Confronting Supreme Court Fact Finding

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ABSTRACT:

Supreme Court justices routinely answer factual questions about the world – such as whether violent video games have a harmful effect on child brain development or whether a partial birth abortion is ever medically necessary. The traditional view is that these findings are informed through the adversary system: by reviewing evidence on the record and briefs on appeal. Routinely, however, the justices also engage in what I call “in house” fact-finding. They independently look beyond the briefs and record to answer general questions of fact, and they rely on their discoveries as authorities. To be sure, judges have always done this, and the Federal Rules of Evidence contain no rule restricting it. But times have changed. The world has recently undergone a massive revolution in the way it receives and evaluates information. No longer do justices need to trek to the library to look up factual questions. Instead they can access massive amounts of factual information at the click of a mouse.

This article discusses how that change in technology has and will affect the Court’s fact-finding practice. It collects over 100 examples of factual authorities relied on in recent decisions of the U.S. Supreme Court that were found “in house” – i.e. that cannot be found in any of the party briefs, amici briefs, or the joint record. These are not insignificant rarities: almost 60% of the most important Court opinions in the last ten years rely on in house research at least once. The article then examines the potential dangers of in house fact finding in the digital age – specifically the possibility of mistake, the systematic introduction of bias, and notice / legitimacy concerns. It concludes that these concerns require an update to our approach to Supreme Court fact finding. It then offers two independent and contrasting solutions: new procedural rules that restrict reliance on factual authorities found in house, or alterations to the adversary method to allow for more public participation.
CONFRONTING SUPREME COURT FACT FINDING

Allison Orr Larsen*

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 you effectively discharge a 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 prescribe 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

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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 (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 and Laurens Walker, Social Authority: Obtaining Evaluating and Establishing Social Science in the Law 134 U. Pa. L. Rev. 477 (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 Davis, An Approach to Problems of Evidence in the Administrative Procedures, 55 Harv. L. Rev. 364 (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
The central feature of a legislative fact is that it “transcend[s] the particular dispute,” and provides descriptive information about the world which judges use as foundational “building blocks” to form and apply legal rules.

To take a controversial example, when the Supreme Court invalidated 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 unexceptional”) that many women come to regret their abortions later in their lives. 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.

So where do the Justices find information that enables them to decide factual questions about the world? The typical answer depending on the purpose for which the fact is used. See Faigman, “Constitutional Fictions: A Unified Theory of Constitutional Facts,” (Oxford 2008). See also Suzanna Sherry, Foundational Facts and Doctrinal Change, 2011 U. Ill. L. Rev. (2011) (discussing a form of legislative facts she calls “foundational facts” because they consist of the factual assumptions on which legal doctrine is based); John McGinnis & Charles Mulaney, Judging Facts Like Law, 25 Const. Comment 69 (2008) (discussing confusion surrounding what they call “social facts”). 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 S. Ct. Rev. 75, 77 (explaining “the phrase virtually belongs to Professor Kenneth C. Davis”) (citing Kenneth C. Davis, Administrative Law Treatise § 15.03 (1958)).

6 Brenda See, Written in Stone? The Record on Appeal and the Decision-Making Process, 401 Gonz. L. Rev. 157, 191 (2004) (legislative facts are 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.”)


9 Carhart, 550 U.S. at – (“While we find no reliable data to measure the phenomenon, it seems unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained.”)

involves trust in the adversarial system. The basic idea is that “the adversary system is quite practiced at finding facts.”

If a fact is important to a case’s resolution, then the parties (and their amici) 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 factual claim, then we can count on the other party to point this out.

The idea, however, that courts depend only on the adversary system to inform their decisions—even for fact-finding—is more “myth” than reality. As others have recently observed, judges “reach beyond the four corners of the parties’ briefing” when they think the parties have not done enough. 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.

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12 I assume in this article that a party’s amici count as part of the adversary process. More on that later.

13 McGinnis & Mulaney, supra, 25 Const. Comment. At 71 ([The judiciary’s] “salient institutionally structure is the adversarial proceeding where each side has incentives to scrutinize relentlessly the factual claims of its opponent.”).


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 the increased pressure the Court feels to pepper its opinions with empirical support. Faigman, Normative Constitutional Fact-Finding: Exploring the Empirical component of Constitutional Interpretation, 139 U. Pa. L. Rev. 541, 550 (1991) (“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.”); Tim Zick, Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths, 82 N. C. Law Rev 115 (2003) (describing and critiquing the increased use of empirical methods and data to decide constitutional cases). See also Faigman, Constitutional Fictions at --. See also A. Christopher Bryant, The Empirical Judiciary, 25 Const. Comment. 467 (2008); Gorod, supra n. at 123-125 (discussing the role of legislative facts in Citizens United v. FEC and Carhart v. Gonzales).
Traditionally, the options facing a judge who wants extra-record information about a legislative fact were limited. This is not due to any procedural bar to independent research. Unlike adjudicative facts, courts are free to approach legislative fact questions without the use of experts, or witness testimony, or even within the bounds of the record. 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.

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.

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17 Kenneth Culp Davis, Proposed Research Service, 71 Minn. L. Rev. 1, 5-6 (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 Edward K. Cheng, Independent Judicial Research in the Daubert Age, 56 Duke L. J. 1263, 1290 (2007) ("Judicial notice of legislative facts is basically unregulated."); Bryant, supra n. at 472 ("while the controversy surrounding judicial determination of legislative facts in constitutional cases is an ancient one, the legal profession’s understanding of it remains inadequate.").

19 Richard J. Pierce, 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 n. – 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, Constitutional Fictions supra n. at xii ("constitutional facts come to the Court’s attention haphazardly"); id. at 98.

20 See Fed. R. Evid. 201(c), and (e); see also advisory committee’s note.

21 Kenneth Culp Davis, Judicial, Legislative, and Administrative Lawmaking: A proposed Research Service for the Supreme Court, 71 Minn. L. Rev. 1, 6, 14 (1986); Id. at 8 ("The Court may be 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 Kurland, Toward a Political Supreme Court, 37 U. Chi. L. Rev. 19, 38 (1969) ("the Court
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.  

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. 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. Now the Justices (and their clerks and their librarians) are flooded with information literally at their fingertips. 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 quite candid about the fact that the internet lacks machinery for gathering the wide range of facts and opinions that should inform the judgment of a prime policymaker.”).

The Court itself seems well aware of the weakness. In Furman v. Georgia, for example, the majority 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. at 405 (1972). 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, (1997).

22 Davis, supra n. 71 Minn L Rev 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 guesses.”).


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.

