 Jurimetrics J. 99 (2002); Todd A. Collins & Christopher A. Cooper,

This Article seeks to accomplish two goals. First, I will demonstrate the prevalence of in-house fact gathering at the U.S. Supreme Court. I will show that virtually all of the Justices do it regardless of whether they are traditionally labeled liberal or conservative, and they cite authorities on a wide range of subject matters (from biology to history to golf). I will also seek to establish a taxonomy of in-house fact finding. I will catalogue what type of legislative facts in-house research is used to support: facts that go to the practical consequences of the decisions, facts that are a critical part of the doctrinal inquiry, and facts that are used rhetorically—when a Justice has enough information to decide a case but makes his position more persuasive with independently discovered data. And finally, I will describe where these sources come from: letters from agencies requested by the Supreme Court librarians, raw data found online, historical sources, traditional law reviews, and others.

Having established that fact finding occurs frequently outside the adversarial system at the Supreme Court, the second goal of this Article is to explore why we should care. As noted, there are currently no rules regulating in-house fact finding of this sort. While that relaxed approach may have been appropriate before, I argue that new digital fact-gathering methods have changed the calculus and should force us to rethink the procedural vacuum. Independent judicial research is now as easy as the click of a mouse, and the amount of factual information available to review is basically infinite. But with this new tool come some new risks—the possibility of mistake, unfairness to the parties, and judicial enshrinement of biased data that can now be quickly posted to the world by anyone without cost.

In-house judicial fact finding is thus no longer an isolated practice that can be ignored. Instead, I suggest two radically different approaches: either we shut down in-house fact finding with stricter procedural rules, or we open up the evaluation of legislative fact to invite broader participation. These two approaches, I submit, map onto the greater debate between judicial minimalists and judicial

Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure, 65 Pol. Res. Q. 396, 398–401 (2012); Paul M. Collins, Jr., The Consistency of Judicial Choice, 70 J. Pol. 861, 863 (2008); Paul J. Wahlbeck, Strategy and Constraints on Supreme Court Opinion Assignment, 154 U. Pa. L. Rev. 1729, 1750 n.85 (2006).

maximalists.[39] The reason we should care, therefore, about in-house fact finding is ultimately because the decision to do it reflects on the greater debate over judicial philosophy and role.

This Article proceeds in four Parts. The first two Parts will describe the prevalence of in-house fact gathering—using the Supreme Court as a case study—by systematically exploring when it happens, how it happens, and the purposes for which independently obtained research is put to use. Part III will then argue that in-house fact finding in today's digital age is worrisome. Part IV will discuss what should be done about it.

I. PREVALENCE OF IN-HOUSE FACT FINDING AT THE SUPREME COURT

A. Defining the Terms and the Quest

Just as the line between law and fact is a slippery one, articulating a precise definition of a legislative fact (as compared to other facts) is similarly challenging. To borrow insight from Fred Schauer, however, "all distinctions potentially have borderline cases, and . . . although lawyers, particularly, are likely to be preoccupied with dusk when people ask them about the distinction between night and day," this does not take away the basic value of the distinction in the first place.[40]

With that in mind, this Article adopts the following distinctions and definitions. First, as others have helpfully defined it, an assertion of fact is a descriptive statement that can (at least theoretically) be falsified.[41] This feature of a fact arguably distinguishes it from statements of value or policy preferences.[42] Facts can then be subdivided using a well-recognized distinction articulated by Ken-

[39] As will be described below, minimalists believe in "judicial modesty"—that each case should be decided narrowly, shallowly, and one at a time—while maximalists think the rule of law is improved when judges are free to issue broad, fully theorized decisions designed to provide guidance. See generally Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999).

[40] Frederick Schauer & Virginia J. Wise, Nonlegal Information and the Delegalization of Law, 29 J. Legal Stud. 495, 498 (2000).

[41] Suzanna Sherry, Foundational Facts and Doctrinal Change, 2011 U. Ill. L. Rev. 145, 150.

[42] Id.

neth Culp Davis in 1942:[43] adjudicative facts are those that "relate specifically to the activities or characteristics of the litigants, and are facts that would typically go to the jury in a jury trial."[44] This sort of fact is the principal means by which judges *apply* doctrine: Did the police read the defendant his Miranda rights? Was the faulty toaster covered by the warranty? Were the funeral protestors intending only to persuade, or were they engaged in physical intimidation?[45]

Legislative facts, by contrast, are *generalized* statements about the world that help the court decide questions of law and policy.[46] Importantly, as David Faigman has clarified, legislative facts are not only those used to announce new legal rules.[47] A court may also use legislative facts to apply rules by, for example, showing the customary way of doing things in a particular community, explaining

[43] Davis, supra note 5, at 402–03; see also Laurens Walker & John Monahan, Social Frameworks: A New Use of Social Science in Law, 73 Va. L. Rev. 559, 561 (1987) ("Though the legislative-adjudicative distinction was developed in the context of administrative law, a broader application ensued and today the usefulness of the distinction is widely recognized.").

[44] See, supra note 6.

[45] I do not suggest that adjudicative facts are always clear-cut, nor are they always left to a jury or trial judge to decide. *Scott v. Harris*, 550 U.S. 372, 378–86 (2007), perhaps provides the best modern example of Supreme Court Justices evaluating trial evidence. Dan M. Kahan et al., Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism, 122 Harv. L. Rev. 837, 838 (2009). For an intriguing take on how our preexisting bias can influence our perception of facts, see Dan M. Kahan et al., "They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction, 64 Stan. L. Rev. (forthcoming 2012), available at http://ssrn.com/abstract=1755706.

[46] Kenneth Culp Davis, Administrative Law Text § 7.03 (3d ed. 1972); David L. Faigman, Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law, 36 Hastings Const. L.Q. 631, 635 (2009); Walker & Monahan, supra note 43, at 569 (noting that generality is the central feature of a legislative fact). But see Ann Woolhandler, Rethinking the Judicial Reception of Legislative Facts, 41 Vand. L. Rev. 111, 114 (1988) ("The key difference between adjudicative and legislative facts is not the characteristics of particular versus general facts, but rather, evidence whose proof has a more established place and more predictable effect within a framework of established legal rules as distinct from evidence that is more manifestly designed to create the rules.").

[47] David Faigman's work—and in particular his recent book *Constitutional Fictions*—helpfully sub-classifies legislative facts according to the function they serve in constitutional cases. So, for example, a "constitutional doctrinal fact" is one the Court asserts in support of its choice of a new legal rule, whereas a "constitutional reviewable fact" transcends any single case but still applies an established legal standard rather than announcing a new one. Faigman, supra note 5, at 46–48.

an expected psychological response in certain circumstances, demonstrating the prevalence of a particular police practice, or predicting practical consequences from a contemplated legal rule.[48] Although these statements are perhaps more common in constitutional cases, they are not limited to only those decisions.[49] As I use the phrase, a legislative fact includes any generalized fact about the world—not specific to the parties—that a judge uses to decide a case or to make his opinion more persuasive.

A recent example of reliance on legislative fact can be seen in *Sykes v. United States*, a statutory interpretation case decided in June 2011.[50] There the Court held that fleeing from a police officer in a car counted as a violent felony for purposes of the Armed Career Criminal Act.[51] "Although statistics are not dispositive," Justice Kennedy wrote for the majority, "here they confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony."[52]

Justice Kennedy and Justice Thomas (in concurrence) recited statistics about the injury and fatality rates connected with vehicular flight.[53] Much of the data discussed came from studies that were not part of the record below, or specific to the Indiana law in question.[54] They were instead "legislative facts," descriptive statements used to answer a question about the world generally—namely, how inherently violent is it to flee from the police?

[48] Ellie Margolis, Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs, 34 U.S.F. L. Rev. 197, 198 (2000).

[49] Kenneth C. Davis, Judicial Notice, 55 Colum. L. Rev. 945, 959 (1955) ("The judicial practice of going beyond the record for legislative facts is most pronounced in constitutional cases, but is not limited to those cases.").

[50] 131 S. Ct. 2267 (2011).

[51] Id. at 2270.

[52] Id. at 2274.

[53] Id. at 2274–75, 2279.

[54] *Sykes* represents an excellent example of legislative facts arising at a late hour in litigation, but most of the statistics used by Justice Kennedy—although not in the record—did come from the briefs and would therefore not be considered the product of "in-house" research as I am using that phrase. That being said, some of the statistics used to support factual assertions in Justice Thomas's concurrence and in Justice Kagan's dissent do come from in-house research. See, e.g., id. at 2280 (Thomas, J., concurring) (citing a series of newspaper articles for the proposition that "the lawsuits that result from these chases" are well known); id. at 2290 n.3 (Kagan, J., dissenting) (asserting that people may not want to stop for police officers and using newspaper articles for support).

Justice Scalia, in dissent, called out his colleagues for this use of extra-record statistics: "Supreme Court briefs are an inappropriate place to develop the key facts in a case."[55] Noting the risk that methodological flaws or bias in the studies will go untested by the adversarial process, Scalia accused the majority of "untested judicial factfinding masquerading as statutory interpretation."[56]

Technically, there was nothing procedurally untoward about the Court using extra-record statistics in this way. Procedural rules developed for adjudicative facts are largely inapplicable when it comes to legislative facts.[57] Legislative facts can be—but do not have to be—the subject of expert testimony in the trial court.[58] Authorities to support assertions of legislative fact can—but need not—come from the record below.[59] And district court decisions on legislative facts may—but are not entitled to—be given deference from reviewing courts.[60] The Federal Rules of Evidence not only

[55] Id. at 2286 (Scalia, J., dissenting).

[56] Id.

[57] Gorod, supra note 10, at 44–45; see also Davis, supra note 17, at 5. The Federal Rules of Evidence reflect this relaxed attitude towards judicial notice of legislative facts. According to the advisory committee notes, when dealing with legislative facts:

> [T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.

Fed. R. Evid. 201(a) advisory committee's note (citing Edmund M. Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 270–71 (1944)); see also Woolhandler, supra note 46, at 112 ("The advisory committee believed that judicial absorption of general nonlegal knowledge should not be circumscribed . . . .").

[58] Faigman, supra note 5, at 97–98.

[59] Keeton, supra note 8, at 44; see also Fed. R. Evid. 201(a) advisory committee's note (quoted supra note 57).

[60] Faigman, supra note 5, at 114 (noting that the Supreme Court "has no overriding theory of when it should be deferential to other bodies—judicial and nonjudicial—that have made findings of constitutional fact"). The confusion in the law reaches far beyond the Supreme Court to courts of all levels and in state courts as well as federal ones. See A Woman's Choice v. Newman, 305 F.3d 684, 689 (7th Cir. 2002) (finding that legislative facts should be reviewed "without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects"); Gorod, supra note 10, at 45; Andrew Koppleman, Power in the Facts, N.Y. Times, Aug. 4, 2010, 10:03 PM, http://www.nytimes.com/roomfordebate/2010/08/04/gay-marriage-and-the-constitution/judge-walkers-factual-findings (discussing what is to happen to Judge Walker's factual findings in the California gay marriage case).

exempt legislative facts from the restrictions on judicial notice, but the advisory committee notes actually encourage their "unfettered use"—explicitly stating that "the parties do no more than to assist; they control no part of the process."[61] In sum, there are simply no rules regulating how the judiciary is to receive or evaluate proof of legislative fact, leaving David Faigman—a leading scholar in this field—to conclude that the law on this procedural question is unregulated, "chaotic," and "a slap-dash affair."[62]

Putting aside for the moment the debate on whether this relaxed procedure is a good thing,[63] it is important to acknowledge two significant changes to judicial decision making since 1975 when legislative facts were exempted from the scope of judicial notice. The first change, as described above, is the radical transformation in the way the world accesses factual information.[64]

Equally important, however, is the second relevant change: a turn towards documented empirical factual support for legal argument.[65] It used to be the norm for a judge to take account of independently obtained facts without owning up to it (that is, without

[61] Fed. R. Evid. 201(a) & accompanying advisory committee's note; Thornburg, supra note 11, at 153 ("The Federal Rules of Evidence and their state counterparts limit only judicial notice of adjudicative facts. Further, the Advisory Committee Notes encourage unfettered use of legislative facts, arguing that judicial access to legislative facts should not be restricted to any limitation in the form of indisputability or formal notice.").

[62] Faigman, supra note 5, at xii, 98.

[63] Edward R. Becker & Aviva Orenstein, The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo. Wash. L. Rev. 857, 899–900 (1992) ("The Rules' failure to address legislative facts has been criticized as too narrow and unambitious. This lack of guidance has led to concerns surrounding the process for noticing legislative facts.").

[64] Of course the Justices themselves need not be Google-savvy. As Supreme Court law clerks (who are on average in their mid-twenties) become more technologically expert, the research methodologies in chambers will change as well. Moreover, empirical studies show that with more law clerks comes more citation to legal precedent, and there is every reason to assume this would hold true for factual citations as well. See Frank B. Cross et al., Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance, 2010 U. Ill. L. Rev. 489, 535 (noting that an increased use of law clerks corresponds with an increased use of citations to precedent).

