POLICING PROCEDURE BEFORE SUBSTANCE: REFORMING JUDICIAL REVIEW OF THE FACTUAL PREDICATES TO LEGISLATION

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INTRODUCTION

THE constitutionality of legislation is often predicated on complex social, medical, scientific, or technological facts either implicitly or explicitly found by the legislature that passed it. Does exposure to violent video games cause psychological harm to minors?[1] Is a particular abortion procedure sometimes medically necessary to preserve the health of women?[2] These factual questions can be critical to determining the constitutionality of incredibly influential legislation, and their resolution affects numerous parties not before the court.

There are general rules governing when judges should defer to legislation. In ordinary circumstances, judges defer to legislation if it is rationally related to a legitimate government interest.[3] When fundamental rights are at stake or the legislature has based a law on a suspect classification, judges will scrutinize legislation more heavily.[4] But how should judges evaluate the facts that are so critical to this analysis?

Despite the importance of this question, courts have been vague and inconsistent in their review of the legislature's empirical judgments.[5] Sometimes courts say they should defer to these judgments when there is sufficient uncertainty in the relevant field, even if the legislation that is premised on these factual judgments implicates fundamental rights.[6]

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[1] See, e.g., Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2739 (2011).

[2] See, e.g., Gonzales v. Carhart, 550 U.S. 124, 161 (2007).

[3] See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

[4] See, e.g., *Gonzales*, 550 U.S. at 146; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[5] See infra Section I.B.

[6] See *Gonzales*, 550 U.S. at 161, 163.

Other times, courts will independently review these judgments even when purporting to apply rational basis review.[7]

This Note aspires toward a unified theory of judicial review for the factual predicates of legislation. Part I will briefly survey the Supreme Court's jurisprudence on this issue, revealing a doctrine that is chaotic, unprincipled, and in need of reform. Part II will then propose a unified theory of judicial review. First, this Part will examine the constitutional role of the judiciary in evaluating these facts. Although some have argued that separation of powers principles require total deference to facts found by legislatures,[8] this Part will argue that because resolution of a factual issue can almost always be outcome-determinative of the constitutional question, judicial review of legislation cannot survive without some judicial oversight of the facts.

This Note will then suggest how judicial review might be conducted, given the relative competencies of courts and legislatures. It will first contend that legislatures are equipped with better tools for legislative fact-finding. Legislatures have the money, the time, and the means to commission studies, hold hearings, call their own expert witnesses, and rely on legislative support services to provide expert analysis. This Note will recognize that legislatures often lack the incentives to use these tools properly. Because of their political accountability, legislatures often feel compelled to provide constituents with the facts they want to hear rather than the facts as they truly exist, particularly on hot-button issues such as abortion, affirmative action, and First Amendment rights. At a more basic level, whenever judicial review stands in the way of legislation being passed, legislatures have the incentive to manipulate the facts in a way that ensures survival.

Given the premise that the optimal legislative fact-finder is not a court but a properly motivated legislature, this Note will propose a method of judicial review that would condition deference to factual judgments on the presence of procedural indicators that a legislature has taken its fact-finding role seriously. This proposed method of review would incentivize legislatures to use their superior fact-finding tools appropriately and limit unnecessary judicial forays into the substance of complex empirical debates.

[7] See, e.g., United States v. Morrison, 529 U.S. 598, 614 (2000).

[8] Note, Judicial Review of Congressional Factfinding, 122 Harv. L. Rev. 767, 767–68 (2008) (arguing that separation of powers principles demand that the judiciary always defer to congressional findings of fact).

The idea of reviewing procedure before substance has been adopted in the world of corporate law in response to a similar problem. Corporate officers have greater expertise in the realm of business decision-making and access to information that puts them in a unique position to make decisions in the best interest of the corporation's shareholders. However, when one or more directors has a conflict of interest, corporate management can no longer be trusted to act in the best interests of the corporation. In these circumstances judicial oversight is needed, but judges lack the competence to review the substance of business decisions. The solution in this area of the law has been to review the procedures behind the judgment before reviewing the judgment itself. Specifically, if the decision is sent to an independent committee and insulated from the biased directors, judicial scrutiny relaxes significantly.

In the context of judicial review of legislation, analogous principles should apply. If a legislature has undertaken procedures that ensure expertise and objectivity in the fact-finding process, its factual judgments should merit greater deference. This Note will argue that the best way to insulate fact-finding from bias is to outsource the decision to an independent organization with sufficient expertise and accountability within the scientific community. In the congressional context, the National Research Council ("NRC") is a prime example of this kind of body. Other bias-insulating procedures could include diligent, factually oriented hearings with qualified expert witnesses on both sides of the issue. Some have criticized this approach as too difficult to implement,[9] but this Note will argue that, for judges, policing fact-finding procedure is more manageable than evaluating the most complicated scientific, medical, or technological questions of the day.

Of course, when a legislature takes insufficient steps to remove the risk of political bias in fact-finding, courts have no choice but to conduct their own review of the facts. Part III will argue that because this substantive review may be unavoidable, steps should be taken to increase the competency of the judiciary in evaluating complicated legislative facts. For example, the judiciary should take a reasoned, methodical approach to evaluating this data instead of haphazardly searching for studies on the internet.[10] Although this Note does not exhaust this important

[9] Neil Devins, Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis, 50 Duke L.J. 1169, 1208–09 (2001).

[10] See Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 Va. L. Rev. 1255, 1260–61 (2012).

topic, it will suggest that a good starting point for judicial guidance can be found in the principles announced in *Daubert v. Merrell Dow Pharmaceuticals*[11] and some of the proposals advanced by Justice Breyer.