25 Zick, supra, at 120 (“the courts are literally awash in data and seem constantly to be clamoring for more).
provides him a powerful new tool for gathering factual data, whether or not that data appears in the briefs.\textsuperscript{26} It is not uncommon for him to quiz an advocate at oral argument with extra-record statistics which he openly admits were gathered through an in-chambers Google search.\textsuperscript{27} And in last term’s decision striking down a law which restricted the sale of violent video games to minors,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{30} Much of this research was not in the record and did not come from any of the briefs.\textsuperscript{31}

Breyer is not apologetic for his independent research and he is not alone. Justice Alito, who vehemently 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.\textsuperscript{32} His opinion, in fact, prompted Justice Scalia to criticize Alito for his “considerable independent research.”\textsuperscript{33}

And not to be outdone, Justice Thomas’s dissent in the same case cites 59 sources to establish the fact that the founding generation believed parents had complete authority over their


\textsuperscript{27} See, e.g., Safeco Insurance Company of America v. Burr, (2007) Oral Argument Transcript at – (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.”).


\textsuperscript{29} Id. at 20. (Breyer, dissenting).

\textsuperscript{30} Id.

\textsuperscript{31} Id at 14 (“The vast preponderance of [Justice Breyer’s] research is outside the record”).

\textsuperscript{32} Id. at 12-16 (Alito) (citing extra-record research including fn 7-12, 13 (Wilson and Sayed only) and 14-18.

\textsuperscript{33} Id. at 11 (Opinion for the Majority).
children’s development. Fifty-seven of those sources cannot be found in the briefs – party briefs or amicus briefs -- and were thus the product of in house research.

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. 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 and 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 fact.

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. And, of the 120 cases since 2000 that political scientists label the “most salient Supreme Court decisions” – largely measured by whether they appear on the front pages of newspapers – 58 percent of them contain at least one assertion of legislative fact supported by sources found “in house.”

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

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34 Id. at (Thomas dissenting)
35 Id at – (Thomas dissenting)
36 Only a handful of scholars have recognized this new reality. See Judge Cathy Cochran, Surfing the Web for a Brandeis Brief, 70 Tex B J 780 (2007); Lee Peoples, The Citation of Wikipedia in Judicial Opinions, 12 Yale J L & Tech 1 (2009). Moreover, although not focused on the modern change in information gathering, Brianne Gorod has asked some very important questions about how appellate courts treat legislative facts generally. See Gorod, Adversary Myth, Duke Law Journal.
37 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 times 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. Todd A. Collins and Christopher A. Cooper, Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure, Political Research Quarterly (March 2011).
conservative, and they cite authorities they find themselves on a wide range of subject matter (from biology to history to Golf). I will also seek to establish a taxonomy of in house legislative fact-finding. I will catalog 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 which are used rhetorically – when a Justice has enough information to decide a case but makes his position more persuasive by bolstering it 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. 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 comes some new risks – the possibility of mistake, unfairness to the parties, and judicial enshrinement of biased data which 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 on to the greater debate between judicial minimalists and judicial 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 of 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

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\(^{39}\) 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 Sunstein, One Case at a Time (2001).
argue that in house fact finding in today’s digital age is worrisome. Part IV will discuss what should be done about it.

PART 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.\(^\text{40}\)

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.\(^\text{41}\) This feature of a fact distinguishes it from statements of value or policy preferences.\(^\text{42}\) Facts can then be subdivided using a well-recognized distinction articulated by Kenneth Culp Davis in 1942: \(^\text{43}\) 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.”\(^\text{44}\) 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?\(^\text{45}\)

\(^\text{40}\) Frederick Schauer and Virginia Wise, Nonlegal Information and the Delegalization of Law, 29 J. Legal Stud. 495, 499 (2000).

\(^\text{41}\) Suzanna Sherry, Foundational Facts and Doctrinal Change, 2011 U. Ill. L. Rev. at 5.

\(^\text{42}\) Sherry, supra.

\(^\text{43}\) Davis, supra n.; See also Laurens Walker and 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.”)

\(^\text{44}\) Brenda See, supra n. – at 198.

\(^\text{45}\) 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 perhaps provides the best modern example of Supreme Court justices evaluating trial evidence. Dan Kahan et al, Whose Eyes are you going to believe? Scott v Harris and the perils of cognitive Illiberalism, 122 Harv L Rev 837 (2009). For an intriguing take on
Legislative facts, by contrast, are generalized statements about the world that help the court decide questions of law and policy. Importantly, as David Faigman has clarified, legislative facts are not only those used to announce new legal rules. 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 an expected psychological response in certain circumstances, demonstrating the prevalence of a particular police practice, or predicting practical consequences from a contemplated legal rule. Although these statements are perhaps more common in constitutional cases, they are not limited to only those decisions. As I use the phrase, a legislative fact includes any generalized fact about the world — not specific to the parties — which 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 United States v. Sykes, a statutory interpretation case decided in June 2011. 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. “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.”

how our pre-existing bias can influence our perception of facts, See Dan Kahan et al., ‘They Saw a Protest’: Cognitive Illiberalism and the Speech-Conduct Distinction.

46 Kenneth Culp Davis, Administrative Law Text §7.03; Faigman, supra 36 Hastings Const L Q at 635; Walker and Monahan, supra 73 Va Law Rev 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 (1988) (arguing that “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-classes 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.


49 Davis, Judicial Notice supra (“Judicial practice of going beyond the record for legislative facts is most pronounced in constitutional cases but is not limited to those cases.”).

50 Sykes v United States, slip op at 1.
Justice Kennedy and Justice Thomas (in concurrence) then recite statistics about the injury and fatality rates connected with vehicular flight.\textsuperscript{51} The data they discuss come from studies that were not part of the record below, or specific to the Indiana law in question.\textsuperscript{52} They were instead “legislative facts:” descriptive statements to answer a question about the world generally -- namely, how inherently violent is it to flee from the police?

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.”\textsuperscript{53} 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 fact-finding masquerading as statutory interpretation.”\textsuperscript{54}

Technically, there was nothing procedurally untoward about the Court using extra-record statistics in this way. Procedural rules which were developed for adjudicative facts are largely inapplicable when it comes to legislative facts.\textsuperscript{55} Legislative facts can be -- but do not have to be -- the subject of expert testimony in the trial court.\textsuperscript{56} Citations to support assertions

\textsuperscript{51} Sykes at 7-9.

\textsuperscript{52} 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, several 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., slip op at – (Thomas J. concurring) (“Also well known are the lawsuits that result from these chases.”) (citing to a series of newspaper articles about crash-related lawsuits); id. slip op at – (Kagan, J. dissenting) (asserting the fact that people may not want to stop for police officers and using newspaper articles for support).

\textsuperscript{53} Sykes, slip op at --.

\textsuperscript{54} Id.

\textsuperscript{55} Gorod, supra at 135. Davis, supra n. --, at 25. 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 “the 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. The parties do no more than to assist; they control no part of the process.” Fed R Evid 201(a) advisory committee notes. See also Woolhandler, 41 Vand L Rev at 112 (“The advisory committee believed that judicial absorption of general nonlegal knowledge should not be circumscribed”).