[65] See Zick, supra note 16 ("Constitutional law is now in the throes of a widespread empirical turn, a quantitative mood swing that is consistent with a more general societal turn toward all things scientific.").

citation).[66] Now—perhaps for a variety of reasons—judges seem to feel an increased pressure to add a citation to their assertions of legislative fact.[67]

This may seem at first like a distinction without a difference—does it really matter if a judge drops a footnote to support a fact or is merely influenced to a certain result by his independent research? But citations matter. As Fred Schauer has persuasively argued, questions of citation are really questions of authority—and authority, after all, lies at the heart of what the law means.[68]

A citation for support in a judicial opinion, he tells us, is the legal equivalent of saying "'I am not making this up.'"[69] And for factual assertions this has become increasingly important. When a judge makes a generalized statement of fact without reliance on authority—as when Chief Justice Marshall asserted in *Gibbons v. Ogden* that "[a]ll America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation"—that factual observation is wrapped up in the legal proclamation and is treated as such.[70]

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[66] Davis, supra note 49, at 953 ("[T]he difference between appearing to stay within the record and frankly acknowledging resort to extra-record sources for legislative facts is usually only a difference in the degree of articulation on the grounds for decision."); Faigman, supra note 7, at 545 ("Historically most constitutional fact-finding depended on the Justices' best guess about the matter.").

[67] Others have observed how Supreme Court decisions (particularly constitutional ones) have become increasingly empirical—that is, they now rely on "data, scientific methods, and scientific conventions in search of greater decisional objectivity and accuracy." Zick, supra note 16, at 140; see also Faigman, supra note 7, at 547; Tracy L. Meares, Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers, 2002 U. Ill. L. Rev. 851, 855 ("Whether or not judges currently are able to handle social science research with expert ease, judges increasingly have suggested in opinions that they would *like* to see empirical work that is relevant to the issues presented to them . . . ."); Zick, supra note 16, at 120 ("The broad empirical turn . . . is due, at least in part, to the ever-expanding pool of data available to the courts.").

[68] Frederick Schauer, Authority and Authorities, 94 Va. L. Rev. 1931, 1935–36 (2008).

[69] Id. at 1950; id. at 1943 ("As with the parent saying, 'Because I said so,' authority is in an important way the fallback position when substantive persuasion is ineffective."); see also Christopher J. Peters, Assessing the New Judicial Minimalism, 100 Colum. L. Rev. 1454, 1482 (2000) (explaining that explicitly giving reasons for decisions relates to the judicial craft "the way the Hippocratic Oath is a norm associated with medical craft; it is essential to the enterprise").

[70] Faigman, supra note 7, at 545 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 190 (1824)).

But when a judge adds empirical support for his factual statement it changes the nature of the assertion. For one thing, the authority makes the statement look more like a fact (something that is either true or false) and less like a legal holding or casually uttered policy preference. This matters because the authority protects and entrenches the statement by elevating its validity with a stamp of scientific imprimatur. Of course it opens the door to future challenges about the factual basis for the claim, but our legal system treats legal findings and factual ones differently—questions of deference are different, for one thing, and future cases are more often brought to challenge legal conclusions rather than factual ones.[71]

A related effect, which comes when a judge drops a factual footnote instead of making a bald assertion of fact, is the increase the authority gives to the entire opinion's persuasive power. Perhaps because we all have access to so much information on our phones now, a modern audience increasingly demands empirical support before accepting an argument.[72] Judicial reliance on authority for legislative fact, therefore, becomes ever more important to convincing the public that the judge has the right result.

For this reason, I am not interested in the theoretical possibility of a judge researching legislative facts on his own. Surely, few people doubt that almost all judges do this,[73] and even fewer doubt there is any way to prevent it if we wanted to. I am interested, instead, in those instances when a judge or Justice supports his position on such a fact with *citation* to authority he found outside of the adversarial process—reliance on what I call "in-house" judicial research of fact.

So what does it mean to find a fact in house? For purposes of this Article, "in-house" fact finding means a Justice supports an assertion of legislative fact with an authority that he found independ-

[71] The different treatment factual and legal assertions receive over time is an issue which deserves more attention than I can give it here, and one I hope to pursue in future work.

[72] Meares, supra note 67, at 851 ("Recent studies show that, over the past decade, judges and lawyers have begun to cite to empirical studies in their work with increasing regularity.").

[73] Thomas B. Marvell, Appellate Courts and Lawyers 192 (1978).

ently—that is, not from any of the party briefs or from the briefs submitted by amici curiae.[74]

A terrific example of in-house fact gathering can be seen in the *Graham v. Florida* case decided in 2010.[75] The question before the Court was whether the Eighth Amendment prohibited sentencing juveniles who committed non-homicide offenses to life without parole. In looking for a "national consensus" on this question, the Court sought to establish just how many minors nationwide were serving such a sentence. The Court explained, "[a]lthough in the first instance it is for the litigants to provide data to aid the Court, we have been able to supplement the study's findings."[76] It then cites several letters from different state departments of corrections all addressed to the Supreme Court library and all on file with the clerk. It further supplemented those numbers with links to newspaper articles from local counties reporting the sentences. None of these sources of information were presented by the parties or even from their amici; they all represent research conducted "in house" at the Court.[77]

B. How Common Is Modern In-House Fact Finding?

If *Graham* were just a one-off example of the Court supplementing the record and briefs with factual research conducted in house, there would hardly be cause for alarm. But *Graham* is decidedly not an aberration. What follows is a descriptive account of how common it is for Supreme Court decisions to contain factual authorities that were not in the record and not presented to the Justices through any of the briefs.

[74] Legislative facts presented to the Court through amicus briefs present their own issues and challenging questions. These are questions I plan to pursue in a subsequent article. For present purposes, however, I am counting amicus submissions of fact as within the adversarial process because the litigants may respond to them before a decision is rendered (through reply briefs or at oral argument). This means that if a decision makes an assertion of legislative fact in reliance on an amicus brief—like the citation about women regretting abortions in *Carhart*—it does *not* count as in-house research for purposes of this Article.

[75] 130 S. Ct. 2011 (2010).

[76] Id. at 2024.

[77] It is certainly possible for adjudicative facts to be researched in house as well. One can imagine a judge revisiting the scene of a crime, for example. Those instances—while important—are beyond the scope of this Article.

Although the phenomenon of in-house fact finding is not at all limited to the Supreme Court, I focused my research there for several reasons. One practical reason is that all modern briefs filed at the Supreme Court are digitally available, thus making it possible to cross-check factual authorities relied on by opinions with the ones presented by the parties and amici. Moreover, because the Supreme Court is one of last resort and limited jurisdiction, Supreme Court Justices will often be asked to look beyond the case at hand and to shape rules for disputes in the future.[78] This means they will be pressed to think about facts that transcend any one case, and will provide a better laboratory for exploring how these legislative fact statements are supported. Finally, although the adversarial system does not work perfectly at any court, the Supreme Court Bar is comprised of some of the best advocates in the country. When that expertise is combined with an unprecedented reception of Supreme Court amicus curiae briefs (the filing of which has increased 800% in recent years),[79] Supreme Court Justices cannot help but be inundated with factual research presented *from within* the adversarial process. If the Justices, therefore, are reaching beyond the briefs—party briefs and amicus briefs—to conduct independent factual research, then one can assume the temptation will be all the greater for lower court judges who have fewer available resources from the parties.

My research reveals 103 examples of decisions in the last fifteen years when a Supreme Court Justice has supported a factual claim with in-house research.[80] I certainly do not claim to have exhausted the universe of in-house research nor do I purport to make any empirical claims on causation. But before diving into the examples I did find, a few words on how I found them. Sometimes the Court,

[78] Neal Devins & Alan Meese, Judicial Review and Nongeneralizable Cases, 32 Fla. St. U. L. Rev. 323, 325–26 (2005) (noting that Justices "announce rules that apply beyond the actual litigants and cases before them" and commenting on the Court's willingness to craft these rules in cases that involve plaintiffs with nongeneralizable claims).

[79] Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 752 (2000); Kelly J. Lynch, Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs, 20 J.L. & Pol. 33, 34 (2004).

[80] A full list of my examples can be found in an appendix on file with the Virginia Law Review Association.

as in *Graham*, is quite candid when it supplements the record and thus many of these cases were found through simple word searches to key phrases like "on file with" or "my research shows." Each instance of a citation found using these word searches was confirmed by cross-referencing every brief filed in the case to ensure that the source was not presented by the parties or their amici and could not be found in the joint appendix.

Plenty of other times, however, the Court cites to in-house research without announcing it has done so. To create an illustrative list of these instances, I needed a more structured inquiry. I generated a list of the most "salient" (or "important" or "landmark")[81] Supreme Court decisions in recent years (from 2000–2010). To do this, I borrowed two indexes often used by political scientists: the Epstein-Segal index and the CQ Press index. The Epstein-Segal index (created by Lee Epstein and Jeffrey Segal) measures salience by asking whether the decision was covered on the front page of *The New York Times* the day after it was decided. The CQ Press index measures salience by compiling subjective opinions from journalists and Supreme Court watchers.[82]

Combining these two indexes revealed 120 "most salient" Supreme Court decisions from 2000–2010. With the help of extraordinarily patient research assistants, we read all of those cases and highlighted assertions of legislative fact (based on the definition outlined above); we then cross-referenced the sources used to support those facts with all the briefs filed in the case. If a Justice made an assertion of fact followed by a citation to a source that was not mentioned in *any* brief (including amicus briefs and the

[81] Collins & Cooper, supra note 38, at 2 (defining the most salient Supreme Court decisions as the most "important" or "landmark" or "controversial").

[82] Both indexes are widely used by political scientists. See, e.g., Brenner & Arrington, supra note 38, at 100–01 (evaluating the different methods of determining salience of Supreme Court decision making and determining that the CQ index was "the best of the lot"); Collins & Cooper, supra note 38, at 3 (discussing the various measures of case salience and their advantages or disadvantages); Richard L. Vining, Jr. & Teena Wilhelm, Measuring Case Salience in State Courts of Last Resort, 64 Pol. Res. Q. 559, 560–61 (2011) (detailing publications which have used the Epstein-Segal *New York Times* salience measure for Supreme Court decisions).

joint appendix), that authority was labeled the product of "in-house" research.[83]

For the reasons articulated above about the importance of legal authority, I did not count an assertion of legislative fact that was not followed by citation (although to be sure those unsupported statements were present). I also did not count instances where the Court appeared to be reviewing the record on its own de novo. Regardless of its propriety, reviewing the record below anew does not qualify as in-house research of legislative fact as I have defined it.

By my count, 90 of the 120 most salient Supreme Court decisions from 2000 to 2010 contained at least one assertion of legislative fact supported by citation. Of those 90, seventy-seven percent contain at least one authority for those facts that was not present in the briefs. Acknowledging that identifying a legislative fact can potentially be tricky, a more conservative approach is just to change the denominator, and look at the percentage of the total 120 salient cases that make a factual assertion supported by a source found outside the adversarial process. Even that conservative estimate shows that a remarkable *fifty-six percent* of these cases contain at least one factual source discovered in house—meaning outside the record, not presented by the parties, and even beyond the scope of the numerous amicus briefs filed.

Given how common it seems to be to cite in-house research for factual statements, it should come as no surprise that all members of the Court do it—regardless of whether they are traditionally labeled liberal or conservative. In *Holder v. Humanitarian Law Project*, a case about the material support to terrorism statute, Chief Justice Roberts relied on a book from an investigative journalist to support his assertion that benign skills—like negotiation—can be used to engage in terrorism.[84] Justice Stevens, in *Massachusetts v. EPA*, cited data gleaned from the National Oceanic & Atmospheric Administration website to demonstrate a dramatic rise in carbon dioxide in the atmosphere.[85] Justice Breyer relied on statistics from a pediatric journal to indicate a lack of popular consensus

[83] We also checked for citations to the record. If a Justice cited a source and followed it with a record citation—even if the source was not in the briefs—we did *not* count that as in-house research.

[84] 130 S. Ct. 2705, 2725 (2010).

[85] 549 U.S. 497, 507 (2007).

across regions concerning gun safety in *McDonald v. City of Chicago* (the Court's most recent Second Amendment decision).[86] And Justice Thomas relied on statistics from the Educational Digest to show why schools need latitude under the Fourth Amendment to fight the "increasingly alarming crisis" of prescription drug abuse among teens.[87] None of these authorities were presented to the Court through the adversarial process.

Even in their short time on the Court, Justices Sotomayor and Kagan already show inclinations towards in-house fact finding. In the *Sykes* case discussed above (concerning whether fleeing from the police is inherently violent), Justice Kagan's dissent relies on several newspaper articles she found to support the claim that people are generally reluctant to stop for police officers.[88] And in a different case from the same year, Justice Sotomayor reached outside the briefs and the record to cite statistics on how rare evidentiary hearings have become in federal habeas proceedings.[89]

Some of this in-house research is used by Justices in concurrence or dissent. And certainly implications of the use of in-house research will differ depending on the posture of the Justice using it. It would be a mistake, however, to conclude that only Justices on the losing end of a case veer from the briefs. At least one citation to in-house factual research can be found in a *majority* opinion in thirty-six of the ninety most salient cases—forty percent—where a legislative fact was considered.