I. UNDERSTANDING THE PROBLEM

Legislation is almost always premised on factual judgments, and this Part will open by describing the nature of these facts. Roughly speaking, these "legislative facts" transcend individual disputes; they are general facts about the world that can have constitutional significance.

The next Section will describe the Court's current doctrine of judicial review regarding these facts. As critical as legislative facts can be to high-profile legislation such as bans on abortion procedures,[12] there is no coherent set of rules governing how the judicial branch should review them. Sometimes courts will defer wholesale to a legislature's view of the facts,[13] sometimes they will defer to some lesser extent,[14] and sometimes they will review these facts de novo,[15] by studying amicus briefs, hearing expert testimony, or conducting independent, off-the-record research.[16] Not surprisingly, this chaotic system produces inconsistent results that are not always based in sound science. In light of this need for reform, Part II will propose a unified theory of judicial review.

A. Legislative vs. Adjudicative Facts

The facts that underlie a piece of legislation are quite different from the facts that courts encounter in a typical trial. Normally, courts manage "adjudicative facts": facts that concern, inter alia, "who did what, where, when, how, why, with what motive or intent."[17] Examples of questions of adjudicative fact include whether a party ran a stoplight on a certain date, whether the defendant's gun was used during a robbery, or whether a supervisor knew about his employee's engagement in sexual harassment. These facts generally have little legal relevance outside of a par-

[11] 509 U.S. 579, 593–94 (1993).
[12] *Gonzales*, 550 U.S. at 132.
[13] See infra Subsection I.B.1.
[14] See infra Subsection I.B.2.
[15] See infra Subsection I.B.3.
[16] See Larsen, supra note 10, at 1263.
[17] David L. Faigman, Constitutional Fictions: A Unified Theory of Constitutional Facts 44 (2008) (quoting Kenneth Culp Davis, Administrative Law Text § 7.03, at 160 (3d ed. 1972)).

ticular dispute, and are normally determined at the trial level.[18] They are typically discrete and retroactive.

In contrast, when a court reviews the constitutionality of legislation, the facts that must be decided are very different from the who/what/when/where facts that they typically encounter. These facts, labeled "legislative facts,"[19] are relevant far beyond resolution of the particular dispute between the parties before the court.[20] Factual findings that safe alternatives exist to partial birth abortions, that violent video games have negative psychological effects on minors, or that the death penalty deters potential criminals all affect the rights of many parties that are not before the court. They are general facts about the world, not just facts about the case.

These different types of facts generally require different types of evidence to be proven. Adjudicative facts are typically proved by eyewitness testimony, physical evidence, or expert testimony. Legislative facts are often more difficult to ascertain, and involve reviewing statistics and social science studies.

The Supreme Court analyzes legislative facts in a variety of contexts. Occasionally, the Court decides legislative facts in the course of formulating constitutional rules.[21] More often, it reviews legislative facts that have been decided by other government actors, such as an administrative agency,[22] school board,[23] or legislature.[24] This Note only concerns legislative facts that are found by a legislature, and therefore the term "legislative fact" in this Note will refer to those social facts that underlie a piece of legislation.

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[18] Id. at 45.

[19] Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404 (1942) (coining the term "legislative facts").

[20] David Faigman, Fact-Finding in Constitutional Cases, *in* How Law Knows 156, 162 (Austin Sarat et al. eds., 2007).

[21] For example, in the course of deciding the minimum number of jurors needed to compose a constitutionally sufficient jury, the Court had to decide whether a jury of five or six could deliberate as reliably and be as representative of the community as a jury of twelve. Ballew v. Georgia, 435 U.S. 223, 239 (1978) (ruling on the use of five member juries); Williams v. Florida, 399 U.S. 78, 100–02 (1970) (ruling on the use of six member juries). Similarly, in *United States v. Leon*, the Court had to decide whether the exclusionary rule had a deterrent effect on police officers that executed a facially valid warrant in good faith. 468 U.S. 897, 900 (1984).

[22] See, e.g., Crowell v. Benson, 285 U.S. 22, 36 (1932).

[23] See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709 (2007).

[24] See, e.g., Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011).

B. Inconsistencies in Judicial Review of Legislative Fact-Finding

Judicial review of legislative factual predicates is notably unprincipled and has attracted considerable scholarly attention.[25] The Court has applied different standards within the same area of law[26] and even to identical factual issues.[27] While one might expect the level of deference to legislative findings of fact to be explained by the level of scrutiny being applied to the legislation more generally, this does not appear to be the case. When applying rational basis scrutiny to the legislation as a whole, the Court sometimes defers to the legislature and sometimes conducts its own, independent review of the facts.[28] Similar inconsistencies can be found within strict scrutiny jurisprudence[29] and under the more malleable standard of intermediate scrutiny.[30] A few of the Court's approaches are surveyed below.

1. Deferring in the Face of Uncertainty

Occasionally, even while applying strict scrutiny, the Court has deferred to a legislature's factual judgment on the basis that the underlying science is uncertain. This approach was most famously employed in *Gonzales v. Carhart*, in which the Court evaluated a facial challenge to the Partial-Birth Abortion Ban Act of 2003.[31] The contested factual issue in *Gonzalez* was whether this ban "create[d] significant health risks for women" (that is, whether there were safe alternatives to the partial-birth procedure).[32] The Court noted that "both sides ha[d] medical support for

[25] See, e.g, Faigman, supra note 17, at 114 ("The Court has no overriding theory of when it should be deferential to other bodies . . . that have made findings of constitutional fact."); John O. McGinnis & Charles W. Mulaney, Judging Facts Like Law, 25 Const. Comment. 69, 76 (2008) (noting that "the Court has been unable to formulate a consistent approach towards Congress' fact-finding"); Note, Deference to Legislative Fact Determinations in First Amendment Cases After *Turner Broadcasting*, 111 Harv. L. Rev. 2312, 2329 (1998) (referring to the Court's deference to legislative factual judgments in the First Amendment area as a "patchwork doctrine").