\textsuperscript{56} Faigman, Constitutional Fictions, at 98.
of legislative fact can – but need not – come from the record below.\textsuperscript{57} And district court decisions on legislative facts may – but are not entitled to – be given deference from reviewing courts.\textsuperscript{58} The Federal Rules of Evidence not only 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.”\textsuperscript{59} 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.”\textsuperscript{60}

Putting aside for the moment the debate on whether this relaxed procedure is a good thing,\textsuperscript{61} it is important to acknowledge two significant changes to judicial decision-making since 1975 when legislative facts were exempted from the scope of judicial

\textsuperscript{57} Edward Becker and Aviva Orenstein, The Federal Rules of Evidence After 16 years, 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.”).

\textsuperscript{58} Faigman, Constitutional Fictions, at 114 (Noting that the Supreme Court is “not guided by any overriding theory of when it should be deferential to other bodies – judicial and nonjudicial – that have made findings of constitutional facts.”). The confusion in the law stems far beyond the Supreme Court to courts of all levels and in state courts as well as federal ones. See Andrew Koppleman, Power in the Facts, NY Times, http://www.nytimes.com/roomfordebate/2010/08/04/gay-marriage-and-the-constitution/judge-walkers-factual-findings (posted August 4 2010) (discussing what is to happen to Judge Walker’s factual findings in the California gay marriage case); A Woman’s Choice v. Newman, 305 F.3d 684, 688 (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.”); see generally Gorod at 140.

\textsuperscript{59} Thornburg, 28 Rev Litig 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.”).

\textsuperscript{60} David Faigman, Constitutional Fictions, supra n -- at 97-98; id. at xii.

\textsuperscript{61} Edward Becker and Aviva Orenstein, The Federal Rules of Evidence After 16 years, 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.”).
notice. The first change, as described above, is the radical transformation in the way the world accesses factual information.62

Equally important, however, is the second relevant change: a turn towards documented empirical factual support for legal argument.63 It used to be the norm for a judge to take account of independently-obtained facts without owning up to it (i.e. without citation).64 Now – perhaps for a variety of reasons -- judges feel an increased pressure to add a citation to their assertions of legislative fact.65

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.66

A citation for support in a judicial opinion, he tells us, is the legal equivalent of saying “I am not making this up.”67 And

62 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, 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 (2010) (noting that an increased use of law clerks corresponds with an increased use of citations to precedent).

63 See Tim Zick, supra at 120 (“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.”).

64 Faigman, supra, 139 U. Pa. L. Rev. at 545 (“Historically most constitutional fact finding depended on the Justices' best guess about the matter.”); Davis, Judicial Notice, at 953 (“the 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.”).


67 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, CJ Peters, supra n. (explaining that explicitly giving reasons for decisions relates to the judicial craft “the way the
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 “all 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.  

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 and less like a legal holding. This matters because the authority protects the observation from future legal challenge and elevates 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, and cases are more often brought to challenge legal conclusions than factual ones.

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. 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 interested not in the theoretical possibility of a judge researching legislative facts on his own. Surely, few people doubt that almost all judges do this, 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

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68 Fiacaman, supra, at U. Pa. Law. Rev. at 545 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824)).

69 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 plan to pursue in future work.

70 Tracey Maeres, Three Objections to the Use of Empiricism in Criminal Law and Procedure and Three Answers, 2002 Univ Ill 851 (2002) (Recent studies show that, over the past decade, judges and lawyers have begun to cite to empirical studies in their work with increasing regularity.");

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 the Court supports an assertion of legislative fact with an authority that it found independently – that is, not from any of the party briefs or from the briefs submitted by amici curie.\(^\text{72}\)

A terrific example of in house fact-gathering can be seen in the *Graham v. Florida* case decided in 2010.\(^\text{73}\) The question before the Court was whether the 8th 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 “although 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.”\(^\text{74}\) 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.\(^\text{75}\)

\[\text{B. HOW COMMON IS MODERN IN HOUSE FACT-FINDING?}\]

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.

\[^{72}\text{ Legislative facts presented to the court through amicus briefs present their own issues and challenging questions. These are questions I plan to pursue in a subsequent paper. For present purposes, however, I am counting amicus submissions of fact as within the adversarial process because the litigants may respond to them before a decision is rendered (through reply briefs or at oral argument). This means if a decision makes an assertion of legislative fact in reliance on an amicus brief – like the citation about women regretting abortions in *Carhart* – it does NOT count as in house research for purposes of this paper.}\]

\[^{73}\text{ Graham v Florida, 130 SCt 2011 (2010).}\]

\[^{74}\text{ Id.}\]

\[^{75}\text{ It is certainly possible for adjudicative facts to be researched in house as well. One can imagine a judge re-visiting the scene of a crime, for example. Those instances are beyond the scope of this paper.}\]
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 shape rules for disputes in the future. 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 percent in recent years), 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 123 examples in the last fifteen years when a Supreme Court justice has supported a factual claim with in house research. 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, 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

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76 Neal Devins and Alan Meese, Nongeneralizable Cases supra n. at --.


78 Examples of these word searches include opinions which include phrases like “on file with” or “our research.”
illustrative list of these instances, I needed a more structured inquiry. I generated a list of the most “salient” (or “important” or “landmark”)\textsuperscript{79} 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 Professors Lee Epstein and Jeffrey Segal) measures saliance 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 saliance by compiling subjective opinions from journalists and Supreme Court watchers.\textsuperscript{80}

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 \textit{any} brief (including amicus briefs and the joint appendix), that authority was labeled the product of “in house” research.\textsuperscript{81}

For the reasons articulated above about the importance of legal authority, I did not count an assertion of legislative fact which 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

\textsuperscript{79} Todd Collins and Christopher Cooper, Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure, Political Research Quarterly (March 2011) (defining the most salient Supreme Court decisions as the “most important” or “landmark” or “controversial”).

\textsuperscript{80} Both indexes are widely used by political scientists. See, e.g. Richard Vining & Teena Wilhelm, Measuring Case Salience in State Courts of Last Resort, Political Research Quarterly (2010) 2 (detailing publications which have used the Epstein-Segal New York Times salience measure for Supreme Court decisions); Resort, Saul Brenner & Theodore S. Arrington, Measuring Salience on the Supreme Court: A research Note, 43 Jurimetrics 99 (2003) (evaluating the different methods of determining salience of Supreme Court decision-making and determining that the CQ index was “the best of the lot”); Todd Collins and Christopher Cooper, Case Salience and Media Coverage of Supreme Court Decisions: Toward a New Measure, Political Research Quarterly (March 2011) (discussing the various measures of case salience and their advantages or disadvantages).