Examples of in-house research cited by majority opinions are abundant. Chief Justice Roberts, writing for the Court in *United States v. Stevens*, cites an article from *Mediaweek* magazine for the fact that there is a "national market for hunting-related depictions in which a living animal is intentionally killed."[90] Several of the

[86] 130 S. Ct. 3020, 3138 (2010) (citing Catherine A. Okoro et al., Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings From the Behavioral Risk Factor Surveillance System, 2002, 116 Pediatrics 370, 372 (2005)).

[87] Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2653 (2009) (Thomas, J., concurring in part and dissenting in part) (citing Ken Schroeder, Get Teens Off Drugs, Educ. Dig., Dec. 2006, at 75).

[88] 131 S. Ct. at 2290 n.3 (Kagan, J., dissenting).

[89] Cullen v. Pinholster, 131 S. Ct. 1388, 1413 (2011) (Sotomayor J., dissenting) (citing N. King, F. Cheesman & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 35–36 (2007)).

[90] 130 S. Ct. 1577, 1589 (2010).

sources Justice Scalia uses in *District of Columbia v. Heller* to set forth the history of the language of the Second Amendment were drawn from outside of the party briefs or the hundreds of amicus briefs filed in that case.[91] And in *Kennedy v. Louisiana*, Justice Kennedy's majority opinion uses statistics posted on a website to show the prevalence of child rape convictions.[92]

To rely on an independently discovered factual source one time in an opinion is one thing; to rely on these extra-record sources extensively is another. In order to capture opinions that extensively rely on in-house research, we noted which of those 120 most salient Supreme Court opinions had four or more factual statements supported with citations to sources not in the briefs. The percentage of such cases was smaller, of course, but still surprisingly large. Of the ninety cases that involve at least one question of legislative fact, forty-two of them (forty-seven percent) have opinions that cite four or more factual sources not in the record and not presented by the briefs.

Once again the Justices who rely extensively on such in-house research cannot be identified by the politics of the President who appointed them. Examples of such extensive in-house fact finding include: Justice Kennedy's opinion for the Court in *Graham v. Florida*,[93] Justice Alito's majority opinion in *McDonald v. City of Chicago*,[94] Justice Ginsburg's dissent in *Gonzales v. Carhart*,[95] Justice Thomas's concurrence in *Safford Unified School District No. 1 v. Redding*,[96] Justice Scalia's concurrence in *Citizens United v.*

[91] 128 S. Ct. 2783, 2789, 2791–93, 2795–98, 2802, 2807, 2812, 2817 (2008) (making twenty assertions of historical fact, supported by some sources coming from the briefs but more than thirty sources from outside the briefs).

[92] 128 S. Ct. 2641, 2660 (2008) (citing Inter-University Consortium for Political and Social Research, National Incident-Based Reporting System, 2005, Study No. 4720, available at http://www.icpsr.umich.edu).

[93] 130 S. Ct. 2011, 2024, 2029, 2033 (2010) (relying on nine sources drawn from outside the briefs to discuss the prevalence of life sentences for juveniles).

[94] 130 S. Ct. 3020, 3037, 3041, 3044 n.28, 3045 n.29, 3047, 3049 (2010) (relying on twelve non-brief sources to recount the history surrounding the Second Amendment).

[95] 550 U.S. 124, 173 n.3, 183 n.7, 184 nn.8–9 (2007) (Ginsburg, J., dissenting) (relying on sixteen sources from outside the briefs which discuss how abortion procedures affect women).

[96] 129 S. Ct 2633, 2650–57 (2009) (Thomas, J., concurring in part and dissenting in part) (relying on eighteen sources found in house to establish the "alarming national crisis" of prescription drug abuse by teenagers).

FEC,[97] and Justice Breyer's dissents in *Free Enterprise Fund v. Public Company Accounting Oversight Board* and *Parents Involved in Community Schools v. Seattle School District No. 1*.[98]

In-house fact finding is thus not a rarity in any sense of the word. It happens in many cases, can be found in opinions from many Justices, and can account for a substantial percentage of the factual citations in any one opinion. Given the change in access to information, and the new emphasis on being persuasive by being empirical, it stands to reason that in-house fact finding will only become more prevalent over time. It is a practice, therefore, which demands further consideration.

II. A TAXONOMY OF IN-HOUSE FACT FINDING

Statements of legislative fact are not all the same. Some—like African American children are stigmatized by segregated schools, or fleeing from the police is inherently violent—are critical to the outcome of a case.[99] Others are merely used rhetorically to bolster an argument—to show practical consequences of a different outcome, for example, or to set the stage by emphasizing the emerging significance of an issue.

Authorities for factual assertions are also varied. Citing statistics published in a peer-reviewed journal will likely be more persuasive than similar statistics culled from an article posted online or gathered by the Supreme Court library and never published at all. And perhaps historical facts ("The Framers all had guns") are different from facts that originate in social science ("Children are developmentally affected by divorce"), which are different from facts about nature ("Carbon dioxide causes global warming").

[97] 130 S. Ct. 876, 925–27 (2010) (Scalia, J., concurring) (making eight assertions about speech at the Founding, supported by nine non-brief sources).

[98] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3166, 3168, 3170, 3178, 3180–81, 3212 (2010) (Breyer, J., dissenting) (making eleven assertions of fact including a long appendix on the structure of federal agencies and relying on eighteen different sources not in any briefs); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 869–77 (2007) (Breyer, J., dissenting) (citing original research in an appendix to show how many states have adopted inter-district racial integration in school districting).

[99] *Parents Involved*, 551 U.S. at 869–77; Sykes v. United States, 131 S. Ct. 2267, 2272 (2011).

What follows is an attempt to identify the various types of in-house fact finding, to provide examples of each, and to discuss implications of the differences.

A. What Factual Assertions Are Supported By Authorities Found "In House?"

Two lines of inquiry help distinguish the types of facts Supreme Court Justices are researching themselves. The first involves the subject matter of the fact and the second involves the purpose for which the fact is used.

1. Subject Matter of Facts Found In House

Justices are not shy about tackling a whole host of factual subject matters on their own. I found opinions citing independently found authorities to answer questions of medicine ("How long do symptoms of carpel tunnel persist?"[100] "What diseases can be attributed to obesity?"[101]), questions about nature ("Can naturally occurring silt clog a river and restrict a dam?"[102] "How much carbon dioxide emissions exist in the atmosphere?"[103]), and questions of social science ("Are poor women more likely to have late-term abortions?"[104] "Does the death penalty have a deterrent effect?"[105] "What are the emotional consequences of prison?"[106] "Do people take race into account when evaluating jurors?"[107]).

[100] Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 199 (2002) (citing medical journals outside the record on a case about whether carpel tunnel is a debilitating condition under the Americans with Disabilities Act).

[101] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 587 (2001) (Thomas, J., concurring) (citing medical risks of obesity to point out that tobacco is not unique in the risks it poses to the health of children).

[102] Rapanos v. United States, 547 U.S. 715, 774–75 (2006) (Kennedy, J., concurring) (citing two articles from *The New York Times* and one from the *Los Angeles Times* on the effect of silt on waterways in a case interpreting the Clean Water Act).

[103] Massachusetts v. EPA, 549 U.S. 497, 507 (2007) (citing the website of the Department of Commerce).

[104] Gonzales v. Carhart, 550 U.S. 124, 173 n.3 (2007) (Ginsburg, J., dissenting).

[105] Ring v. Arizona, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring).

[106] Barber v. Thomas, 130 S. Ct. 2499, 2517 (2010) (citing Nat'l Prison Rape Elimination Comm'n, National Prison Rape Elimination Report 4 (June 2009)).

[107] Miller-El v. Dretke, 545 U.S. 231, 268 (2005) (citing various studies to show that discriminatory use of preemptory challenges is still a problem in spite of the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986)).

The Justices go beyond the adversary system to assert facts about economics,[108] international practices,[109] and emerging new technology.[110] And it is quite common for them to cite raw statistics of all types—collected from websites, solicited from agencies, or found in a journal—about a huge range of prevailing practices or social norms.[111]

Although a slightly different animal (for reasons discussed below), the Justices are also very willing to cite historical facts, even if the sources of those facts were not in the briefs or the record. Historical sources are at bottom factual ones.[112] Debates over original intent are really factual disputes about, for example, "whether the drafters or ratifiers of the Fourteenth Amendment expected the Equal Protection Clause to invalidate segregated schools or whether the Free Speech Clause was intended to cover obscenity."[113]

It should come as no surprise that Justice Thomas and Justice Scalia—committed to principles of originalism—frequently cite his-

[108] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 903 (2007) (citing R.H. Coase, The Nature of the Firm, 4 Economica (n.s.) 386 (1937)).

[109] Baze v. Rees, 128 S. Ct. 1520, 1535 (2008) (citing the practice of giving muscle relaxers before euthanasia in the Netherlands in a case about the constitutionality of lethal injection); McCreary Cnty. v. ACLU, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring) (citing independently found sources for the proposition that "Americans attend their places of worship more often than do citizens of other developed nations . . . and describe religion as playing an especially important role in their lives" (citations omitted)).

[110] Metro-Goldwyn-Mayer Studios v. Grokster, Ltd., 545 U.S. 913, 964 (2005) (Breyer, J., concurring) (citing Wired News and CNET News).

[111] See, e.g., Sykes v. United States, 131 S. Ct. 2267, 2279 (2011) (Thomas J., concurring) ("Many thousands of police chases occur every year. In California and Pennsylvania, which collect statewide pursuit data, police were involved in a combined total of more than 8,700 chases in 2007 alone."); id. at 2274 (majority opinion incorporating statistics from Justice Thomas' concurrence); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3184 (2010) (Breyer, J., dissenting) (attaching an appendix with statistics gathered by the Office of Personnel Management and submitted to the Supreme Court library to demonstrate the number of administrative law judges subject to for-cause removal); United States v. Stevens, 130 S. Ct. 1577, 1589 (2010) (citing statistics in *Mediaweek* magazine, outside the record, to demonstrate how large the national market is for hunting magazines).

[112] Faigman, supra note 5, at 46 ("[O]riginal intent, one of the most common bases for constitutional interpretation is almost wholly fact based.").

[113] Id.

torical sources they researched on their own.[114] But they are not the only Justices who do so. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Breyer's dissent contains a detailed history about desegregation efforts in this country since *Brown v. Board of Education*, including a fifty-state survey explaining which states have adopted open-choice plans and statistics indicating their success rates over time.[115] Much of this information was found in house—helpfully cataloged by Breyer in an appendix—but not in the record or presented by the parties.

Once again, Breyer may be the most candid about his independent research, but he is not the only one doing it. In decisions interpreting the First Amendment's religious clauses, for example, different Justices take turns citing different historical sources—not in the briefs—which alternatively do or do not support invocations of God by members of the Founding generation.[116]

2. How Do the Justices Use In-House Factual Research?

Perhaps more important than the subject matter of in-house research is the way such factual assertions are put to use. Legislative facts are employed in all kinds of ways: to show the prevalence of a practice, to stress the societal significance of an issue, to show an emerging national consensus, or to establish an historical understanding of a word, just to name a few.

This is certainly not the first attempt to classify the use of legislative facts—David Faigman, in particular, has done tremendous work on that score.[117] The question at hand, however, is more specific: when a Justice conducts original research on a legislative fact,

[114] See, e.g., McDonald v. City of Chi., 130 S. Ct. 3020, 3065 & n.4 (2010) (Thomas J., concurring) (citing historical sources—some discovered in house—to describe the Founding generation's use of the words "privileges and immunities"); District of Columbia v. Heller, 128 S. Ct. 2783, 2795 n.10 (2008) (collecting historical sources—some discovered in house—that use "bear arms" in non-military settings).

[115] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 870 (2007) (Breyer J., dissenting) (attaching an appendix cataloging sources).

[116] See McCreary Cnty. v. ACLU, 545 U.S. 844, 878–80 (2005) (citing James Madison and Justice Story, although noting there are conflicting conclusions); id. at 886 (Scalia, J., dissenting) (citing George Washington); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 30 (2004) (Rehnquist, J., concurring) (citing various examples of patriotic invocations of God in the early Republic).

[117] See, e.g., Faigman, supra note 5, at 46–62.

for what purpose does he feel comfortable citing his discovery? Are authorities found in house only used to serve a kind of "see also" function—supplementing what the adversarial process can answer? Or are the Justices relying on new, independently discovered factual authorities that are critical to a case's resolution?

It turns out the answer is "yes" to both. There is a big divide, I think, between facts used rhetorically—only to bolster an argument's persuasive power—and facts that are potentially dispositive to a case's outcome. To be sure, both purposes of in-house research could be problematic, but in different ways and perhaps on different levels. Let us therefore tackle each one separately.

David Faigman tells us that the Supreme Court "insistently employs factual arguments rhetorically, as premises that can be manipulated or massaged in the service of one or another legal outcome."[118] To use a colorful analogy, one could say Justices use their in-house research the way drunks use lampposts—"for support rather than illumination."[119] Examples of in-house research being used this way are plentiful.

Of the cases I found, the most common rhetorical citation of in-house-found facts (particularly statistics) was to demonstrate the emerging significance of a question to society. So, for example, in *Safford Unified School District No. 1 v. Redding*, Justice Thomas cites three different teen surveys and more than a dozen newspaper articles—none of which were in the briefs—to convince his colleagues that teenage abuse of prescription drugs was an "alarming national crisis" justifying strip searches of students without violating the Fourth Amendment.[120] And in *United States v. Booker*—the case that invalidated the Federal Sentencing Guidelines—Justice Stevens cites a handful of independently found articles to establish that prosecutors bargain with defendants over which facts will form the basis for sentencing.[121] Neither fact seemed critical to the case's

[118] Id. at 25.