[26] See Note, supra note 25.

[27] See infra text accompanying notes 31–37.

[28] In dormant commerce clause cases, the Court generally defers to the legislature, but in commerce clause cases or Fourteenth Amendment Enforcement Clause cases, the Court has discarded Congress's factual determinations in favor of its own. Caitlin E. Borgmann, Rethinking Judicial Deference to Legislative Fact-Finding, 84 Ind. L.J. 1, 15 (2009).

[29] See infra text accompanying notes 31–37.

[30] Note, supra note 25, at 2329.

[31] 550 U.S. at 132–33.

[32] Id. at 161.

their position"[33] and that there was "documented medical disagreement" about the health risks created by the ban.[34] Faced with a difficult medical question, the Court deferred to Congress, holding that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[35]

The approach in *Gonzales* diverged significantly from the Court's precedent on almost the identical issue. Seven years prior to *Gonzales*, the Court in *Stenberg*, faced with a similar "division of medical opinion," had expressly refused to defer to the Nebraska legislature's factual judgment about the safety of an abortion procedure.[36] Instead of punting the question, the Court reasoned that "the uncertainty mean[t] a significant likelihood that those who believe that [the method being banned] is a safer abortion method in certain circumstances may turn out to be right" and therefore concluded that the ban created an impermissible health risk.[37]

Justice Breyer has also, at times, deferred to a legislature's factual judgments when the science behind them is unclear. This maneuver is illustrated most clearly in *Brown v. Entertainment Merchants Association*, in which video game and software industries raised a First Amendment challenge to a California law limiting the sale of violent video games to minors.[38] There, the survival of the statute under strict scrutiny hinged in large part on the empirical question of whether exposure to violent video games was harmful to minors.[39] Breyer, in dissent, acknowledged a disagreement among psychologists and sociologists who had examined the issue.[40] He was careful to note that there is often contention in studies of human behavior and that "[he], like most justices, lack[s] the . . . expertise to say definitively who is right."[41] Based on this uncertainty, Breyer ultimately deferred to the legislature, noting that "[t]his Court has always thought it owed an elected legislature some de-

[33] Id.
[34] Id. at 162.
[35] Id. at 163.
[36] Stenberg v. Carhart, 530 U.S. 914, 937 (2000).
[37] Id.
[38] 131 S. Ct. 2729, 2732 (2011).
[39] Id. at 2738.
[40] Id. at 2772. In Appendix A, Justice Breyer cited 115 studies evidencing a relationship between violent video games and psychological harm in children, and in Appendix B, 34 studies to the contrary. Id. at 2772–79 (Breyer, J., dissenting).
[41] Id. at 2769.

gree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence."[42]

2. Substantial Evidence Standard

Other cases have deferred to a legislature's factual judgment as long as it is supported by "substantial evidence." For example, in *Turner Broadcasting System, Inc. v. FCC*, the Court deferred to Congress's factual prediction that local broadcasting would fail without a law requiring cable television providers to carry their programming because Congress had "drawn reasonable inferences based on substantial evidence."[43] The Court explained that this standard was "more deferential than [courts] accord to judgments of an administrative agency."[44] Although both Congress and administrative agencies have greater "expertise" concerning legislative fact-finding than the judiciary, the Court owed Congress "an additional measure of deference out of respect for its authority to exercise the legislative power."[45]

Justice Breyer appears to have embraced something similar to this "substantial evidence" standard in connection with the form of intermediate scrutiny he proposed in his dissent in *District of Columbia v. Heller*.[46] In *Heller*, the Court held that a series of District of Columbia gun regulations violated the Second Amendment right to bear arms.[47] In the process of applying a modified form of intermediate scrutiny,[48] Justice Breyer cited numerous social science studies that illustrated the safety benefits of gun regulation.[49] He also addressed contrary studies presented by amici, ultimately concluding that these statistics are not "strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them."[50] Breyer concluded that "[the studies] succeed in proving that the District's predictive judgments are controversial. But

[42] Id. at 2770.
[43] 520 U.S. 180, 195 (1997) (internal quotation marks omitted).
[44] Id.
[45] Id. at 196.
[46] 554 U.S. 570, 704–05 (2008) (Breyer, J., dissenting).
[47] Id. at 636 (majority opinion).
[48] Justice Breyer's so-called "interest-balancing inquiry" would ask "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important government interests." Id. at 689–90 (Breyer, J., dissenting).
[49] Id. at 694–99.
[50] Id. at 702.

they do not by themselves show that those judgments are incorrect; nor do they demonstrate a consensus, academic or otherwise, supporting that conclusion."[51] A judge's role, under his proposed balancing test, is simply to determine whether the legislative judgment is supported by "substantial evidence."[52]

3. De Novo Review

Occasionally, courts show little or no deference to legislative fact-finding even while purporting to apply rational basis review. In *United States v. Morrison*, in which the constitutionality of the Violence Against Women Act hinged on whether gender-motivated violence substantially affected interstate commerce,[53] the Court refused to defer to Congress's "numerous findings" to this effect.[54] After noting that "the existence of congressional findings is not sufficient" and that the factual determination was "ultimately a judicial rather than a legislative question," the Court held that the law was unconstitutional.[55]

Courts have also subjected congressional fact-finding to close scrutiny under the Enforcement Clause of the Fourteenth Amendment, an area where they purport to engage in rational basis review.[56] Commentators frequently cite *Board of Trustees v. Garrett*,[57] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[58] and *City of Boerne v. Flores*,[59] as illustrations of intense judicial scrutiny of the legislature's factual record.[60]