\textsuperscript{81} 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.
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 2000-2010 contained at least one assertion of legislative fact supported by citation. Of those, 77 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 look at the percentage of the total 120 salient cases that make a factual assertion of any kind supported by a source found outside the adversarial process. Even that conservative estimate shows a remarkable 56 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.\(^82\) Justice Stevens, in Mass v. EPA, cited data gleaned from the National Oceanic & Atmospheric Administration website to demonstrate a dramatic rise in carbon dioxide in the atmosphere.\(^83\) Justice Breyer relied on statistics from a magazine to show a lack of popular consensus that self-defense is a fundamental right in McDonald v. City of Chicago (the Court’s most recent Second Amendment decision).\(^84\) 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.\(^85\) 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 relying on in house fact finding. In the Sykes case discussed earlier (concerning whether fleeing from the police is inherently violent), Justice Kagan’s dissent relies on several newspaper articles she found to

\(^{82}\) Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010)


\(^{84}\) McDonald v. City of Chicago, 130 S.Ct 3020, 3137 (2010).

support the claim that people are generally reluctant to stop for police officers. 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.

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 36 of the 90 most salient cases – 40% -- 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 of live animals being intentionally killed.” Several of the sources Justice Scalia uses in DC 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. And in Kennedy v. Louisiana, Justice Kennedy’s majority opinion uses statistics posted on a website to show the prevalence of child rape convictions.

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 which extensively rely on in house research, we noted which of those 120 most salient Supreme Court opinions had four or more factual citations to sources not in the briefs. The percentage of cases was smaller, of course, but still surprising. Of the ninety cases which involve at least one question of legislative fact, 42 of them (47%) have opinions which cite four or more factual sources not in the record and not presented by the briefs.

89 District of Columbia v. Heller, 554 U.S. 570 (2008) (making 20 assertions of historical fact, supported by some sources coming from the briefs but more than 30 sources from outside 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*, Justice Alito’s majority opinion in *McDonald v. City of Chicago*, Justice Ginsburg’s dissent in *Gonzales v. Carhart*, Justice Thomas’s concurrence in *Stafford Unified School District*, Justice Scalia’s concurrence in *Citizens United*, and Justice Breyer’s dissent in *Free Enterprise Fund* and *Parents Involved in Community Schools*.

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.

**PART II. A TAXONOMY OF IN HOUSE LEGISLATIVE 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. Others are merely used rhetorically to bolster one’s argument -- to show practical consequences of a different outcome, or to set the stage by emphasizing the emerging significance of an issue.

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91 *Graham v. Florida*, 130 S.Ct 2011 (2010) (relying on nine sources drawn from outside the briefs to discuss the prevalence of life sentences for juveniles)

92 *McDonald v. City of Chicago*, 130 S.Ct 3020 (2010) (relying on 12 non-brief sources to recount the history surrounding the Second Amendment).

93 *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Ginsburg, dissenting) (relying on 11 sources from outside the briefs which discuss how abortion procedures affect women).

94 *Citizens United v. FEC*, 130 S.Ct 876 (2010) (making 8 assertions about speech at the founding, supported by nine non-brief sources).

95 *Free Enterprise Fund v. PCAOB*, 130 S.Ct 3138 (2010) (making 11 assertions of fact including a long appendix on the structure of federal agencies and relying on 18 different sources not in any briefs); *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007) (citing original research in an appendix to show how many states have adopted inter-district racial integration in school districting).

96 Id.
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 traumatized by divorce”) which are different from facts about nature (“Carbon dioxide causes global warming.”)

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 legislative fact questions Supreme Court Justices are researching themselves. The first involves the subject matter of the factual question and the second involves the purpose for which the fact is used.

1. SUBJECT MATTER OF FACTS FOUND IN HOUSE

The 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?\textsuperscript{97} What diseases can be attributed to obesity?\textsuperscript{98}), questions about nature (Can naturally occurring silt clog a river and restrict a dam?\textsuperscript{99} How much carbon dioxide emissions exist in the atmosphere\textsuperscript{100}), and questions of social science (are poor women more likely to have late-term abortions?\textsuperscript{101} Does the death penalty have a deterrent

\textsuperscript{97} Toyota Motor Mfg., Kentucky, 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 ADA).

\textsuperscript{98} 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).


\textsuperscript{100} Mass v. EPA at 507 (citing website from Department of Commerce).

\textsuperscript{101} Gonzales v. Carhart, 550 U.S. 124, n. 3 (Ginsburg dissenting)
effect?\textsuperscript{102} What are the emotional consequences of prison?\textsuperscript{103} Do people take race into account when evaluating jurors?\textsuperscript{104}).

The justices go beyond the adversary system to assert facts about economics,\textsuperscript{105} international practices,\textsuperscript{106} and emerging new technology.\textsuperscript{107} 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.\textsuperscript{108}

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.\textsuperscript{109} Debates over original intent are really factual disputes about, for example, “whether the founders of the Fourteenth Amendment expected the Equal Protection Clause to invalidate segregated schools or

\textsuperscript{102} Ring v. Arizona, 536 U.S. 584, 614-615 (2002) (Breyer, dissenting)

\textsuperscript{103} Barber v. Thomas, Barber v. Thomas 130 S Ct 2499, 2517 (2010) (citing the National Prison Rape Elimination Report).

\textsuperscript{104} Miller-El v. Dretke, 535 U.S. 231, 268 (citing various studies to show that discriminatory use of preemptory challenges is still a problem in spite of the Batson decision) .

\textsuperscript{105} Leegin Creative Leather Products Inc. v. PSKS, Inc. 551 U.S. 877, 903 (2007) (citing Coase)

\textsuperscript{106} Baze v. Rees, 553 U.S. 35, 59 (2008) (Chief Justice Roberts citing practice of giving muscle relaxers before euthanasia in the Netherlands in a case about the constitutionality of lethal injection); McCreary County, Ky. V. American Civil Liberties Union of Ky., 545 U.S. 844, 882 (2005)(O’Conner 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.”).


\textsuperscript{108} See, e.g., Sykes v. United States, 564 U.S. – at slip op. 12 (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 slip op 7. (majority opinion incorporating statistics from Justice Thomas’ concurrence); United States v. Stevens, 130 S.Ct 1577 (2010) (citing statistics in Mediaweek magazine (outside the record) to demonstrate how large the national market is for hunting magazines); Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S.Ct 3138 (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).

\textsuperscript{109} Faigman, Constitutional Fictions at 46 (“Original intent, one of the most common bases for constitutional interpretation is almost wholly fact based.”).
whether the Free Speech Clause was intended to cover obscenity.\textsuperscript{110}

It should come as no surprise that Justice Thomas and Justice Scalia – committed to principles of originalism -- frequently cite historical sources they researched on their own.\textsuperscript{111} But they are not the only Justices who do so. In Parents Involved v. Community Schools, Justice Breyer’s dissent contains a detailed history about de-segregation efforts in this country since Brown, including a 50 state survey explaining which states have adopted open-choice plans and statistics indicating their success rates over time.\textsuperscript{112} 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, 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 generations.\textsuperscript{113}

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 at classifying the use of legislative facts – David Faigman alone has done tremendous

\textsuperscript{110} Id.