[119] Adam Liptak, When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant, N.Y. Times, Mar. 19, 2007, at A8 (quoting comments of Hon. Robert D. Sack at the Second Circuit Roundtable Discussion on March 8, 2007).

[120] 129 S. Ct. 2633, 2653–54 (2009) (Thomas, J., concurring in part and dissenting in part).

[121] 543 U.S. 220, 290 n.11 (2005) (Stevens, J., dissenting in part).

outcome, but both were used as persuasive ammunition—here, specifically, to capture a reader's attention.

A similar rhetorical use for such facts is to show the practical impact or justification for a law. In *Ewing v. California*, for example, the question before the Court was whether California's "three strikes" repeat offender statute was cruel and unusual punishment.[122] Justice O'Connor, writing for the majority to uphold the law, recites statistics to support California's assertion that recidivism was a growing and real problem in the state. For support, she cites a study conducted by a reporter for *The Sacramento Bee* newspaper and not submitted to the Court by either party or any amici curiae.[123]

Was this study essential to Justice O'Connor's (or the rest of the majority's) decision to uphold the law? Would she have written the opinion the same way without it? Of course it is impossible to say. Presumably the authority adds some sort of persuasive power, or else she would not have included it.[124]

It may be tempting to dismiss the independently found citation as superfluous and inconsequential, but that is a temptation worth resisting. Paying attention to cited authorities is no trivial matter.[125] Unlike other disciplines (like math or science), the "law's practice of using and announcing its authorities . . . is part and parcel of law's character."[126] Or, as Frank Cross and colleagues put it recently, "[c]itations function something like the currency of the legal system."[127]

Ask, in other words, why Justice O'Connor felt the need to cite anything; could she not have just written that criminals tend to be repeat players and stopped at that? The answer, I believe, is in Fred Schauer's insight that the backbone of law is authoritative: "what matters is not what the reason says but where it comes

[122] 538 U.S. 11, 14 (2003).

[123] Id. at 26.

[124] See Gorod, supra note 10, at 25 n.99 ("[E]ven if judges sometimes use facts as rhetorical tools . . . the fact that they often use *extra-record* facts as those rhetorical tools suggests that those facts are also influencing their decisions.").

[125] Schauer, supra note 68, at 1934–35.

[126] Id. at 1935.

[127] Frank B. Cross et al., Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance, 2010 U. Ill. L. Rev. 489, 490.

from."[128] Typically, he tells us, we take actions for substantive reasons—we eat spinach because it is good for us, not because we are told to do it.[129] But in legal decisions, lawyers and judges can resort to content-independent reasons, i.e., reliance on the *source* of the reason, or an authority, as opposed to just the substance of the reason. If this is true, then "a great deal turns on what the authorities are,"[130] and studies, statistics, or other factual sources found outside the record or briefing process matter even if they are used "merely" to make an argument stronger.[131]

As for potentially dispositive questions of fact—with answers that can turn dissents into majorities and vice versa—it seems even less palatable that the Justices go beyond the record on these inquiries. And yet they do.

To begin with, for the skeptical reader, questions of legislative fact can indeed be outcome determinative. David Faigman has helpfully illustrated this reality in his taxonomy of what he calls "constitutional facts."[132] "Constitutional doctrinal facts," he tells us, are facts used to establish the meaning of the Constitution.[133] Chief examples are questions of original intent, which are, as explained above, fact-based questions about the state of the world at one time or another: How did the Framers of the Fourteenth Amendment feel about segregated schools? Did the authors of the Second Amendment intend it to bestow an individual right?

"Constitutional reviewable facts," by contrast, are facts that "transcend particular disputes" but are used to apply a particular

[128] Schauer, supra note 68, at 1936.
[129] Id. at 1935.
[130] Id. at 1960.
[131] The same response applies to a related variant of in-house research: string citations which include some sources unearthed by in-house research and some brought to the Court's attention by the parties. My research revealed several examples of that "see also" type of in-house research. See, e.g., Barber v. Thomas, 130 S. Ct. 2499, 2517 (2010) (citing statistics from the National Prison Rape Elimination Commission Report—not in the briefs—but also citing similar numbers from a Department of Justice website which was in the briefs). To be sure, normative concerns are likely lessened when a Justice relies on an independently found factual source alongside one from within the record. But for the reasons expressed above about the centrality of authorities to law's very nature, the citation of the new authority should still raise concerns.
[132] Faigman, supra note 5, at 46.
[133] Id.

constitutional rule, rather than create it.[134] A good example is whether homegrown medical marijuana will affect the larger marijuana market—a dispositive question of fact in *Gonzales v. Raich* and critical to applying the Court's doctrine interpreting the Commerce Clause.[135]

Both sorts of potentially dispositive facts have been the subject of in-house fact gathering at the Court in recent years. *District of Columbia v. Heller*—the 2008 decision invalidating a Washington, D.C. handgun ban as unconstitutional—provides a good example.[136] In his opinion for the majority interpreting the Second Amendment, Justice Scalia relies on the factual assertion that, at the time the Constitution was drafted, "'[k]eep arms' was simply a common way of referring to possessing arms, for militiamen *and everyone else*."[137] For support, he cites ten historical sources showing common word usage from the early eighteenth century.[138] Three of these authorities were brought to the Court's attention by the briefs, but seven of them were found in house.

Even better examples of potentially dispositive facts found in house come from the Court's cases interpreting the Eighth Amendment's ban on cruel and unusual punishment. When asking whether lethal injection is cruel and unusual because it creates a "substantial risk of pain," six of the seven opinions in *Baze v. Rees* relied on factual sources not in the record.[139]

Indeed several of the opinions (including the one for the plurality) discuss an example from Holland—where a similar drug combination is used in legal euthanasia—even though this example was not discussed in the briefs and was only brought up in passing at

[134] Id. at 47.

[135] 545 U.S. 1, 19 (2005); see also Faigman, supra note 5, at 47.

[136] 128 S. Ct. 2783 (2008).

[137] Id. at 2792.

[138] Id. at 2792 n.7.

[139] See, e.g., 128 S. Ct. 1520, 1535 (2008) (Roberts, C.J.) (plurality opinion) (citing Gerritt K. Kimsma, Euthanasia and Euthanizing Drugs in The Netherlands, *in* Drug Use in Assisted Suicide and Euthanasia 193, 200, 204 (Margaret P. Battin & Arthur G. Lipman eds., 1996), an article on euthanasia practices in the Netherlands); id. at 1539–40 (Alito, J., concurring) (citing ethics codes from nurses and emergency personnel); id. at 1543 n.1 (Stevens, J., concurring) (citing Rebecca H. Rhoades, The Humane Society of the United States Euthanasia Training Manual 133 (2002)); id. at 1558–61 (Thomas, J., concurring) (citing historical examples of cruel execution methods).

oral argument.[140] And a central medical study to answer this question about risk of pain—the Lancet study—is drawn into question by the Justices who apparently read subsequently released medical critiques of it on their own.[141] This entire discussion is part of an evidentiary procedural free-for-all, which, in fact, prompts Justice Alito to warn that public policy on the death penalty should not "be dictated by the testimony of an expert or two or by judicial findings of fact based on such testimony."[142]

Potentially dispositive authorities found in house are not limited to constitutional cases. In *PGA Tour v. Martin*—a case involving whether, under the Americans with Disabilities Act, a professional golfer's physical handicap should excuse him from the requirement that he walk and carry his golf clubs—the Court found that striking the ball and not walking from hole to hole was the "essence" of golf, and that the method of transportation on the course evolved over time.[143] This finding was supported by citations to a book called *Rules of the Green*, and to an encyclopedia of golf issued by *Golf Magazine*—neither of which were in the record or briefs. And—as Fred Schauer observed in his review of the case—these

[140] Id. at 1535 (Roberts, C.J.) (plurality opinion) (citing Kimsma, supra note 139); id. at 1541 (Alito, J., concurring) (citing Perspective Roundtable: Physicians and Execution—Highlights from a Discussion of Lethal Injection, 358 New Eng. J. Med. 448 (2008)).

[141] Id. at 1564 (Breyer J., concurring) (citing and critiquing the Lancet Study, Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 The Lancet 1412 (2005)); see also Transcript of Oral Argument at 7–8, *Baze*, 128 S. Ct. 1520 (No. 07-5439) (Breyer, J.) ("What are they? That is, I was—I can't find—what should I read? Because I've read the studies. I've read that Lancet study, which seemed to me the only referee for it said it wasn't any good. And I've read the Zimmer study and I found in there an amazing sentence to me which says that The Netherlands Information Task Force concluded it is not possible to administer so much of it that a lethal effect is guaranteed. They're talking about thiopental. So I'm left at sea. I understand your contention. You claim that this is somehow more painful than some other method. But which? And what's the evidence for that? What do I read to find it?").

[142] 128 S. Ct. at 1541–42 (Alito, J., concurring). Other in-house factual authorities applying Eighth Amendment doctrine can be found in the cases discussing whether a "national consensus" has developed to stop imposing a particular punishment on a group of people. See, e.g., Graham v. Florida, 130 S. Ct. 2011 (2010) (supplementing the party's data as discussed above); Kennedy v. Louisiana, 128 S. Ct. 2641, 2660 (2008) (relying on a website found in house to demonstrate how many executions would be permitted if they could be imposed for convictions of child rape).

[143] 532 U.S. 661, 683–84 (2001).

authorities were used not to answer a question "peripheral or incidental to the Court's major concern," but to address *the* major issue in the case and to determine who won.[144]

B. Where Do the Sources Come From?

Apart from the subject matter and purposes for which in-house fact finding is used, a final relevant observation is the type of authority the Justices are finding for themselves. Twelve years ago, Fred Schauer and Virginia Wise observed that technological advancements (they chiefly noted accessibility to Westlaw and Lexis databases) were changing legal citations in Supreme Court briefs and judicial opinions.[145] Specifically, they documented an increase in citations to what they called "nonlegal" authorities—sources like *Life* magazine, general interest newspapers, and philosophy journals.[146] Many of these sources were being brought to the Court's attention by the parties and amici. "[B]ut it would be a mistake," they observed, "to attribute too much of the increase to information provided in this way by the litigants or amici."[147] Instead, they thought there was also an upswing in citation to nonlegal sources found independently by the Justices—or perhaps more likely by their clerks.

My research supports that hunch.[148] Of the citations I found to factual authorities from outside the adversarial process, roughly half were discovered in what Schauer and Wise would call traditional "legal sources." These authorities include primary and secondary historical sources,[149] law reviews published by American law

[144] Schauer, supra note 15, at 283.

[145] Schauer & Wise, supra note 40, at 495.

[146] Id. at 496.

[147] Id. at 503.

[148] The discussion that follows includes a few choice examples, but all of my research notes are available upon request.

[149] See, e.g., Citizens United v. FEC, 130 S. Ct. 876, 906 (2010) (citing B. Bailyn, Ideological Origins of the American Revolution 5 (1967)) (noting the Framers' understanding of robust free speech); *Heller*, 554 U.S. at 583 & n.7 (citing 3 A Compleat Collection of State-Tryals 185 (London, Timothy Goodwin 1719)) (showing common usage of the phrase "keep arms" in the early eighteenth century); Troxel v. Granville, 530 U.S. 57, 96 (2000) (Kennedy, J., dissenting) (citing 1 D. Kramer, Legal Rights of Children 124, 136 (2d. ed. 1994)) (asserting that through the nineteenth century there was no legal right of parental visitation).

schools,[150] and other resources on subjects related to law (for example, police practices).[151]

The other half of in-house-found facts, however, came from sources that are not strictly "legal."[152] On their own, the Justices found factual information from journals of social science—including the *American Sociological Review*,[153] the *Journal of College Student Development*,[154] the *Journal of Substance Abuse*,[155] and from the National Association of Social Workers.[156] They also pursued and cited evidence from medical sources like the *Cleveland Clinic Journal of Medicine*,[157] the *Journal of the American Medical Association*,[158] the *New England Journal of Medicine*,[159] and the *Journal on Obstetrics and Gynecology*.[160]

[150] Abbott v. Abbott, 130 S. Ct. 1983, 1991 (2010) (citing statistics in several law review articles for the assertion that joint legal custody has become "increasingly common"); *Baze*, 128 S. Ct. at 1553 (Scalia, J., concurring) (citing Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703, 706 (2005)) (arguing that capital punishment has a deterrent effect).

[151] See, e.g., Berghuis v. Thompkins, 130 S. Ct. 2250, 2270 n.3 (2010) (citing D. Zulawski & D. Wicklander, Practical Aspects of Interview and Interrogation 55 (2d ed. 2002)) (stating that modern police training resources instruct officers to obtain a waiver or rights before interrogation); Hudson v. Michigan, 547 U.S. 586, 599 (2006) (citing D. Waksman & D. Goodman, The Search and Seizure Handbook (2d ed. 2006)) (showing an example of sources available to teach officers what is required of them under the Supreme Court's interpretation of the Fourth Amendment).