4. Inconsistencies in Allocation of Burden of Proof

Along the same lines, courts have been inconsistent in where they place the burden of proof for facts underlying legislation. Despite purporting to apply rational basis review, the Court has sometimes placed

[51] Id. at 703.
[52] Id. at 704–05.
[53] United States v. Morrison, 529 U.S. 598, 609 (2000).
[54] Id. at 614.
[55] Id. at 614, 619.
[56] Borgmann, supra note 28, at 3; A. Christopher Bryant & Timothy J. Simeone, Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes, 86 Cornell L. Rev. 328, 332–39 (2001).
[57] 531 U.S. 356 (2001).
[58] 527 U.S. 627 (1999).
[59] 521 U.S. 507 (1997).
[60] Borgmann, supra note 28, at 15 & n.85; Bryant & Simeone, supra note 56, at 89 & n.1.

the burden on the legislature to prove legislative facts.[61] Conversely, even when maintaining that it was applying strict scrutiny, the Court has sometimes placed the burden on the challenger of a statute to show that the legislature's empirical judgment was incorrect.[62]

II. PROPOSED METHOD OF REVIEW

The previous Part has illustrated the need for a uniform approach to judicial review of legislative facts. Part II will argue that judicial deference to legislative facts should depend on the use of procedures designed to produce thorough, objective fact-finding. It will first argue that a regime in which a legislature's factual judgments are given unconditional deference is unworkable. Courts should scrutinize the facts underlying legislation to the same degree they scrutinize legal and policy judgments because these facts can be equally dispositive of the constitutionality of a statute. Excessive deference to legislative fact-finding encourages legislatures to smuggle legal and policy judgments into the facts in an effort to insulate themselves from judicial review.

This Note will instead propose that courts should condition deference to a legislature's empirical judgments on the legislature's use of fact-finding procedures that minimize the risk of error or bias. Such a rule would encourage legislatures to use the wealth of fact-finding tools at their disposal in the hope that these judgments are made in a reasoned, scientific manner.

A. The Necessity of Review

It has been argued that separation of powers principles require deference to a legislature's empirical judgments at all times, even when heightened scrutiny is triggered.[63] This Note will argue that unconditional deference is not a viable option under the current regime of judicial review. Empirical determinations are an integral part of judicial review, and unconditional deference to a legislature's empirical judgments

[61] See Faigman, supra note 17, at 101–02 (interpreting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448–50 (1985), to place the burden on the legislature to prove the relevant legislative facts while purporting to apply rational basis review).

[62] See id. at 102 (interpreting *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992), to place the burden on the challenger to prove the relevant legislative facts while purporting to apply strict scrutiny).

[63] Note, supra note 8, at 767–68.

would allow legislatures to effectively insulate themselves from any form of judicial scrutiny by rigging the facts. Further, the political process is an ineffective check against this sort of manipulation because it fails to achieve one of the most fundamental objectives of judicial review: protection of disfavored minorities.

1. Preserving the Efficacy of Judicial Review

Judicial review is an inherently empirical enterprise. Any form of heightened scrutiny has at least two components: an evaluation of the strength of the government interest and an evaluation of how closely the legislation is related to furthering this interest. For example, strict scrutiny requires that the government interest be "compelling" and that the legislation be "narrowly tailored" to furthering this interest.[64] Intermediate scrutiny, though it takes somewhat different forms, usually requires the government interest to be "important" and the legislation to be "substantially related" to furthering this interest.[65]

Empirical judgments will always be involved either in determining the strength of the government interest or the relationship of the law to furthering that interest. Take, for example, judicial review of the affirmative action program in *Grutter v. Bollinger*.[66] In that case, the government interest at stake was defined as attaining a diverse student body.[67] How does the court decide whether this is "compelling"? The first step in this analysis involves determining whether diversity in the student body produces educational benefits. This judgment is factual and is capable of empirical testing. Researchers can divide subjects into two groups, control for every variable except the level of diversity, and measure the effects on education. There may be some value judgments inherent in how to classify the results (for instance, deciding what constitutes a "benefit"), and there may be practical difficulties in determining a "right" answer to the question, but the inquiry is fundamentally empirical. The second judgment—how "important" these benefits are—is inherently a value judgment. There is no theoretical "right answer" because the answer depends on personal beliefs about the importance of improved education. People would be willing to spend more or less

[64] See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
[65] See, e.g., Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
[66] 539 U.S. 306, 311 (2003).
[67] Id. at 328.

money, or sacrifice different levels of fairness in the admissions process, to achieve these benefits. No one is right or wrong; there are only differences of opinion.

There is also an empirical component to the question of how narrowly tailored a given affirmative action program is to achieving diversity of viewpoints—that is, how close of a proxy is race for diversity? Again, assuming agreement on what constitutes "diversity" or "race," this is an empirical question that is capable of scientific study.

Similarly, determining whether a state law restricting the sale of violent video games[68] to minors is "narrowly tailored" to achieve a "compelling interest" inherently involves both empirical questions and policy judgments. First, the extent to which exposure to violent video games causes psychological damage to minors is an empirical question. It may be hotly contested, difficult to study, and the results may depend on how one measures psychological damage or what one classifies as a violent video game, but it is a question about the effect of one empirical phenomenon (exposure to violent video games) upon another (the presence of psychological problems in minors). There is an empirical answer to this question, however difficult it is to uncover. On the other hand, in order to evaluate how "compelling" the interest is here, it is necessary to place a *value* on the ability to avoid this psychological harm. This latter judgment is subjective and a matter of opinion.