\textsuperscript{113} See McCreary County v. ACLU, 545 U.S. 844, 878-880 (2005) (Souter, J.) (citing James Madison and Justice Story, although noting there are conflicting conclusions); Id. at 886 (Scalia, J., dissenting) (citing George Washington); Elk Grove Unified School Dist v. Newdow, 542 U.S. 1, 30 (2004) (Rhenquist, concurring) (citing various examples of patriotic invocations of God in the early Republic).
work in that area.\footnote{This is certainly not the first attempt at classifying the use of legislative facts David Faigman’s work on the issue is exceptionally provocative and helpful on this score. See eg Faigman, Constitutional Fictions supra n. --. The taxonomy in this article addresses a different question, however – namely how are justices using legislative facts which they research themselves.} The question at hand, however, is more specific: when a Justice conducts original research on a legislative fact, 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 adversary 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 – 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.”\footnote{Faigman, Constitutional Fictions, at 25.} He is right, and 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 \textit{Stafford Unified School District 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.\footnote{129 S. Ct 2633, 2650-57 (2009) (Thomas, J. concurring in part and dissenting in part)} And in \textit{United States v. Booker} -- the case which 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.\footnote{U.S. v. Booker, 543 U.S. 220, 290 (2005).}

A similar rhetorical use for such facts is to show the practical impact of a law. In \textit{Ewing v. California}, for example, the question before the Court was whether California’s “three
strikes” repeat offender statute was cruel and unusual punishment. 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.

Was this study critical 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. It may be tempting to dismiss the independently-found citation as superfluous, but paying attention to cited authorities is no trivial matter. 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.” Or, as Frank Cross put it recently, “citations function something like the currency of the legal system.”

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 Schauer’s insight that the backbone of law is authoritative: “what matters is not what the reason says but where it comes from.” 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. 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” and studies or statistics or other factual sources

\[119\] Id. at 26.
\[120\] See Gorod supra n – at fn 99 (“Even 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.”)
\[121\] Schauer, Authority and Authorities at 1934.
\[122\] Id.
\[123\] 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 (2010)
\[124\] Schauer supra at 1936.
\[125\] Id. at 1935.
\[126\] Id. at 1960.
found outside the record or briefing process matter even if they are used “merely” to make an argument stronger.\textsuperscript{127}

As for potentially dispositive questions of fact – with answers that can turn dissents into majorities and vice versa – it seems 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.”\textsuperscript{128} “Constitutional doctrinal facts,” he tells us, are facts used to establish the meaning of the Constitution.\textsuperscript{129} Chief examples here 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 constitutional rule, rather than create it.\textsuperscript{130} A good example here is whether homegrown medical marijuana will affect the larger marijuana market – a dispositive question of fact in \textit{Gonzales v. Raich} and critical to applying the Court’s doctrine interpreting the Commerce Clause.\textsuperscript{131}

Both sorts of potentially dispositive facts have been the subject of in house fact gathering at the Court in recent years. \textit{Heller v. the District of Columbia} – the 2008 decision invalidating a DC handgun ban as a violation of the Second Amendment – provides a good example. 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,

\textsuperscript{127} The same answer applies to an additional variant of in house research we found in our search: 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,\textsuperscript{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 less when a Justice relies on an independently-found factual source alongside one from within the record. But for the reasons expressed above, the citation of the new authority should still raise some concerns.

\textsuperscript{128} Faigman, Constitutional Fictions at 46.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 47.

\textsuperscript{131} Gonzales v. Raich, 125 SCt 2195 (2005); See also Faigman at 47.
“‘keep arms’” was simply a common way of referring to possessing arms, for militiamen and everyone else.”132 For support, he cites ten historical sources showing common word usage from the early eighteenth century.133 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. Reese relied on factual sources not in the record.134

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 only brought up in passing at oral argument.135 And the central medical study on the record to answer this question about risk of pain – the Lancet study – was drawn into question by the Justices who apparently read subsequently released medical critiques of it on their own.136 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.”137

133 Id. at n. 7.
134 See Baze v Reese, 553 US 35 (2008) at 59 (Roberts citing Kimsma article on euthanasia practices in Holland); id. at 65 (Alito citing ethics codes from nurses and emergency personnel); id. at Stevens fn 1 (citing Humane society website); id. at 101 (Thomas, J.) (citing historical examples of cruel execution methods).
135 Id. at 59 (Roberts citing Kimsma article); id. at 65 (Alito citing Perspective Roundtable: Physicians and Execution-Highlights from a Discussion of Lethal Injection, 358 New England J. Med. 448 (2008)).
136 Id. at 109 (Breyer concurring and citing ). See also oral argument transcript at – (“JUSTICE BREYER: 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?”)
137 Id. at 7 (slip op)(Alito 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
Potentially dispositive authorities found in house are not limited to constitutional cases. In *PGA Tour Inc. v. Casey Martin* – a case involving whether, under the ADA, a professional golf player’s 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.\(^{138}\) This finding was supported by cites to a book called “Rules of the Green,” an encyclopedia of golf, and an issue of Golf magazine – none of which were in the record or briefs. And as Fred Schauer observed in his review of the case – these authorities were used to answer a question “not peripheral or incidental to the Court’s major concern,” but to address THE major issue in the case and to determine who won.\(^{139}\)

**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.\(^{140}\) Specifically, they documented an increase in citation to what they called “nonlegal” authorities – sources like Life magazine, general interest newspapers, and philosophy journals. Many of these sources were being brought to the Court’s attention by the parties and amici. “But 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.”\(^{141}\) Instead, they thought there was also an upswing in citation to non-legal sources found independently by the justices -- or perhaps more likely by their clerks.

\(^{138}\) 121 S.Ct 1879, 1893-94 (2001)

\(^{139}\) Fred Schauer, The Dilemma of Ignorance, supra at 283.

\(^{140}\) Fred Schauer and Virginia Wise, Nonlegal Information and the Delegalization of Law, 29 J Legal Stud 495 (2000).

\(^{141}\) Id. at 503.
My research supports that hunch. 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, law reviews published by American law schools, or other resources on subjects related to law (like, for example, police practices).

The other half of in house found facts, however, came from sources that are not strictly “legal.” On their own, the justices found factual information from journals of social science -- including the American Sociological Review, the Journal of College Student Development, the Journal of Substance Abuse, and from the National Association of Social Workers. They also pursued and cited evidence from medical sources like:

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


146 Of course I acknowledge, like Schauer and Wise, that the line between the legal and the non legal is not one that is simple to define. See supra n. – at 497.