[152] Of course I acknowledge, like Schauer and Wise do, that the line between the legal and the non-legal is not one that is simple to define. See Schauer & Wise, supra note 40, at 497.

[153] *Parents Involved*, 551 U.S. at 840 (citing Lincoln Quillian & Mary E. Campbell, Beyond Black and White: The Present and Future of Multiracial Friendship Segregation, 68 Am. Soc. Rev. 540, 541 (2003)).

[154] Grutter v. Bollinger, 539 U.S. 306, 364 (2003) (Thomas, J.) (citing study for the proposition that "black students experience superior cognitive development at historically black colleges").

[155] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 892 (1992) (citing James A. Mercy & Linda E. Saltzman, Fatal Violence Among Spouses in the United States, 1976–85, 79 Am. J. Pub. Health 595 (1989)).

[156] Id. (citing Benigno E. Aguirre, Why Do They Return? Abused Wives in Shelters, 30 J. Nat'l Ass'n of Soc. Workers 350, 352 (1985)).

[157] Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 199 (2002) (citing R.S. Carneiro, Carpal Tunnel Syndrome: The Cause Dictates the Treatment, 66 Cleveland Clinic J. Med. 159, 161–62 (1999)).

[158] *Heller*, 128 S. Ct. at 2857 (Breyer, J., dissenting) (citing Garen J. Wintemute, The Future of Firearm Violence Prevention, 282 J. Am. Med. Ass'n 475 (1999)).

In addition, the Justices were prone to rely on stories found in newspapers or magazines of general circulation. These include nationally circulated periodicals like the *Wall Street Journal* and the *New York Times*,[161] but also stories from the *Sacramento Bee*,[162] the *Arkansas Gazette*,[163] and the *Tampa Tribune*,[164] to name a few. The Justices also independently found and relied on articles in magazines with more niche audiences, such as *Mediaweek*, *Music Week*, *Sporting News*, and *Golf Magazine*.[165]

Showing a sign of the times, many of these citations to newspapers were in website format, but reliance on websites was certainly not limited to digital periodicals. I found it was quite common for Justices to demonstrate the prevalence of a practice through statistics they found themselves. And, at a fairly high rate these statistics were supported by citations to websites—I found seventy-two such citations in my non-exhaustive search.

Importantly, statistics were independently gathered from websites with widely ranging indicia of reliability. Some numbers came from government agency websites like the Food and Drug Admin-

[159] *Baze*, 128 S. Ct. at 1541 (Alito, J., concurring) (citing Perspective Roundtable: Physicians and Execution—Highlights from a Discussion on Lethal Injection, 358 New Eng. J. Med. 448 (2008)).

[160] Gonzales v. Carhart, 550 U.S. 124, 173 n.3 (2007) (Ginsburg, J., dissenting) (citing Eleanor A. Drey et al., Risk Factors Associated with Presenting for Abortion in the Second Trimester, 107 Obstetrics & Gynecology 128, 133 (2006)).

[161] Hollingsworth v. Perry, 130 S. Ct. 705, 707 (2010) (citing Jim Carlton, Gay Activists Boycott Backers of Prop 8, Wall St. J., Dec. 27, 2008, at A3 (reporting that opponents of Proposition 8 compiled Internet blacklists of those supporting the law)); Locke v. Davey, 540 U.S. 712, 734 (2004) (Scalia, J., dissenting) (citing Elaine Sciolino, Chirac Backs Law to Keep Signs of Faith Out of School, N.Y. Times, Dec. 18, 2003, at A17 (reporting on France banning religious attire—"invoking interests in secularism no less benign than those the Court embraces today")).

[162] Ewing v. California, 538 U.S. 11, 26 (2003) (citing a newspaper-conducted study on recidivism rates in California).

[163] Muscarello v. United States, 524 U.S. 125, 130 (1998) (citing to show common usage of the phrase "to carry").

[164] Sykes v. United States, 131 S. Ct. 2267, 2290 n.3 (2011) (Kagan, J., dissenting) (citing articles covering car crash to show dangers of high speed chases).

[165] United States v. Stevens, 130 S. Ct. 1577, 1589 (2010) (citing an article in *Mediaweek* about hunting popularity); Metro-Goldwyn-Mayer Studios v. Grokster, 545 U.S. 913, 964–65 (2005) (Breyer, J., concurring) (citing articles in *Music Week* and on wired.com about the piracy fight); *PGA Tour*, 532 U.S. at 697 (Scalia, J., dissenting) (citing *Sporting News*); id. at 684 n.40 (Stevens, J.) (citing *Golf Magazine*'s *Encyclopedia of Golf* to show competitive nature about the game of golf).

istration[166] or Customs and Border Patrol.[167] Others originated from non-profit organizations like the Rape, Abuse & Incest National Network,[168] the Cato Institute,[169] the Center for Reproductive Rights,[170] or OpenSecrets.org (a site that tracks political campaign contributions).[171] The implications for these varying sources—a chance for imputing bias, a chance for mistake—are discussed below, but suffice it to say the practice of Justices searching online for authorities to support factual assertions is not rare in the least.

Finally, one other form of in-house fact finding bears specific mention. In nine different cases, a Justice cites factual information solicited from the Supreme Court library.[172] These authorities rely on data submitted in a letter by an expert who was not recruited by either party at any stage of the litigation—and whose "testimony" is not submitted under oath.

Recall that Justice Kennedy in *Graham v. Florida* relied on such letters from various state prison officials to demonstrate how many juveniles were serving life sentences across the country.[173] Similarly, in *O'Sullivan v. Boerckel*—a case about how federal habeas petitioners must first exhaust their claims to state supreme courts—Justice Breyer's dissent cites a memorandum authored by Carol Flango at the National Center for State Courts. In her letter—addressed to the Supreme Court library and on file with the Clerk's office—Ms. Flango provides the Court with statistics on how many cases are actually reviewed by state courts with discretion over

[166] Wyeth v. Levine, 129 S. Ct. 1187, 1230 & nn.16–17 (2009) (Alito, J., dissenting).
[167] Ali v. Fed. Bureau of Prisons, 128 S. Ct. 831, 845 (2008) (Kennedy, J., dissenting).
[168] Kennedy v. Louisiana, 128 S. Ct. 2641, 2669 n.2 (2008) (Alito, J., dissenting).
[169] Hudson v. Michigan, 547 U.S. 586, 614 (2006) (Breyer, J., dissenting).
[170] Roper v. Simmons, 543 U.S. 551, 625–26 (2005) (Scalia, J., dissenting).
[171] Randall v. Sorrell, 548 U.S. 230, 252 (2006).
[172] See Abbot v. United States, 131 S. Ct. 18, 27 (2010); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3181 (2010) (Breyer, J., dissenting); Graham v. Florida, 130 S. Ct. 2011, 2024 (2010); Marrama v. Citizens Bank of Mass., 549 U.S. 365, 374 & n.10 (2006); Blakely v. Washington, 542 U.S. 296, 324 n.2 (2004) (O'Connor, J., dissenting); Apprendi v. New Jersey, 530 U.S. 466, 551 (2000) (O'Connor, J., dissenting); O'Sullivan v. Boerckel, 526 U.S. 838, 863 (1999) (Breyer, J., dissenting); Harris v. Alabama, 513 U.S. 504, 521 n.8 (1995) (Stevens, J., dissenting); Richardson v. Marsh, 481 U.S. 200, 209 (1987).
[173] 130 S. Ct. at 2024.

their dockets.[174] In none of these instances was the factual information briefed by the parties. Instead, a Justice solicited the information—almost like a subpoena—from an expert from whom he or she wanted to hear and did not reveal the results until the case was handed down.

III. WHY THE CURRENT PROCEDURAL APPROACH IS OUTDATED: RISKS OF MODERN IN-HOUSE FACT FINDING

At this point it should be hard to deny that Supreme Court Justices routinely look outside of the record for answers to their factual questions or at least for support to the factual dimensions of their arguments. It should also be clear that they do not just conduct independent research while mulling over their votes, but they also cite what they find as authority for their decisions. The lingering question remains: why does any of this matter? Assuming—as I think it is safe to do—that the digital revolution and the dramatic change in the way we access information mean in-house fact finding will only increase over time, should it make any difference to our normative reactions about the process for this brand of judicial decision making?

My answer—not surprisingly—is yes. The world looks very different from the way it looked when legislative facts were exempted from the scope of judicial notice rules in 1975. In 1975, inherent institutional weaknesses limited the judiciary from pervasively conducting in-house research.[175] Crafting the rules to grant courts freedom to do extra factual research meant one thing when that research took hours or days in the library. Now, however, not only are judges still free to look outside the record and the briefs for questions of fact, but their ability to do so is tremendously enhanced. The digital revolution has two palpable relevant effects: it increases the amount of factual information available for review

[174] 526 U.S. at 863 (citing Memorandum from Carol R. Flango, Nat'l Ctr. for State Courts, to Supreme Court Library (June 11, 1999) (on file with Clerk of Court's case file)).

[175] While academics have engaged in a robust debate about the virtues and vices of judicial fact finding compared to legislative fact finding, see, e.g., Devins, supra note 21, at 1169–70, most agree at the outset of that debate that the judiciary faces significant institutional weaknesses in its ability to gather facts, see, e.g., Cheng, supra note 18, at 1283; Davis, supra note 17, at 4.

(statistics, social science research, and polling data can now all be posted to the world for free by anyone) and it also makes this information faster to obtain—literally just fingertips and a Google search away.[176]

This new research tool is a game changer. Of course there are benefits to letting judges research freely in a new digital age. Like all of us, judges presumably make better decisions when they know more. But there are also troubling effects that accompany a robust practice of in-house judicial fact finding today. This Article addresses three of them: the systematic introduction of bias, the possibility of mistake, and concerns about notice and legitimacy.

To be sure, these risks have always existed when judges look outside the record on questions of fact, but the dangers are more potent in a world where information is easily accessed and freely traded. As shown above, in-house factual research in the digital age is not something that happens on occasion and without consequence. Perhaps in the 1970s the evidence rules could afford to ignore it—but not anymore.

A. Systematic Introduction of Bias

Most questions of legislative fact are not easy. Consequently, studies and statistics purporting to answer them can be slanted depending on the identity of the researcher or the goal of the research.

This of course has always been true, and it is true whether the question is the subject of expert testimony at trial, briefed by the parties on appeal, or researched independently by a judge. But when evaluating studies, statistics, or expert opinion purporting to answer questions of legislative fact, bias is easier to spot at certain stages of litigation than at others. Dueling experts in the courtroom can be asked directly about each other's opinions. The same could be said of dueling citations at the briefing process—even when facts come from amici—since these sources are all subject to counterarguments in reply briefs or at oral argument.

[176] Thornburg, supra note 11, at 167–68 (discussing People v. Mar, 52 P.3d 95 (Cal. 2002), a California Supreme Court decision in which the majority candidly admitted to "us[ing] a Google search to learn about stun belts and their medical effects").

Exxon Shipping Co. v. Baker—the 2008 case about punitive damages stemming from the Exxon Valdez oil spill—provides an excellent example of empirical studies that were presented to the Court but financed by a party.[177] Justice Souter, writing for the majority, acknowledged the existence of certain mock jury studies that showed punitive damage awards were unpredictable; he went on to say, however, that "[b]ecause this research was funded in part by Exxon, we decline to rely on it."[178] Interestingly, both the existence of these studies and the fact that they were partially financed by Exxon were brought to the Court's attention from within the adversarial process—by various amicus and party submissions.[179] The safety net of the adversary system, however, is useless when the parties do not see the factual sources before the Justices rely upon them as authorities and enshrine them in the U.S. Reports. When that happens, biased studies—studies conducted by or financed by those with a particular point of view—do not get vetted by the litigants first, and the bias can go undetected.

Sykes v. United States provides another good example.[180] There, not surprisingly, statistics and studies were marshaled by both parties on the dispositive factual question of whether "[r]isk of violence is inherent to vehicular flight."[181] Some of these studies made it into the Court's opinion, but they apparently were insufficient to answer the question. As discussed above, Justice Kennedy (writing for the majority) and Justice Thomas (in concurrence) set forth new statistics for how many crashes in Pennsylvania and California were caused by police chases. They also cite fatality and injury rates from these data, complete with anecdotal evidence reported in newspaper articles.[182] None of these new data were in the record below.

[177] 128 S. Ct. 2605 (2008). Whether or not these specific studies were sound is a debate I need not enter.

[178] Id. at 2626 n.17.

[179] See, e.g., Brief *Amici Curiae* of Sociologists, Psychologists, and Law and Economics Scholars in Support of Respondents at 14–15, *Baker*, 128 S. Ct. 2605 (No. 07-219), 2008 WL 275482 at *14–15; Brief of Plaintiffs, In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 1997) (Nos. 97-35191, 97-35192, 97-35193), 1997 WL 34647140 at *39 n.44.

[180] 131 S. Ct. 2267 (2011).

[181] Id. at 2274.

[182] Id. at 2279 (Thomas, J., concurring).