These empirical questions are almost always outcome determinative, and unconditional deference would allow a legislature to avoid judicial review by rigging the facts. For example, a legislature could find as facts that ninety-five percent of minors exposed to violent video games for more than one hour a week developed major psychological disorders as a result, that currently one hundred million minors receive this level of exposure, and that the proposed restrictions on sales of violent video games to minors would effectively limit exposure to zero. A court, taking these facts as a given, would have no choice but to value the government interest (here, preventing major psychological disorders in minors) as "compelling" and to determine that the legislation (which would attack every instance of the problem) was "narrowly tailored."

Justice Clarence Thomas recognized this problem when he served as a judge on the Court of Appeals for the D.C. Circuit, writing in *Lamprecht v. FCC* that complete deference to a legislature's factual findings would

[68] See, e.g., Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011).

transform judicial review into an "elaborate farce."[69] Academic commentators have come to similar conclusions, noting that "if judges must defer to a legislature's findings of fact, the legislature can potentially avoid judicial review by shielding themselves with fact-finding that may not be true."[70] The legislature can also frame value or legal judgments as facts, as evidenced by the attempt of some social conservatives to frame as a "factual" finding the judgment that life begins at conception.[71] Complete deference is simply not a viable option if the current system of judicial review is to function effectively.

2. Inadequate Checks from the Political Process

It has been argued that the difficulty of passing legislation and the political check on legislators prevent them from rigging the facts and evading judicial review.[72] Both of these assurances overlook the countermajoritarian role of the judiciary.[73] The judicial system has a special constitutional responsibility to protect the rights of disfavored minorities,[74] precisely *because* disfavored minorities have no ability to block the lawmaking process or vote legislators out of office. Judicial review is most important when the majority of legislators and voters are quite happy to pass laws that harm these groups.

For example, consider a case where a newly enacted law limits medical care in maximum-security prisons to the extent that it violates the Eighth Amendment. A state legislature, in an effort to avoid the politically unpopular decision to raise the funds necessary to provide constitutionally adequate medical care to convicted felons, finds as a fact that the new law will actually have no effect on the quality of medical care to prisoners. No individual legislators would try to block the passage of the law because they fear the political consequences, and voters may be happy to let non-voting felons suffer if it means their taxes stay low. In a situation like this one, the court is potentially the only institution that could effectively protect the rights of these minorities.

[69] 958 F.2d 382, 392 n.2 (D.C. Cir. 1992).
[70] McGinnis & Mulaney, supra note 25, at 86.
[71] See Devins, supra note 9, at 1182–83.
[72] Note, supra note 8, at 783–84.
[73] See Borgmann, supra note 28, at 3 (referring to "the courts' crucial responsibility for protecting individual rights").
[74] Sean C. Doyle, HIV-Positive, Equal Protection Negative, 81 Geo. L.J. 375, 408 (1992).

B. Policing Procedure Before Substance

Given that some level of oversight is needed over a legislature's factual judgments, this Note argues that judicial review should be most lenient when the legislature has used fact-finding procedures that minimize the risk of error or bias. As this Part will argue, legislatures are much better equipped to decide questions of legislative fact, but because they often lack the incentives to do so accurately, judges need to maintain oversight. Because judges are better equipped to evaluate the procedures behind legislative fact-finding than the substance of complicated factual issues, judges should incentivize legislatures to use the tools at their disposal properly by deferring to the substance of their judgments if they do.

1. Relative Competencies

There is disagreement in the academic community over the relative competencies of the judiciary and the legislature in finding legislative facts. Generally, however, even commentators arguing that courts may have superior competency acknowledge that legislatures have superior fact-finding tools, but suggest that courts may be more competent because of their insulation from political pressures.[75] This Part will adopt this basic view by arguing that while legislatures have better tools for this kind of fact-finding, they do not always have the incentives to actually find the facts.

a. Superior Tools of Legislatures

The Court itself has on many occasions acknowledged that legislatures are superior fact-finders in the realm of legislative facts. For example, in *McCleskey v. Kemp*, the Court noted that "[l]egislatures . . . are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"[76] Similarly, in his concurrence in *Washington v. Glucksberg*, Justice Souter noted that legislatures have "more flexible mechanisms for factfinding than the Judiciary."[77]

[75] See, e.g., Devins, supra note 9, at 1182–87; Faigman, supra note 17, at 133.
[76] 481 U.S. 279, 319 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).
[77] Washington v. Glucksberg, 521 U.S. 702, 788 (1997) (Souter, J., concurring).

These judicial concessions make sense given that, unlike courts, legislatures are designed to look at the "big picture" rather than just an individual case before them.[78] Accordingly, legislatures have the power to commission studies, hold hearings, call their own expert witnesses, or rely on legislative support services like the Congressional Research Service and the General Accounting Office.[79] Compared to courts, legislatures "have substantial staff, funds, time and procedures to devote to effective information gathering and sorting."[80]

The judiciary, on the other hand, decides issues on a case-by-case basis and can only devote a limited amount of time to resolving complex issues of legislative fact. Courts, which have no support services to help them digest complex factual issues, rely on evidence submitted by parties or amici who have obvious incentives to distort the facts. Often, law journals are the most accessible source of the relevant empirical research,[81] the quality of which has generally been "sharply critic[ized]" by social scientists.[82]

A series of cases in the 1970s examining the constitutionality of reduced jury sizes illustrates the Court's lack of competence regarding legislative facts. These cases framed the relevant constitutional question as whether a jury smaller than twelve could as effectively: (a) promote group deliberation, (b) provide a representative cross section of the community, and (c) offer protection from outside influences.[83] The first case, *Williams v. Florida*, appeared to rely on social science data in holding that a six-member jury was constitutionally permissible.[84] Unable to commission its own studies, the Court was forced to look to "[w]hat few experiments [had] occurred" and ultimately concluded that "there is no discernible difference between the results reached by the two different-sized juries."[85] Social scientists, prompted by what some

[78] McGinnis & Mulaney, supra note 25, at 94.