149 Planned Parenthood v Casey, 505 US 833 (1992) (citing Fatal Violence Among Spouses in the United States)

the Cleveland Clinic Journal of Medicine,\textsuperscript{151} JAMA,\textsuperscript{152} the New England Journal of Medicine,\textsuperscript{153} and the Journal on Obstetrics and Gynecology.\textsuperscript{154}

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 New York Times, and the Wall Street journal,\textsuperscript{155} but also stories from the Sacramento Bee,\textsuperscript{156} the Arkansas Gazette,\textsuperscript{157} and the Tampa Tribune,\textsuperscript{158} to name a few. The justices also independently found and relied on articles in magazines with more niche audiences: like, for example, Musicweek, Digital Entertainment, Mediaweek, Sporting News, and Golf Magazine.\textsuperscript{159}

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 72 citations in my non-exhaustive search.

Importantly, statistics were independently gathered from websites with widely ranging indicia of reliability. Some numbers

\begin{footnotes}
\item[152] District of Columbia v. Heller, 554 US 570, 698 (citing an article on firearm violence).
\item[153] Baze v. Rees, 553 US 35, 68 (citing Perspective Roundtable: Physicians and Execution Highlights from a Discussion on Lethal Injection).
\item[155] Locke v Davey, 540 US 712, 734 (2003) (Scalia dissenting) (citing NY times article about France banning religious attire -- "invoking interests in secularism no less benign than those the Court embraces today"); Hollingsworth v Perry, 130 SCt 705, 707 (2010) (citing a WSJ article for the proposition that opponents of Proposition 8 compiled intent blacklists of those supporting the law).
\item[156] Ewing v California, 538 US 11, 26 (2003)
\item[157] Muscarello v United States, 524 US 125, 130 (used to show common usage of the phrase "to carry").
\item[158] Sykes v. United States, 131 SCt 2267, 2280 (2011) (citing articles covering car crash to show dangers of high speed chases).
\item[159] MGM v. Grokster, 545 US 913, 965 (2005) (citing article in Digital Entertainment and Mediaweek about the piracy fight); United States v. Stevens, 130 SCt 1577, 1589 (2010) (citing article in Mediaweek about hunting popularity); PGA Tour v Casey Martin, 532 US 661, 696 (citing Sporting News and Golf magazine to show competitive nature about the game of golf).
\end{footnotes}
came from government agency websites like the FDA\textsuperscript{160} or Customs and Border Patrol.\textsuperscript{161} Others originated from non-profit organizations like the Rape Abuse and Incest National Network,\textsuperscript{162} the Cato Institute,\textsuperscript{163} Reproductive Rights.org,\textsuperscript{164} or opensecrets.org (a site that tracks political campaign contributions).\textsuperscript{165} 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 of the Supreme Court cites factual information solicited from the Supreme Court library.\textsuperscript{166} 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 \textit{Graham v. Florida} relied on such letters from various state prison officials to demonstrate how many juveniles were serving life sentences across the country.\textsuperscript{167} Similarly, in \textit{O’Sullivan v. Boerkel} – 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 their dockets.\textsuperscript{168} In none of these instances was the factual information briefed by the parties. Instead Justice Breyer solicited the information – almost like a subpoena – from an expert

\textsuperscript{160} Wyeth v Levine, 129 SCt 1187, 1230 (2009).
\textsuperscript{163} Hudson v Michigan, 547 US 586 (2006).
\textsuperscript{164} Roper v Simmons, 543 US 551, 625 (2005).
\textsuperscript{167} Graham, 130 SCt at 2024.
\textsuperscript{168} O’Sullivan, 526 US at 863.
from whom it wanted to hear, and did not reveal the results until
the case was handed down.

PART 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 dramatic change in the way we access information means 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 engaging in in house research. 169 Crafting the rules to
grant courts freedom to conduct 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 (statistics, social science research, polling data
can all be posted to the world for free by anyone now) and it also
makes this information faster to obtain -- literally just fingertips
and a Google search away. 170

169 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. Neal
Devins, supra n. 50 Duke L J at 1169, most agree at the outset of that debate that
the judiciary faces significant institutional weaknesses on its ability to gather
facts. See, e.g. Kenneth Culp Davis, supra n. 71 Minn L Rev at 5; Edward
Cheng, Independent Judicial Research in the Daubert Age, 56 Duke L J 1263,
1283 (2007).

170 Thornburg, 28 Rev Litig at 168 (discussing People v. Mar, 52 P.3d 95 (Cal
2002), a California Supreme Court decision in which the majority candidly
admitted to using a Google search to learn about stun belts and their medical
effects).
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 research of legislative fact 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 opinion. 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 counter arguments in reply briefs or at oral argument.

The safety net of the adversary system, however, is useless when the parties do not see the factual sources before they are relied upon as authorities and enshrined 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 a good example. There, not surprisingly, statistics and studies were marshaled by both parties on the dispositive factual question of whether “risk of violence is inherent to vehicular flight.”\footnote{Sykes v United States (slip op at 7).} Some of these studies made it into the Court’s decision, but they apparently were insufficient to answer the question. 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 this data, complete with anecdotal evidence reported in newspaper articles. None of this data was in the record.

Justice Scalia (in dissent) calls this “untested judicial fact-finding masquerading as statutory interpretation.” He points out that “an 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.” Specifically, he notes that the data on which the majority relies “may be skewed towards the rare and riskier forms of flight” because, perhaps, the injuries would have occurred regardless of the police chase. He also complains that “the 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.”

What Justice Scalia is worried about is the unnoticed introduction of bias that occurs when sources for legislative facts 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 factual sources 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 results depending on the searcher. A search for “global warming,” for example, may reveal different results for different users depending

\[172\] Id. (Thomas concurring at 12)

\[173\] Id. at slip op 5 (Scalia dissenting).

\[174\] Id.

\[175\] Id.

\[176\] Id.

on which websites are bookmarked, which political blogs are
visited, or even what groups the users belong to on facebook.\footnote{178}

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.\footnote{179} 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.” 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 was specifically designed to combat bias of this sort: “Our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error.”\footnote{180} The idea is that parties compete to persuade a court, keeping each other in check; and “although the

\footnote{178 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 asserts that they actually have “algorithms in place designed specifically to limit personalization and promote variety in the results page.” See Jacob Weisbeg, Is Web personalization turning us into solipsistic twits? Available at http://www.slate.com/articles/news_and_politics/the_big_idea/2011/06/bubble_trouble.html (June 10, 2011). 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 is at least a potential risk of in house fact finding.}

\footnote{179 Pariser, supra n. at --.}

\footnote{180 Frost, supra n. at 500; See also then-Judge Alito’s opinion in Neonatology Associates v. Commissioner, 293 F.3d at 131 (3d Cir.) (“the 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, 719 (2010). 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)
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.”\textsuperscript{181} Granted, the system is by no means perfect (particularly when the resources of the parties are lopsided). But objectivity is definitely injured when shortcuts are taken and a system designed to protect against bias is bypassed altogether.\textsuperscript{182}

\section*{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 just incorrect.