Justice Scalia (in dissent) calls this "untested judicial fact finding masquerading as statutory interpretation."[183] He points out that "[a]n adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all."[184] Specifically, he notes that the data on which the majority relies "may be skewed towards the rare and riskier forms of flight"[185] because, perhaps, the injuries would have occurred regardless of the police chase. He also complains that "[t]he Court does not reveal why it chose one dataset over another," nor does it fess up to the fact that it relies on studies which are "government-funded."[186]

What Justice Scalia is worried about is the unnoticed introduction of bias that occurs when factual sources are not tested by the adversary system. His precise concern is the development of these facts late in litigation—in Supreme Court briefs—but his worry is even more pointed when the authorities are not seen by the parties at all but instead are found in house by judges after the litigants' role is over.

Importantly, this risk of systematic introduction of bias in fact finding is significantly enhanced in the digital age. To "google" something is now common parlance and common practice for looking up an unknown fact. But Internet searches like these may not present results in a neutral fashion. Since web companies—like Google—can gather vast amounts of information about their users and because they try to tailor services to our personal tastes, some claim the search engines filter the search results depending on the searcher.[187] A search for "global warming," for example, may reveal different results for different users depending on which websites

[183] Id. at 2286 (Scalia, J., dissenting).
[184] Id.
[185] Id.
[186] Id.
[187] Eli Pariser, The Filter Bubble: What the Internet Is Hiding from You 8–17 (2011) [hereinafter Pariser, The Filter Bubble]; see also Eli Pariser, When the Internet Thinks It Knows You, N.Y. Times, May 22, 2011, at A23, available at http://www.nytimes.com/2011/05/23/opinion/23pariser.html.

are bookmarked, which political blogs are visited, or even what groups the users belong to on Facebook.[188]

The consequence, as Eli Pariser powerfully explains in his new book, is that we get trapped in a "filter bubble" and are only exposed to information that confirms our world view.[189] These "personalization filters," Pariser says, "serve up a kind of invisible autopropaganda, indoctrinating us with our own ideas, amplifying our desire for things that are familiar and leaving us oblivious to the dangers lurking in the dark territory of the unknown."[190] To be clear, the fear is not just that we will look for confirmation of our own ideas (a possibility that exists with or without the Internet); the concern is that Google will silently do this for us.

Ponder the implications of the filter bubble for in-house judicial research of legislative fact. A search for statistics on fatalities in police chases, or a search for the physiological effect of the chemicals used in lethal injection could produce different results for different chambers depending on, for example, the Internet history (or Facebook profile!) of the users. The end result is worse than a Justice purposely finding something to cite that supports what she wants to argue; it is that she will *only* find factual authorities to support what it is she wants to argue. This opens a real possibility for the systemic introduction of bias—unrealized bias—into assertions of fact in judicial opinions.

The American adversary system is designed to combat bias of this sort: "Our legal tradition regards the adversarial process as the best means of ascertaining truth and minimizing the risk of error."[191] The idea is that parties compete to persuade a court, keep-

[188] Just to be sure I am not inflicting my own scholarship with factual bias, I should note that not everyone agrees with Pariser's thesis. According to an article on Slate.com critiquing Pariser's work, a spokesperson from Google has asserted that they actually have "algorithms in place designed specifically to limit personalization and promote variety in the results page." See Jacob Weisberg, Bubble Trouble: Is Web Personalization Turning Us into Solipsistic Twits?, Slate.com, June 10, 2011, 7:16 AM, http://www.slate.com/articles/news_and_politics/the_big_idea/2011/06/bubble_trouble.html. In any event, all seem to concur that the technology to produce the filter bubble is out there; therefore biased results from tailored Internet searches present at least a potential risk of in-house fact finding.

[189] Pariser, The Filter Bubble, supra note 187, at 15.

[190] Id.

[191] Frost, supra note 11, at 500 (quoting Mackey v. Montrym, 443 U.S. 1, 13 (1979)); see also Neonatology Assocs. v. Comm'r, 293 F.3d 128, 131 (3d Cir. 2002) (opinion of

ing each other in check; and "[a]lthough the truth-seeking aspect of the adversary system is colored by the desire of litigants to win, that competitiveness also helps to control the use of conclusory statements as facts."[192] Granted, the system is by no means perfect (particularly when the resources of the parties are lopsided). But objectivity is lost when shortcuts are taken and a system designed to protect against bias is bypassed altogether.[193]

B. Possibility of Mistake

A second risk of in-house fact finding is the chance that the Court gets the facts wrong. This is more than the possibility of incorporating biased factual authorities into judicial opinions. There is also the separate concern that the factual authorities found in house—and only seen by internal Court personnel before becoming enshrined in the U.S. Reports—will be flatly incorrect.

Recall *Graham v. Florida*: the case that invalidated life without parole sentences for juveniles who commit non-homicide offenses.[194] In that case Justice Kennedy relied on a letter from the Bureau of Prisons ("BOP") solicited by the Supreme Court library detailing how many prisoners were in fact serving such sentences for crimes they committed as juveniles. This letter was kept confidential until the opinion was released.

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then-Judge Alito) ("[T]he fundamental assumption of our adversary system [is] that strong (but fair) advocacy on behalf of opposing views promotes sound decision making."); Issachar Rosen-Zvi, Just Fee Shifting, 37 Fla. St. U. L. Rev. 717, 718–19 (2010) (noting that "[t]he rationale underlying [the adversary system] is that competition between opposing parties leads to the triumph of truth," but arguing that this model assumes "fairly matched adversaries"). But see Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 Yale L.J. 1535, 1616–25 (1998) (criticizing use of competing expert testimony to elucidate scientific facts).

[192] Frost, supra note 11, at 500; Rogovin, supra note 11.

[193] One response to the potential for bias implicit in in-house fact finding is that there is always possibility for dissent—an in-house adversary of sorts. We need not worry, in other words, about Justice Kennedy and Justice Thomas's use of extra-record statistics in *Sykes* because Justice Scalia was there to monitor it and speak up. Skeptical eyes are surely one value of dissents generally, but the reassurance is not complete. For one thing, there is no guarantee of a dissent in every case (particularly in lower courts). And, moreover, when a fact is not dispositive to a case, there is a significant risk that dissenting judges or Justices—who, after all, are not in the same position as rivaling parties—will accept their colleagues' factual research at face value.

[194] 130 S. Ct. 2011 (2010).

One week after the decision, the Solicitor General's Office submitted a letter to the Clerk of the Court—subsequently obtained by the Legal Times Blog—correcting the numbers listed in the BOP report.[195] It turns out that not one of the six inmates listed in the BOP's letter was actually serving a life sentence for a crime committed as a juvenile.[196] The Solicitor General apologetically stated that due to "time restraints" the BOP had released automated inmate records to the Court that were unfortunately inaccurate.[197] The Solicitor General's Office apparently did not know the BOP letter to the Court existed until after the decision was released.[198]

Granted, we can quibble about whether this mistake had any impact on the case's resolution. Would Justice Kennedy have voted differently in *Graham* had the BOP supplied him with the right numbers? Probably not. But even so, as shown above, questions of legislative fact *can* be outcome-determinative and even these potentially dispositive facts are being researched in house. Further, and in any event, it seems normatively desirable to want outputs of a legal system—even factual assertions that do not change the outcome of litigation—to be as error-free as possible.[199]

As is true with the risk of incorporating bias into judicial opinions, the risk of factual mistakes is also one that is exacerbated by new modes of digital research. Not only are data easier to find thanks to the Internet, but—importantly—they are also easier to post. No longer does a budding biologist, political scientist, or statistician need a reputable journal to publish his results. All he needs is a reliable Internet connection to post it, tweet it, or link it to his

[195] Debra Cassens Weiss, SG: Bureau of Prisons Supplied Wrong Info to SCOTUS in Landmark Juvenile Case, ABA J., May 28, 2010, 8:48 AM, http://www.abajournal.com/news/article/sg_says_bureau_of_prisons_supplied_wrong_information_to_supreme_court.

[196] See Tony Mauro, Solicitor General Revises Data on Federal Juvenile Sentences, Blog of LegalTimes, May 24, 2010, 7:50 PM, http://legaltimes.typepad.com/blt/2010/05/solicitor-general-revises-data-on-federal-juvenile-sentences.html (quoting a May 24, 2010 letter from Acting Solicitor General to Clerk of the Supreme Court).

[197] Id.

[198] Id.

[199] Frost, supra note 11, at 500 (quoting Mackey v. Montrym, 443 U.S. 1, 13 (1979)) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error.").

Facebook page. In other words, it is now virtually costless to publish one's opinions, findings, or research to the world.[200]

Of course this expansion of information has tremendous value, but it also comes with significant risk. As the legal luminary Jon Stewart puts it, "the Internet is just a world passing around notes in a classroom."[201] Some factual information on the Internet is trustworthy, but some of it is not; and discerning the difference is not always easy.

Moreover, with the speed at which information can now be disseminated online it becomes possible for those with a stake in litigation—even if not the litigants—to actually post factual findings and studies manufactured *in anticipation of the case's resolution*. Without knowing it, therefore, a Justice can stumble upon factual information online that was purposefully and quickly posted with the hope that he would find it. If, at trial, an expert relied on data or a study generated with an eye towards the litigation at hand, that fact would certainly be brought up by an opponent (and the study might be deemed unreliable and screened out under *Daubert*).[202] But if the study is instead discovered by a judge in house, there is no similar screening mechanism in place to stop it from becoming an authority.

The counterargument, of course, is that mistakes are more likely to occur when information is limited. Thus, it could be said, having more information available digitally should benefit and not detract from the accuracy of judicial decision making. But perhaps the wash of factual information judges find themselves able to access makes them unrealistically confident in their ability to address subject matters that are otherwise foreign to them.

No one should be shocked that judges make decisions about things they know little about—that is indeed central to the judicial function for courts of general jurisdiction. But also central to the

[200] Yvette Ostolaza & Ricardo Pellafone, Applying Model Rule 4.2 to Web 2.0: The Problem of Social Networking Sites, 11 J. High Tech. L. 56, 76 (2010) ("An individual can post content on the web for free, making it instantly accessible to anyone who wishes to view it; there are no barriers to enter the world of online publishing apart from accessing the Internet.").

[201] Thomas Goetz, Reinventing Television: We Interrupt This Broadcast to Bring You a Special Report from Jon Stewart, Wired, Sept. 2005, http://www.wired.com/wired/archive/13.09/stewart.html.

[202] Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

art of judging is the educating function of a trial and (on appeal) the briefing process. Indeed, "[t]he process of making a trial record, so the traditional picture has it, is precisely the process by which the judiciary informs itself about matters that would otherwise have been beyond its ken."[203] Once the judge goes beyond the record and briefs to educate himself, are we once again troubled by his lack of expertise?

The answer may depend on the subject matter of the fact. Some legislative facts are the sort a Justice is well equipped to evaluate on his own and other facts are not. Today's Justices are all lawyers and have experience studying American history, for example, so perhaps it matters less that they unearth historical documents on their own as opposed to medical journals or raw data. Of course this argument is far from infallible. For one thing, not everyone agrees that the task of "reliably identifying original intent" falls within the competence of judges as opposed to trained historians.[204]

But even putting historical sources to the side, recall that the Justices cite independently found authorities for all sorts of factual questions. Very few members of the judiciary have prior experience in scientific fields, for example.[205] And, as most scientists will readily admit, all scientific findings are not to be trusted equally.[206] It is not easy to evaluate the significance of scientific claims, not to mention the validity of the methods employed.[207] Given the limited

[203] Schauer, supra note 15, at 279.

[204] Faigman, supra note 5, at 91 ("Complicating matters substantially is the challenge that history as a discipline is rarely able to provide definitive proof and is very susceptible to the biases of the age in which it is done.").

[205] See Valerie P. Hans, Judges, Juries, and Scientific Evidence, 16 J.L. & Pol'y 19, 30 (2007–2008) (noting the relative inexperience judges have in math and science). To be sure, it is possible that a Justice has a prior background in medicine, physics, or psychology, but at the very least her time on the bench would make her out of practice and perhaps out of touch with the latest research trends.

[206] Faigman, supra note 5, at 32–33.

[207] Brewer, supra note 191, at 1538 ("Most judges and juries, however, are not sufficiently familiar with relevant scientific fields to be able independently and reliably to bring scientific information to bear on their decisions."); David L. Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, 38 Emory L.J. 1005, 1081 (1989) ("The legal relevance of social science research simply cannot be divorced from its scientific credibility."); Thomas W. Merrill, Is Public Nuisance a Tort?, 4 J. Tort L. 1, 32 (2011) ("Courts are severely limited in their ability to collect and process large quantities of information about social problems, or to evaluate that information when it implicates disputed issues of science or econom-

time for deciding a case and the limited research resources available to the judiciary, judges and Justices are institutionally ill-equipped to evaluate questions of psychology, social science, physics, or medicine.[208] And, consequently, when Justices deal in matters outside their expertise, they are more likely to make a mistake.

An example of a possible mistake on this score comes from the recent violent video games case, *Brown v. Entertainment Merchants Ass'n*.[209] "Cutting-edge neuroscience," Justice Breyer wrote, "has shown that 'virtual violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior.'"[210] For this factual proposition he quotes a 2006 study published in the *Media Psychology* journal.[211] At least some neuroscience types, however, now claim that Justice Breyer read the study incorrectly—or attributed a conclusion to the authors that they did not make.[212] The point is that even though anyone can sort through neuroscience studies now with just a click of a mouse, we should not be confident that judges—or anyone without the relevant expertise—can sort through the data on their own without making a mistake.

ics."); Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. Rev. 91, 94–95 (1993).