[79] Devins, supra note 9, at 1178–79.

[80] Id. at 1178 (quoting Robin Charlow, Judicial Review, Equal Protection and the Problem With Plebiscites, 79 Cornell L. Rev. 527, 578 (1994)).

[81] Erica Frankenberg & Liliana M. Garces, The Use of Social Science Evidence in *Parents Involved* and *Meredith*: Implications for Researchers and Schools, 46 U. Louisville L. Rev. 703, 728 (2008).

[82] Elizabeth Chambliss, When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies," 71 Law & Contemp. Probs. 17, 21 (2008).

[83] E.g., Williams v. Florida, 399 U.S. 78, 100 (1970).

[84] See id. at 101 & n.48.

[85] Id. at 101.

have called the "naivete and ignorance of the Supreme Court,"[86] responded with a "multitude of studies" examining the effect of size on a jury's ability to deliberate and adequately represent the community.[87] The Supreme Court cited these studies in a later case holding that five-member juries were constitutionally unacceptable.[88] Commentators have noted that *Ballew*'s "treatment of the statistical literature [was], at best, careless" because the studies did not support a line between five and six, but rather the line between six and twelve that was rejected in *Williams*.[89] The Court declined to revisit the issue in 2008,[90] despite an invitation from an impressive coalition of academics.[91]

Brown v. Entertainment Merchants Association provides further evidence of judicial incompetence regarding complex legislative facts. While Justice Breyer cited a study in the Media Psychology journal for the proposition that exposure to violent video games results in neural patterns indicating aggression,[92] some neuroscience commentators have argued that he interpreted this study incorrectly.[93] Justice Breyer, in fact, later admitted that he was not qualified to make this kind of factual judgment.[94] Justice Scalia, in the same case, criticized studies cited by others for showing only correlation, not causation, when the studies did in fact show causation, just not on a phenomenon that Scalia thought represented psychological harm to children.[95] Scalia appears to have

[86] Donald N. Bersoff & David J. Glass, The Not-So *Weisman*: The Supreme Court's Continuing Misuse of Social Science Research, 2 U. Chi. L. Sch. Roundtable 279, 301 (1995).

[87] David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. Pa. L. Rev. 541, 578 (1991).

[88] Ballew v. Georgia, 435 U.S. 223, 232–39 (1978).

[89] Faigman, supra note 87, at 578–79 (quoting David Kaye, And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury, 68 Calif. L. Rev. 1004, 1008 (1980)).

[90] Gonzales v. State, 982 So. 2d 77, 77–78 (Fla. Dist. Ct. App. 2008), cert. denied, 555 U.S. 1056 (2008).

[91] Brief for Steven G. Calabresi et al. as Amici Curiae Supporting Petitioner at 1, Gonzalez v. Florida, 555 U.S. 1056 (2008) (No. 08-6833).

[92] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2768 (2011) (Breyer, J., dissenting) (quoting René Weber et al., Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study, 8 Media Psychol. 39, 51 (2006)).

[93] Larsen, supra note 10, at 1299.

[94] *Entm't Merchs.*, 131 S. Ct. at 2769 (Breyer, J., dissenting) ("I, like most judges, lack the social science expertise to say definitively who is right.").

[95] Id. at 2739 (majority opinion). Scalia claimed that one of the studies in the joint appendix showed "at best some correlation between exposure to violent entertainment and minuscule real world effects." Id. (citing Joint Appendix Vol. II at 496, 506, *Entm't Merchs.*, 131

mischaracterized a gripe about external validity as a problem with causation, confusing correlation with causation.[96] This is an alarmingly basic mistake to make.[97]

b. Skewed Incentives

While legislatures have the tools they need to find facts accurately if they want to, at least in some circumstances they are not properly incentivized to use them. Public choice theory posits that legislators are motivated by the desire to be reelected rather than the desire to serve the public good, and are therefore more likely to discard accurate facts for the facts that their constituents want to hear.[98] Under this view, legislators may use hearings not as an honest attempt to find the facts, but as a way to learn the demands of their constituents, as "a forum for bargaining with other members for votes," or as a means to pad the record in anticipation of judicial review.[99]

While legislative motivations are likely to be more complicated than public choice theory assumes, it is not difficult to see how legislatures would not always have the incentives to engage in thorough and objective fact-finding. Other commentators have agreed, noting that legislatures, at least in certain situations, have the "institutional incentives to

S. Ct. 2729 (No. 08-1448)). However, the study cited did show that exposure to violent video games *caused* subjects to produce more aggressive words in a word completion task. Joint Appendix, Vol. II at 506, *Entm't Merchs.*, 131 S. Ct. 2729 (No. 08-1448) ("Participants produced a significantly higher percentage of aggressive words after violent video games . . . than after nonviolent videogames." (quoting Thomas D. Cook & Donald T. Campbell, Quasi-Experimentation: Design & Analysis Issues for Field Settings 37 (1979))).

[96] Scalia's criticism seems to be that a causal relationship between violent video games and word completion is not compelling evidence of a causal relationship between such games and psychological harm. See *Entm't Merchs.*, 131 S. Ct. at 2739 (criticizing study for observing "minuscule real-world effects"). This criticism, while certainly fair, is not an attack on the causal nature of the study, but on the external validity of the findings. See Gregory Mitchell et al., Beyond Context: Social Facts as Case-Specific Evidence, 60 Emory L.J. 1109, 1129 n.90 (2011) ("External validity refers to the approximate validity with which we can infer that the presumed causal relationship can be generalized to and across alternate measures of the cause and effect." (quoting Thomas D. Cook & Donald T. Campbell, Quasi-Experimentation: Design & Analysis Issues for Field Settings 37 (1979))).