Recall \textit{Graham v. Florida}: the case that invalidated life without parole sentences for juveniles who commit non-homicide offenses. In that case Justice Kennedy relied on a letter from the Bureau of Prisons 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.

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.\textsuperscript{183} 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

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\textsuperscript{182} 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 \textit{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 any 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 colleague’s factual research at face value.

committed as a juvenile. The SG apologetically stated that due to “time restraints” the BOP had released automated inmate records to the Court which were unfortunately inaccurate. The Solicitor General’s Office apparently did not know the BOP letter to the Court existed until after the decision was released.

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 those 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.

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 is data easier to find thanks to the internet, but – importantly – it is also easier to post. No longer does a budding biologist or 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 facebook page. In other words it is now virtually costless to publish one’s opinions or findings or research to the world.

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 the world passing around notes in a classroom.” Some factual information on the internet is trust-worthy, but some of it is not; and discerning the difference is not always easy.

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185 Id. (quoting May 24, 2010 letter from Acting Solicitor General to Clerk of the Supreme Court).

186 Id.

187 Frost supra n. – at 500.

188 Yvette Ostolaza and Ricardo Pellafone, Applying Model Rue 4.2 to Web 2.0: The Problem of Social Networking Sites, 11 J. High Tech. L. 56 (“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.”).

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 that was generated with an eye towards the litigation at hand, that fact would certainly be brought up by an opponent (and even perhaps the study would be deemed unreliable and screened out under Daubert). 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 at addressing subject matters 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 art of judging is the educating function of a trial and (on appeal) the briefing process. Indeed, “the 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 be beyond its expertise.”\(^\text{190}\) 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.\(^\text{191}\)

\(^{190}\) Schauer, The Dilemma of Ignorance, at 279.

\(^{191}\) Of course this argument is far from infallible. For one thing, not everyone agrees that the task of “reliably identifying original intent” falls within judicial competence as opposed to trained historians. Faigman, Constitutional Fictions at 91 (“Complicating matters substantially s the challenge that history as a discipline is rarely able to provide definitive proof and is very susceptible to the bias of the age in which it is done”).
Recall from Part II, however, that the judges cite independently found authorities for all sorts of factual questions. Putting historical sources to one side of the spectrum (which raise perhaps unique implications given their closeness to legal reasoning), scientific data belongs on the other end. Very few members of the judiciary have prior experience in scientific fields. And, as most scientists will readily admit, all scientific findings are not to be equally trusted. It is not easy to evaluate the significance of scientific claims, not to mention the validity of the methods employed. Given the limited time for deciding a case and the limited research resources available to the judiciary, judges are institutionally ill-equipped to evaluate questions of psychology, social science, physics, or medicine. 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. EMA. “Cutting-edge neuroscience,” Justice Breyer wrote, “has shown that ‘virtual

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192 See Valerie P. Hans, Judges, Juries, and Scientific Evidence, 16 J.L. & POL’Y 19, 30 (2007-2008) (noting the relative inexpertise judges have in math and science). To be sure, it is possible that a Justice has a prior background in medicine or 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.

193 Faigman, Constitutional Fictions, at 32-33.

194 Thomas Merrill, Is Public Nuisance a Tort? 4 J. Tort L. 1 (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 economics.”); Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 Yale L.J. 1535, 1616-25 (1998) (“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.”); Michael Rustad & Thomas Koenig, The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, 72 N.C. L. Rev. 91, 94 (1993); 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 cannot be divorced from its scientific credibility.”).

195 But see Edward Cheng, Independent Judicial Research in the Daubert Age, 56 Duke L J 1263, 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, Constitutional Fictions 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.
violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior."  For this factual proposition he quotes a 2006 study published in the Media Psychology journal. 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. 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.

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 reliable journals and away from dubious junk science. But this sentiment 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 judges rely on articles in the New England Journal of Medicine, but they also cite to blog posts, sporting magazines, interest group websites, and (in lower courts) even to Wikipedia.

Moreover, judges – 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

196 Brown v. EMA (Breyer J., dissenting) at --.

197 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, Brown v. EMA. 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.


199 Cheng supra at 1283.


201 PGA Tour v Casey Martin, 532 US 661, 696 (citing Sporting News and Golf magazine to show competitive nature about the game of golf).

202 Roper v. Simmons, 543 U.S. 551, 625 (Scalia, J.) (“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 Reproductive Rights.org).

from, and despite what other opposing authority is out there. 204 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 outside their areas of expertise 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 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. 205 Several justices (Breyer, Alito, Thomas, and Scalia) start their own war-of-the-experts battle – drawing on sources found both on and off the record -- concerning the effect these games have on a child’s development. 206 Justice

205 Brown v EMA, 564 U.S. – (2011)
206 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 appendices listing peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video
Breyer confesses confusion in deciding which expert is right: “I, like most judges, lack the social science expertise to say definitively who is right.”\textsuperscript{207} 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, effectively now “the record” for legislative facts includes anything a jurist can find on the internet.\textsuperscript{208} 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 goals of the adversary process. Although surely it has its critics, the American tradition of litigant autonomy has significant advantages.\textsuperscript{209} One virtue is that the parties control their own fate: “if a party is intimately involved in the adjudicatory process and

\textsuperscript{207} Brown 564 U.S. -- (2011).

\textsuperscript{208} An example of ambushing an attorney with extra-record facts can be seen at oral argument in last term’s \textit{Milner v. Department of Navy}. The Court was interpreting a 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 which 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] the situation.” See Oral Argument, \textit{Milner v. Department of Navy} (argued 12/1/2010), 2010 WL 4876494 at *29.

\textsuperscript{209} Amanda Frost, Limits of Advocacy, 59 Duke L.J. at 459 (discussing adversarial theory before explaining its limitations).
feels that he has been given a fair opportunity to present his case, he is likely to accept the results whether favorable or not.”

Devotion to the adversary system is thus just as much about fairness to the litigants as it is about producing correct results. Although perhaps a judge’s colleagues will keep him honest if he relies too much on new authorities never vetted by the parties, 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. It is narrow-minded, he tells us, “to think of adjudication as decision-making by judges. Adjudication is decision-making by judges and litigants.” 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 who the parties represent. Adjudication “may be differently democratic and possibly less democratic than political decision-making. But it is inaccurate to say that adjudication is non-democratic.”

210 Stephan Landsman, Readings on Adversarial Justice: The American Approach to Adjudication at p. 34. (1988)

211 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 n. at 460.