[208] But see Cheng, supra note 18, at 1274 (arguing for greater independent research on scientific data, and noting that "[a] judge can just as easily search the *New England Journal of Medicine* or some other science-related site as Westlaw or LEXIS"). In addition, some scholars have called for the judiciary to obtain greater familiarity with empirical methods so they are more equipped to handle claims with empirical basis. See Faigman, supra note 5, at 181. That argument seems sensible but is distinct from the normative question of whether they should be researching such science on their own outside the adversarial process.

[209] 131 S. Ct. 2729 (2011).

[210] Id. at 2768 (Breyer, J., dissenting) (quoting René Weber, Ute Ritterfeld & Klaus Mathiak, Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study, 8 Media Psychol. 39, 51 (2006)).

[211] This study was not the product of in-house research; it was cited in a brief submitted by scientists as amici curiae. See Brief of Social Scientists, Medical Scientists, and Media Effects Scholars as Amici Curiae in Support of Respondents at 29, *Brown*, 131 S. Ct. 2729 (No. 08-1448). Nonetheless, it still illustrates the larger point that evaluation of science is difficult for judges, making it all the more significant when they do so on their own.

[212] See Neuroskeptic, Violent Brains In The Supreme Court, Neuroskeptic Blogspot, July 15, 2011, 9:00 AM, http://neuroskeptic.blogspot.com/2011/07/violent-brains-in-supreme-court.html.

Some may argue that we need not worry about judicial inexperience with science because it is just this inexperience that will steer a Justice toward reputable journals and away from dubious junk science.[213] But this logic is not completely reassuring. Recall from the collection of examples described above that Justices cite authorities with a terrific range of prestige and reputation. Yes, they rely on articles in the *New England Journal of Medicine*, but they also cite to blog posts,[214] sporting magazines,[215] interest group websites,[216] and (in lower courts) even to Wikipedia.[217]

Moreover, Justices—like all of us—have a tendency to engage in "motivated reasoning" and to look for facts that support the argument they are building, wherever those facts may come from and despite what other opposing authority is out there.[218] This tendency may encourage the ad hoc and potentially mistaken evaluation of scientific findings—looking for what one wants to see—particularly if the studies to be used as authorities were never tested by the adversarial method or addressed by experts below. Couple this reality with the new, instant ability to find facts to support almost anything (thanks to Google), and confidence in judicial fact finding diminishes significantly.

With an increased surge of data comes the increased need to filter out the junk. It is important to recognize that conferring that screening responsibility to reviewing judges on their own—without assistance from the parties through cross examination or even

[213] Cheng, supra note 18, at 1283.

[214] See United States v. Jones, 132 S. Ct. 945, 963 & n.9 (2012) (Alito, J., concurring) (citing Dave Barth, The Bright Side of Sitting in Traffic: Crowdsourcing Road Congestion Data, Google Official Blog, Aug. 25, 2009, 11:16 AM, http://googleblog.blogspot.com/2009/08/bright-side-of-sitting-in-traffic.html).

[215] PGA Tour v. Martin, 532 U.S. 661, 684 n.40 (2001) (Stevens, J.) (citing *Golf Magazine* to show changes in the game of golf); id. at 697 (Scalia, J., dissenting) (citing *Sporting News* to show the competitive nature of the game of golf).

[216] Roper v. Simmons, 543 U.S. 551, 625–26 (2005) (Scalia, J., dissenting) ("And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability.") (citing Center for Reproductive Rights, The World's Abortion Laws (June 2004), http://www.reproductiverights.org/pub_fac_abortion.html).

[217] Peoples, supra note 36.

[218] Devins, supra note 21, at 1181–82 (2001); Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cin. L. Rev. 615, 619–24 (2000).

competitive briefing—can result in misunderstood information and mistakes.

C. Questions of Fairness and Legitimacy

Even if Justices are good at independent research in the digital age and even if worries about mistakes and bias are overblown, there remains a basic question of fairness. This concern has two components: (1) the short-term fairness question with respect to the parties, and (2) the long-term fairness question about the legitimacy of Supreme Court decisions generally.

When a Justice relies on factual authorities he finds himself, the parties can be taken by surprise. Of course when a question is outcome determinative to a case, it is not likely that a party will be shocked to learn of its relevance at decision time. But parties *can* be surprised when a new fact is brought up to bolster an argument or, perhaps more importantly, when a new study or a new statistic is used as authority for a question of fact that turns out to be dispositive.

An example of the latter can be seen in the violent video game case discussed above.[219] Several Justices (Breyer, Alito, Thomas, and Scalia) conduct their own battle of the experts—drawing on sources found both on and off the record—concerning the effect these games have on a child's development.[220] Justice Breyer confesses confusion in deciding which expert is right: "I, like most judges, lack the social science expertise to say definitively who is

[219] *Brown*, 131 S. Ct. 2729.

[220] In his dissent, Breyer explains the research methodology behind his independent research:

> With the assistance of the Supreme Court Library, I have compiled these two appendixes listing peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games. . . .
>
> Many, but not all, of these articles were available to the California Legislature or the parties in briefing this case. I list them because they suggest that there is substantial (though controverted) evidence supporting the expert associations of public health professionals that have concluded that violent video games can *cause* children psychological harm. . . . And consequently, these studies help to substantiate the validity of the original judgment of the California Legislature, as well as that judgment's continuing validity.

Id. at 2771–72 (Breyer, J., dissenting).

right."[221] But of course he picks a side anyway—evaluating some of these studies without any input from the parties.

One consequence of this late-in-the-game introduction of new evidence is that the litigants are deprived of their chance to chime in. Perhaps, in the respondent's view, the methodology of the new study was biased? Or maybe the relevance of opinion to this specific issue was questionable? Whatever the reason litigants have to complain, when a Justice conducts independent factual research and relies on his findings as authority in the opinion, the parties are robbed of the chance to protest. Indeed, now effectively "the record" for legislative facts includes anything a jurist can find on the Internet.[222] With such a large landscape of information to master, it is virtually impossible for a litigant to identify and potentially rebut every potentially relevant study.

This lack of party participation is flatly inconsistent with the goals of the adversarial process. Although surely it has its critics, the American tradition of litigant autonomy has significant advantages.[223] One virtue is that the parties control their own fate: "if a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not."[224]

[221] Id. at 2769.

[222] An example of ambushing an attorney with extra-record facts can be seen at oral argument in last term's *Milner v. Department of Navy*, 131 S. Ct. 1259 (2011). The Court was interpreting a Freedom of Information Act ("FOIA") provision that exempted the government from making certain disclosures. The question at hand was whether the Navy had to disclose some maps it thought should be kept secret for security purposes. At oral argument, Chief Justice Roberts asked the lawyer for the Navy whether a government agency could just classify the information, regardless of whether the FOIA exemption applied. The attorney said that he was not "an original classifying authority," and so he "was not in a position to say." At that point, Justice Alito jumped in and supplied an example he found on the Internet: "There is a document on the FBI web site called 'Security clearance process for state and local law enforcement,' which seems to address exactly [this] situation." See Transcript of Oral Argument at *28–29, *Milner*, 131 S. Ct. 1259 (No. 09-1163), 2010 WL 4876494.

[223] Frost, supra note 11, at 459 (discussing adversarial theory before explaining its limitations).

[224] Stephan Landsman, Readings on Adversarial Justice: The American Approach to Adjudication 34 (1988).

Devotion to the adversary system is thus just as much about fairness to the litigants as it is about producing correct results.[225] Although perhaps a judge's colleagues will keep him honest if he relies too much on new authorities never vetted by the parties,[226] this does nothing to comfort the litigant who had no notice of the new factual source and never had the chance to weigh in when it counted.

Our system is designed so the litigants have meaningfully participated in the adjudication of their disputes for another reason: this participation also infuses democratic legitimacy into court decisions. In his work on procedural minimalism, C.J. Peters has perceptively pointed out that the political branches do not have a monopoly on democratic decision making; instead, he argues, adjudication involves an element of direct participation and indirect participation too.[227] It is narrow-minded, he tells us, "to think of adjudication as decisionmaking by *judges*. Adjudication is decisionmaking by judges *and litigants* . . . ."[228] Litigants frame the questions, litigants create the arguments, and litigants present the facts. This means, in effect, that a court decision carries "a strong measure of democratic legitimacy"—both as to the parties involved in the case and also to future litigants with similar interests whom the parties represent.[229] "Adjudication may be differently democratic, and possibly . . . less democratic, than political decisionmaking. But it is inaccurate to say that adjudication is *non*democratic."[230]

[225] Indeed, at its core, the adversary system evokes elements of due process. Due process "focuses on giving the *individual* an opportunity to present his case, rather than on ensuring that a case is accurately and fully argued by some third party." Frost, supra note 11, at 460.

[226] For an example of this, see Justice Scalia's majority opinion in *Brown*, where he first chides Justice Breyer and then Justice Alito for their extra research efforts. 131 S. Ct. at 2739 n.8 ("Justice Breyer would hold that California has satisfied strict scrutiny based upon his own research into the issue of the harmfulness of violent video games. . . . The vast preponderance of this research is outside the record—and in any event we do not see how it could lead to Justice Breyer's conclusion, since he admits he cannot say whether the studies on his side are right or wrong."); id. at 2738 (noting Justice Alito's "considerable independent research").

[227] Peters, supra note 69, at 1481.

[228] Id.

[229] Id. at 1483.

[230] Id. at 1486.

Legitimacy concerns matter for more than just the parties to the case, or even to similarly situated parties who may be litigating the issue in the future. As others have argued, there are good institutional reasons why legislatures and agencies—not courts—are typically given the responsibility of investigating facts on their own.[231] Putting aside the practical reasons for this division of labor, judicially found factual authorities may be seen as illegitimate in the eyes of the public.

It is important to remember, of course, that the U.S. Supreme Court is more than just a court. Its explanatory obligations extend further than just to the litigants who bring the case and want their dispute resolved. When the Supreme Court relies on facts to issue a ruling—particularly a ruling with significant social implications for the entire country—it is speaking to the public at large and in particular to those people who care about the issue of fact under review.

The question then becomes: when the Justices practice in-house fact finding, does it seem unfair in a way that would undermine its legitimacy in the eyes of the public? Consider a challenge to a statute that largely turns on a question of legislative fact, like the law in California restricting the sale of violent video games to minors. Evidence on the effect these games may have on children was evaluated or provided by: the California legislators and the interest groups who lobbied them; the lower court judges who heard testimony on the subject; the parties who briefed the Supreme Court; and the twenty-four interested groups who filed amicus briefs to the Court specifically addressing this question.[232]

This is a wide berth of democratic participation—from the voters who enacted the legislation, to the parties who litigated the dispute, to the interested groups who filed briefs with the Court on the subject. By going beyond all of those avenues of information to look for factual authorities, the Court extracts democratic legiti-

[231] See authorities cited supra in note 21.

[232] The list of amici who weighed in on this question include: the National Association of Broadcasters, the Comic Book Legal Defense Fund, The Progress & Freedom Foundation, the Electronic Frontier Foundation, the Rutherford Institute, Common Sense Media, Eagle Forum Education & Legal Defense Fund, the California Psychological Association, the California Psychiatric Association, a collection of social scientists, medical scientists, and media effect scholars, and ten different states. Briefs of Amici Curiae, *Brown*, 131 S. Ct. 2729 (No. 08-2448).

macy from its decision—a concern that affects not only parties to the dispute, but all of us.

IV. WHAT SHOULD BE DONE?

If the current approach of complete freedom to research facts outside the adversarial process is broken and outdated, what should be done to fix it? I suggest two radically different approaches that coincide with the two poles on the larger debate about judicial minimalism: (1) the minimalist solution is to restrict the amount of in-house fact finding—confining the evaluation of legislative fact to sources presented by the adversary system; and (2) the maximalist solution is to eliminate the problems by opening up the adversary system so that information flows more freely and openly. Regardless of which course is more persuasive to you, either course is superior to the outdated procedural void that currently exists.

A. The Minimalist's Solution: Shut It Down

The long debate about the proper scope of American judicial review and the propriety of judicial self-control is as old as this country itself and has been engaged over time by some of the best American legal minds.[233] Much of the modern debate seems to center around Cass Sunstein's call for "judicial minimalism."[234] In a nutshell, new minimalists favor "narrow" and "shallow" judicial decisions, as opposed to "wide" and "deep" ones. Making a narrow decision means "saying no more than necessary to justify an outcome, and leaving as much as possible undecided."[235] Making a shallow decision means avoiding grand theories and limiting the binding impact of the decision to only cases with very similar facts.[236] The virtues of this path, Sunstein and others have argued,

[233] Peters, supra note 69, at 1455–58 (providing history of the debate featuring the work of Alexander Hamilton, Alexander Bickel, James Madison, and Cass Sunstein, among others).

[234] Sunstein, supra note 39.

[235] Id. at 3.