[97] See Jon Y. Ikegami, Note, Objection: Hearsay—Why Hearsay-Like Thinking Is a Flawed Proxy for Scientific Validity in the *Daubert* "Gatekeeper" Standard, 73 S. Cal. L. Rev. 705, 723 (2000) (describing confusion between causation and correlation as a "basic mistake that scientists are taught to avoid").

[98] Devins, supra note 9, at 1182.

[99] McGinnis & Mulaney, supra note 25, at 95.

ignore or distort" the facts.[100] When legislatures want to manipulate the facts, there are plenty of methods at their disposal. Committee chairs have the ability to pack their committees with biased members if they so desire.[101] A biased committee can screen witnesses to make sure they get only the testimony that their political party wants to hear.[102] Some have noted that "[p]erfunctory hearings" in which witnesses read off a script and committee members pretend to pay attention are not uncommon.[103] Once the "fact-finding" hearing is complete, the majority members write the committee report and ultimately determine which witnesses to credit and which to disregard.[104]

Gonzales v. Carhart illustrates a case where Congress showed little interest in accurate fact-finding. In *Gonzales*, the relevant factual conclusion—that a specific abortion procedure was never medically necessary—was made before any of the hearings actually took place.[105] Once the "fact-finding" hearing was held, the minority party opposing the bill was only allowed to call one witness.[106] Because the minority party chose a constitutional law expert instead of a medical witness, the committee ended up with entirely one-sided testimony on the medical issue.[107] Furthermore, the experts that did end up testifying were not required to establish, to the degree necessary in a judicial *voir dire*, that they were competent to answer the questions they were asked.[108]

Congress's factual findings turned out to be demonstrably incorrect. The District Court of Nebraska concluded that many of these findings were contradicted by the Congressional record.[109] In addition, three Courts of Appeals held that no "reasonable person" could agree with

[100] Saul M. Pilchen, Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments, 59 Notre Dame L. Rev. 337, 369 (1984).

[101] Devins, supra note 9, at 1183.

[102] Id. at 1183–84.

[103] Pilchen, supra note 100, at 367.

[104] McGinnis & Mulaney, supra note 25, at 97.

[105] Elizabeth DeCoux, Does Congress Find Facts or Construct Them? The Ascendance of Politics over Reliability, Perfected in *Gonzales v. Carhart*, 56 Clev. St. L. Rev. 319, 370–71 (2008).

[106] Id. at 373.

[107] Id.

[108] Id. at 372.

[109] Kate T. Spelman, Revising Judicial Review of Legislative Findings of Scientific and Medical "Fact": A Modified Due Process Approach, 64 N.Y.U. Ann. Surv. Am. L. 837, 854–55 (2008–2009).

Congress's factual findings,[110] suggesting that these findings would not pass muster under rational basis review, much less strict scrutiny. The findings also ran contrary to those made by the American College of Obstetricians and Gynecologists, which some consider "the leading relevant medical organization" for this issue.[111] When the case made its way up to the Court, the majority openly acknowledged that "some recitations in the Act are factually incorrect."[112] The Court declined to discuss all the errors, noting that "[t]wo examples suffice."[113] First, although Congress had determined that "no medical schools provide instruction on the prohibited procedure," testimony at trial had established that this procedure was indeed taught in multiple medical schools.[114] Second, Congress had found that there was "a medical consensus that the prohibited procedure [was] never medically necessary,"[115] a conclusion drawn presumably from the fact that no opposing medical witnesses were allowed to testify. Again, testimony at trial demonstrated this to be false.[116] However, as discussed above, the Court ultimately deferred to Congress's judgment (even while purporting to apply strict scrutiny) because "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[117]

Another area where Congress has exhibited a complete lack of interest in constitutionally dispositive facts is diversity preferences in broadcasting.[118] Here, Professor Neil Devins concludes that "power politics, not factfinding, explains Congress's role in defending FCC diversity preferences."[119] For example, in 1985, when the FCC proposed to engage in fact-finding to see if racial preferences did actually result in more diverse programming, Congress held hearings lambasting FCC Commissioners "for their failure to honor congressional preferences" and passed legislation prohibiting the FCC from investigating any fur-

[110] See Faigman, supra note 17, at 113.
[111] Spelman, supra note 109, at 856.
[112] *Gonzales*, 550 U.S. at 165.
[113] Id.
[114] Id.
[115] Id. at 165–66.
[116] Id. at 166.
[117] Id. at 163.
[118] See Devins, supra note 9, at 1201–02.
[119] Id. at 1202.

ther.[120] As Professor Devins notes, "Congress wanted to preserve these race preferences, and if preventing Commission factfinding was the most expedient way to get to the answer 'yes,' so be it."[121]

2. The Argument for Procedural Review

Given that legislatures have better tools than courts for this type of legislative fact-finding, but do not always have the incentives to use them correctly, a sensible approach may be for courts to provide these incentives by conditioning deference to the substance of the legislature's findings on the adequacy of the procedures employed in reaching those findings. A few commentators have alluded to this possibility, but it has never been fully developed.[122]

If judicial deference to legislative fact-finding is based on competency, as courts often claim it is,[123] such deference no longer makes sense when the legislature fails to exercise this competency. Just because Congress has the *ability* to use the tools, time, and money at its disposal to evaluate legislative facts in a more competent way than the judiciary does not mean it should be deferred to when it fails to do so. By evaluating the procedures Congress uses to find facts, courts can determine whether Congress has really earned competency-based deference. When Congress is using fact-finding tools merely to put on a show, there is no reason a court should be deferential.