212 For an example of this, see Justice Scalia’s majority opinion in Brown v. EMA where he chides first Justice Breyer and then Justice Alito for their extra research efforts. Se 564 U.S. at – (“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 11 (noting Justice Alito’s “considerable independent research”).

213 Id. at 1481.

214 Id. at 1483.

215 Peters 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.\footnote{See supra n --.} Putting aside the practical reasons for this division of labor, there remains a question of whether judicially-found factual authorities are legitimate 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 farther than 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 legislative 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, to continue with the example discussed above, 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, the lower court judges who heard testimony on the subject, the parties who briefed the Supreme Court, and the 24 interested groups who filed amicus briefs to the Court specifically addressing this question.\footnote{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.}

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 to the Court on the subject. Going beyond all of those avenues of information to look for factual authorities means the Court extracts democratic legitimacy from its decision – a concern that affects more than parties to the dispute, but all of us.

**PART IV: WHAT SHOULD BE DONE?**
If the current approach of complete freedom to research facts outside the adversary 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, both are 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.\textsuperscript{218} Much of the modern debate seems to center around Cass Sunstein’s call for “judicial minimalism”:\textsuperscript{219} 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.”\textsuperscript{220} Making a shallow decision means avoiding grand theories and limiting the binding impact of the decision to only cases with very similar facts.\textsuperscript{221} The virtues of this path, Sunstein and others have argued, amount to fewer and less costly errors in addition to allowing space for “democratic processes to maneuver.”\textsuperscript{222}


\textsuperscript{219} Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harvard University Press 1999).

\textsuperscript{220} Id. supra n. – at 3.

\textsuperscript{221} 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 at 1459. Procedural minimalism holds that the Court “should do what is necessary to resolve a constitutional case but should avoid issues not necessary to the resolution of that particular case. Id. It is the latter, procedural minimalism, which is most relevant to this paper.

\textsuperscript{222} Id. at 53-54.
Minimalism is a more complex concept than the “judicial restraint” trumpeted in politics and judicial nomination hearings. 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. The hallmark of judicial minimalism is “the constructive use of silence” and the willingness to leave things undecided. This commitment takes several forms: avoiding constitutional questions, respecting precedents, refusing to issue advisory opinions or decisions in cases which are not ripe, to name a few.

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. Indeed, some have suggested that Chief Justice Roberts has his eye set on a legacy of minimalism. And at least seven members of the current Court (Justices Roberts, Kennedy, Breyer, Ginsburg, Alito, and Sotomayor and Kagan) have been labeled a minimalist — either by Sunstein or others.

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

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223 Sunstein supra at x.
224 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.”).
225 Id. at 5.
226 Sunstein supra at 5.
227 Schauer, Abandoning the Guidance Function at 207 (“We have seen an increase in narrow and fact-specific rulings”); Sunstein, supra at xi (“The current Supreme Court embraces minimalism”).
228 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 it is not”).
229 Sunstein, supra at 26; Frank Cross, The Most Important and Best Supreme Court Decisions and Justices, 60 Emory L J at 491; Mark Rahdert, Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending, 32 Cardozo L. Rev. 1009 (2011) at 1046; David D. Kirkpatrick, Judge's Mentor: Part Guide, Part Foil, N.Y. Times, June 22, 2009, at A1 (portraying Judge Sotomayor as a judicial minimalist and quoting former Yale Law 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 available at 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.”)
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 by a belief that judicial decision-making is (1) more likely to lead to mistakes than political decision-making, and (2) is “inherently less legitimate from the perspective of democracy.” As described in Part III above, both concerns are exacerbating by the current approach to in house fact finding.

A minimalist’s reform 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 for the rule to require a reviewing court to remand a case back to the trial court to take evidence “the old fashioned way” on the factual question. On this view, if the Court finds itself unable to answer a factual question within the adversary process, it must stop and send the case back to a tribunal capable of hearing more evidence. For a variety of practical reasons, this seems less than desirable, but there are other more pragmatic reform possibilities.

Instead 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 additionally 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

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230 Sunstein at 11.

231 Neal Devins, Democracy Forcing Constitution at 1978 (noting that judicial minimalism is supported by inherent limitations on the factfinding 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.)

232 Christopher Peters, Assessing the New Judicial Minimalism 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).
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 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.”

A final reform possibility (and certainly a more radical one) would be a wholesale change to the Supreme Court jurisprudence – a change 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. 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 some will applaud this move to empirics and fact-based decision making, but to the extent its interaction with digital information gathering is leading to biased results, mistakes, or legitimacy deficits, perhaps it 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 just facts relevant 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 role. Maximalists, as opposed to minimalists, are not convinced in 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

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233 Schauer, Dilemma of Ignorance at 289-90.

234 See authorities cited supra – (Zick et al)
justifications” for their outcomes.\(^{235}\) 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.”\(^{236}\) Where minimalists can claim the virtue of fewer errors, maximalists can claim the ability to give more guidance for lower courts and individuals.\(^{237}\)

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.\(^{238}\) 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.\(^{239}\)

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.\(^{240}\) Furthermore, as Fred Schauer reasons, “although 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

\(^{235}\) Sunstein at 9.

\(^{236}\) Devins, supra n at 1990.


\(^{239}\) Id. at 905.

\(^{240}\) Schauer, Do Cases Make Bad Law supra at --. See also Neal Devins and Alan Meese, Judicial Review and Nongenerlizable Cases, 32 Fla St U L Rev 323 (2005); Jeffery Rachlinski, Bottom Up versus Top Down Lawmaking, 73 U Chi L Rev 933 (2006); Amanda Frost, Limits of Advocacy, supra at --.
be applied to the alternatives” – i.e. fact finding done by Congress. 241

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 well informed,” 242 and there is no reason to rely on the litigants to educate them. Thus, the answer to in house fact finding could lie through 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), 243 providing an easier way for justices to call on their own experts (as Justice Breyer advocates and indeed practices), 244 or perhaps creating a judicial research service akin to the Congressional Research Service from which judges can request help. 245

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. 246 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 where the information they have to offer can be subjected to some form of scrutiny and testing.” 247

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. 248 This reform would take advantage of

242 Davis, Judicial Notice, Columbia L Rev at --.
244 See Schauer, Dilemma of Ignorance at 292;
245 Davis, Proposed Research Service supra n --/.
246 Brianne Gorod, The Adversary Myth, supra at --.
247 Id.
248 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 technologies to allow experts, historians, and interested citizens a chance to participate in informing 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 publicly available website.” 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 digital 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 of 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 completely transformed the way we consume facts about the world. It is not surprising that court decisions could 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 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.

New Deal, 89 Tex Law Rev 1247 (2011). This possibility furthers far more attention than the current

http://www.americanbar.org/groups/criminal_justice/citizen_amicus/purpose.html