[236] Id. Minimalism has both procedural and substantive components. Substantive minimalism holds "that the Court should presumptively avoid invalidating the government action challenged in a particular constitutional case . . . ." Peters, supra note 69, at 1459. Procedural minimalism holds that the Court "should do what is necessary

are that it amounts to fewer and less costly errors, while allowing space for "democratic processes . . . to maneuver."[237]

Minimalism is a more complex concept than the "judicial restraint" trumpeted in politics and judicial nomination hearings.[238] Minimalist judges are fine with invalidating legislation under some circumstances; they are not committed to majoritarianism any more than they are committed to originalism or any other general theory or broad rule.[239] The hallmark of judicial minimalism is "the *constructive use of silence*" and the willingness to leave things undecided.[240] This commitment takes several forms: avoiding constitutional questions, respecting precedents, and refusing to issue advisory opinions or decisions in cases which are not ripe, to name a few.[241]

The call for minimalism has been quite influential. Most observers agree that an increasing number of decisions from the modern Supreme Court are minimalist decisions.[242] Indeed, some have suggested that Chief Justice Roberts has his eye set on a legacy of minimalism.[243] And at least seven members of the current Court (Justices Roberts, Kennedy, Breyer, Ginsburg, Alito, Sotomayor, and Kagan) have been labeled a minimalist—either by Sunstein or others.[244]

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to resolve a constitutional case, but should avoid issues not necessary to the resolution of that particular case." Id.

[237] Sunstein, supra note 39, at 53–54.

[238] Id. at x.

[239] Cf. id. at 261 ("A maximalist, for example, may be entirely devoted to the principle of judicial restraint; consider the idea that all congressional enactments should be upheld.").

[240] Id. at 5.

[241] Id.

[242] Id. at xi ("The current Supreme Court embraces minimalism."); Frederick Schauer, Abandoning the Guidance Function: *Morse v. Frederick*, 2007 Sup. Ct. Rev. 205, 207 ("[W]e have seen an increase in narrow and fact-specific rulings . . . .").

[243] Jonathan H. Adler, Making Sense of the Supreme Court, The Volokh Conspiracy, July 2, 2010, 9:58 AM, http://volokh.com/2010/07/02/making-sense-of-the-supreme-court ("[A]t present, we can characterize the Roberts Court as a moderately conservative minimalist Court (except when its [sic] not).").

[244] Sunstein, supra note 39, at 9; Frank B. Cross & James F. Spriggs II, The Most Important (and Best) Supreme Court Opinions and Justices, 60 Emory L.J. 407, 491 (2010); Mark C. Rahdert, Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending, 32 Cardozo L. Rev. 1009, 1046 (2011); David D. Kirkpatrick, Judge's Mentor: Part Guide, Part Foil, N.Y. Times, June 22, 2009, at A1, A11 (portraying then-Judge Sotomayor as a judicial minimalist and quoting former Yale Law

A commitment to minimalism, I submit, means seriously restricting in-house fact finding. Minimalists seek to render decisions that are "no broader than necessary" and "*incompletely theorized*."[245] When a Justice relies on a factual source he found in-house he is necessarily thinking of the future and does not want to be restricted by the authorities presented by the parties. Love it or hate it, this is wide and deep decision making; it is not case-specific, and not under-theorized.

In fact, the troubles described above which accompany in-house fact finding offer new reasons to favor minimalism. The case for minimalism is bolstered if one believes that judicial decision making is (1) more likely to lead to mistakes than political decision making,[246] and (2) is "inherently less legitimate from the perspective of democracy."[247] As described in Part III above, both concerns are exacerbated by the current approach to in-house fact finding.

A minimalist's response to in-house fact finding, therefore, should be to limit it by revising the Federal Rule of Evidence on judicial notice and re-inserting legislative facts into its scope. Practically speaking, this can take one of several forms. I suggest four.

The most extreme minimalist reform is to require a reviewing court to remand a case back to the trial court to take evidence "the old fashioned way" on a factual question that cannot be answered by the sources in the record. On this view, the Justices should limit their factual authorities to the ones presented by the parties; if the Court finds itself unable to answer a factual question within the adversarial process, it should stop and send the case back to a tribunal capable of hearing more evidence. For a variety of practical

Dean and Second Circuit Judge Guido Calabresi, who described Sotomayor's approach in a controversial case as one of "judicial minimalism"); Dahlia Lithwick, Her Honor, New York Magazine, Nov. 27, 2011, http://nymag.com/news/politics/elena-kagan-2011-12/index4.html (Justice Kagan "is deciding her cases one at a time, without hints or promises about where she may be moved down the road.").

[245] Sunstein, supra note 39, at 11.

[246] Neal Devins, The Democracy-Forcing Constitution, 97 Mich. L. Rev. 1971, 1978 (1999) (noting that judicial minimalism is supported by inherent limitations on the fact-finding ability of courts because courts are "shackled by the temporal and reactive nature of litigation" and they simply do not have the resources to "engage in thorough cost-benefit analysis" of important factual questions).

[247] Peters, supra note 69, at 1460 (noting this justification for minimalism in addition to the belief that judges are not better decision makers when it comes to individual rights).

reasons, this seems less than desirable, but there are other more pragmatic reform possibilities.

Short of a remand, the Rule could instead require additional briefing if a factual question remains hazy on the record. If the importance of a legislative fact is highlighted later in the litigation to the point that a judge feels the need to gather more information, he can simply ask the parties for additional briefing—indeed this is sometimes the move when a legal question arises later in the litigation day.

Before protesting that requiring additional briefing would be too cumbersome and costly, consider the distinct possibility that in-house fact finding is not always a procedure for gathering knowledge but a procedure for bolstering opinions with data once a decision is already made. If this is true, then this change would simply screen out gratuitous in-house fact finding and leave a mechanism in place for instances where the Court is really in the dark on a factual question.

Or, even simpler, a third possibility is for the Rule to adopt a canon of avoidance—like the canon to avoid constitutional questions when interpreting statutes—which would mean, in effect, that a court should not decide a case in a way that would require extra-record fact finding. This is similar to the approach advocated by Justice Scalia that courts should "not venture into domains in which they have little expertise."[248]

A final reform possibility (and certainly a more radical one) would be a wholesale change to the Supreme Court jurisprudence—a shift away from inquiries whose answers depend on legislative facts and towards specific dispute resolution instead. On this view, in-house fact finding is just a symptom of a larger problem: an emphasis on the wrong kind of information.

Scholars have recently observed a new empirical emphasis in Supreme Court decisions.[249] One plausible explanation for this shift is that the change in access to information has increased judicial reliance on legislative facts, period. Put differently, because legislative facts are easier to research, they are becoming more relevant. Of course, many will applaud this move to empirics and fact-based

[248] Schauer, supra note 15, at 289–90.
[249] See supra text accompanying notes 16, 67.

decision making, but to the extent its interaction with digital information gathering is leading to biased results, mistakes, or legitimacy deficits, perhaps an unregulated Supreme Court empirical practice is not worth its cost.

To the extent, therefore, that the modern Justices want to be known as minimalists and a robust practice of in-house fact finding is inconsistent with that tenet, it is worth asking whether they are taking on too many cases that turn on facts about the world as opposed to facts relevant only to the current dispute.

B. The Maximalist's Solution: Open It Up

One can imagine an entirely different approach for reforming in-house fact finding—one that maps onto the opposite side of the debate on judicial roles. Maximalists, as opposed to minimalists, are not convinced of the value of leaving things undecided. Judges who issue maximalist decisions try to craft broad rules to cover a wide range of circumstances beyond just the dispute before them, and also to provide "ambitious theoretical justifications" for their outcomes.[250] The rationale behind this view is that courts should not be afraid to engage in "deep" theorizing because there "are occasions where courts ought to speak about right and wrong on highly contested divisive social issues."[251] Where minimalists can claim the virtue of fewer errors, maximalists can claim the ability to give more guidance to lower courts and individuals.[252]

A related argument from this camp is that the restrictions of litigation can result in poor decisions: that "cases make bad law," as Fred Schauer puts it.[253] The idea here is that common law decision making—the gold standard for minimalists—rests on "a fundamentally mistaken premise" that superior lawmaking comes from resolving actual disputes. The concern is that concrete cases "are more often distorting than illuminating," and that judges focus on the "*this-ness*" of the case at hand while ignoring or misunderstanding the nature of future similar controversies.[254]

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[250] Sunstein, supra note 39, at 9.

[251] Devins, supra note 246, at 1990.

[252] Schauer, supra note 242, at 208 ("Guidance and minimalism are thus opposing virtues . . . .").

[253] Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883 (2006).

[254] Id. at 884.

Bearing this in mind, maximalists should find an altogether different problem with the current approach to in-house fact finding. The problem is not that judges are looking at too much information; the problem is that they are not considering enough. Maximalists distrust the parties to present evidence that comprehensively addresses the factual question because the lens through which the parties present it—"I should win my case"—may distort the answer for the ordinary case in the future.

In fact, the nature of a legislative fact is general and forward-looking; so, on this view, it would be inappropriate to confine one's knowledge of generalized facts to the factual information presented by the parties—doing so would be unfair to future litigants and may distort the accuracy of the answer to the question.[255] Furthermore, as Fred Schauer reasons, "[a]lthough it may seem scary to have major issues of policy determined by nine relatively uninformed people assisted by thirty-odd twenty-somethings surfing the Web, similarly dismal characterizations can be applied to the alternatives"—that is, fact finding done by Congress.[256]

From the maximalist perspective, what should be done is to make judges *better* at evaluating legislative facts without the parties' help. On this view, as Kenneth Culp Davis put it, judges are generally "at their best when they are well informed,"[257] and there is no reason to rely on the litigants to educate them. Thus, the answer to in-house fact finding could lie in structural changes in the judiciary meant to educate the decision makers.

Examples of these reform possibilities include: training of judges on empirical analysis (as Judge Posner urges);[258] providing an easier way for Justices to call on their own experts (as Justice Breyer advocates and indeed practices);[259] and perhaps increasing the resources for the talented Supreme Court librarians and creating a judicial research service akin to the Congressional Research Ser-

[255] Id. at 905; see also Devins & Meese, supra note 78; Frost, supra note 11, at 516 (arguing that in some circumstances it is necessary for judges to address issues not presented by the parties "when failure to do so would lead to inaccurate or misleading statements of law"); Jeffery J. Rachlinski, Bottom-Up Versus Top-Down Lawmaking, 73 U. Chi. L. Rev. 933, 933 (2006).

[256] Schauer, supra note 15, at 289.

[257] Davis, supra note 49, at 949.

[258] Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1, 3 (1998).

[259] See Schauer, supra note 15, at 292.

vice from which Justices can request help (as Kenneth Davis suggests).[260]

Others have proposed tweaking the mechanics of the adversary system to better educate reviewing judges. Brianne Gorod recently suggested increasing and accelerating the role of amici on questions of legislative fact by loosening the standing requirements at the trial court.[261] If judges are going to look beyond the record anyway it is better, she says, "to bring those organizations and individuals with relevant facts into the process at the trial court stage, when the information they have to offer can be subjected to some form of scrutiny and testing."[262]

Going one step further, a different reform would be to adopt an administrative law model of legislative fact investigation. Instead of shutting down in-house fact finding, this proposal would open up the process completely. On this view, when the Court contemplates a question of legislative fact, it would solicit opinions and evidence from all interested parties and encourage public participation, much like the notice and comment process in administrative agencies.[263] This reform would take advantage of new technologies to allow experts, historians, and interested citizens a chance to inform the Court about generalized fact questions.

In fact, the American Bar Association has launched something called "The Citizen Amicus Project" which "seeks input from interested parties to help resolve constitutional issues." The solicitations—aimed at law students—are not "formally filed with the Supreme Court, but will be posted in a publically available website."[264] Although there of course is no guarantee members of the Court would see this website, there is also no procedural hurdle preventing them. This is perhaps a first step in harnessing the digi-

[260] Davis, supra note 17, at 17.

[261] Gorod, supra note 10, at 69–73.

[262] Id.

[263] At least one scholar has recently noticed that the Court is acting like an administrative agency with respect to facts relevant to antitrust violations. See Rebecca Haw, Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal, 89 Tex. L. Rev. 1247 (2011). The implications of this analogy demand far more attention, and I hope to pursue them in later work.

[264] American Bar Association, What Is "The Citizen Amicus Project"?, http://www.americanbar.org/groups/criminal_justice/citizen_amicus/purpose.html (last visited May 16, 2012).

tal revolution to increase public participation in the Court's resolution of fact-based questions.

All of the above suggestions for reform are from a maximalist perspective—with an eye towards improving judicial competence to address questions of legislative fact. If judges are making mistakes or relying on biased factual sources, it is because they need more help evaluating facts and the institutional reforms have not kept up with the changes of the digital age. If judges are undermining their legitimacy by extracting the democratic participation inherent in the adversary method, then they should re-insert it by formally asking the public to weigh in with more information.

CONCLUSION

The digital revolution has changed so much about the way we live and has completely transformed the way we consume facts about the world. It is not surprising that court decisions would be similarly affected. To date, the review of legislative facts has been subject to a procedural hodgepodge—sometimes the subject of expert testimony, sometimes the subject of briefing by parties or amici, sometimes the subject of independent judicial research, sometimes all of the above. This assorted procedural reality no longer works. As the pace of accessing information accelerates exponentially—and as judges are understandably tempted to take advantage of it—we need to seriously contemplate the implications of in-house judicial fact finding and update our approach to accommodate them.