Professor Elizabeth DeCoux posits a similar solution in her article *Does Congress Find Facts or Construct Them? The Ascendance of Politics over Reliability, Perfected in* Gonzales v. Carhart.[124] Professor DeCoux comes to the conclusion that "political considerations have infected fact-finding to an increasing extent, to the point that almost all fact-finding in modern hearings is deliberately shaped so as to accomplish a political goal."[125] Because of this, Professor DeCoux argues that Congress should "either employ neutral fact-finding bodies or adopt rules of evidence to promote reliability in its hearings," and suggests that "defer-

[120] Id.
[121] Id.
[122] See DeCoux, supra note 105, at 326; Devins, supra note 9, at 1208.
[123] See supra text accompanying notes 76–77.
[124] DeCoux, supra note 105, at 326.
[125] Id.

ence to legislative findings should depend on the presence of such limits to check unbridled discretion in fact-finding."[126]

Professor Devins also addresses this idea but dismisses it quickly. Specifically, he alludes to "a constitutional interpretive canon that would condition judicial approval of legislation to the procedures that Congress employs when enacting a bill," but he gives short shrift to the concept, concluding that it is inhibited by "[t]wo insurmountable hurdles."[127] The first, he explains, is that because "Congress is acting at the behest of special interest groups, any such factfinding is likely be boilerplate."[128] The second is that "courts cannot set manageable standards to overcome the problem of boilerplate factfinding."[129] Professor Devins explains that it would not be possible to tell if a witness list at a hearing was skewed, whether Congress made a reasonable assessment of social science research, or whether Congress appropriately judged the credibility of witnesses.[130]

This Note will argue that Professor DeCoux's solution is workable, despite Professor Devins' criticisms. First, this Note will seek to defend Professor DeCoux's solution by showing that a similar approach has been adopted in the context of corporate law. Next, this Note will provide examples of the types of procedures that would warrant deference to the substance of legislative factual judgments. Despite Professor Devins' concerns, judges are capable of policing procedure, and this method of review would produce better results than the current regime of judicial forays into complex empirical debates. Lastly, this Note will examine *Gonzales v. Carhart* as a case study, arguing why deference was inappropriate in that case and what a legislature would have to have done to earn it.

a. Analogy to Corporate Law

The legal system has faced a similar problem in the context of corporate law and courts have responded with a similar solution to that proposed by Professor DeCoux—policing procedure before substance.

[126] Id.
[127] Devins, supra note 9, at 1208.
[128] Id.
[129] Id.
[130] Id. at 1208–09.

Corporate officers are in general much more competent to make business decisions for the corporation than reviewing judges.[131] This is one of the "key justifications" for what has been labeled the "business judgment rule"[132]—the rule that "where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty."[133] This rule, which mirrors the rational basis standard used by courts in evaluating the constitutionality of legislation, applies in ordinary circumstances where the court has no reason to believe that corporate officers will not be using their superior business judgment in the best interest of the corporation.

However, when a director or controlling shareholder of a corporation has a conflict of interest, the general presumption that corporate officers are acting in the best interest of the corporation is cast aside.[134] One such conflict arises when a derivative suit is brought on behalf of a corporation, and corporate directors who have either profited from the transaction underlying the suit or have been named as defendants in the suit are in the position of deciding whether the suit should move forward.[135] Most jurisdictions deal with this obvious conflict of interest by adopting the approach used in *Zapata Corp. v. Maldonado*.[136] Courts generally allow the corporation to outsource decisions about the lawsuit to a "Special Litigation Committee" ("SLC") consisting of disinterested and independent directors provided certain conditions are met.[137] The first

[131] See Frank H. Easterbrook & Daniel R. Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161, 1196 (1981) ("Courts lack the experience and information necessary to make business decisions.").

[132] See, e.g., Julian Velasco, How Many Fiduciary Duties Are There in Corporate Law?, 83 S. Cal. L. Rev. 1231, 1247 (2010) (noting that "judicial incompetence to make business decisions is one of the key justifications of the business judgment rule").

[133] Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996) (citing Saxe v. Brady, Del. Ch., 184 A.2d 602 (1962)).

[134] Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (noting that the business judgment rule "does not apply in cases . . . in which the corporate decision . . . is tainted by a conflict of interest" (internal citations omitted)).

[135] Id. at 887–88.

[136] 430 A.2d 779 (Del. 1981).

[137] 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 9:17, at 1 (9th ed. 2012) ("The board retains the power to appoint an SLC of disinterested and independent directors empowered to investigate the allegations in the complaint and recommend or, if complete authority with respect to the suit is delegated, to move for dismissal if the committee concludes that the suit should be dismissed as not in the best interests of the corporation and its shareholders.").

condition, and the one most relevant for purposes of this Note, is a process requirement: The SLC must satisfy the court that it is free of bias, that it has acted in good faith, and that it has conducted a reasonable investigation.[138]

The basic intuition of the *Zapata* analysis is that courts are more adept at policing the procedure behind the committee's decision than the substance of the decision itself. The court does not have the competence to make a business decision for the corporation, but it can make sure that those that *are* competent are going through all of the right motions. This idea can and should be transplanted into the realm of legislative fact-finding. The problem is the same—the court needs to ensure that the proper decision was made by an actor with the competence to make that decision but who may lack the incentives to do so. The solution should be the same as well.

There are a few important differences between the application of this principle in the context of corporate law and in the context of reviewing legislation. In the context of reviewing legislation, the cause for alarm is not a circumstantial conflict of interest, but an inherent, structural conflict of interest: the legislature's accountability to voters, who care more about getting their policies codified into law than they care about verifying the existence of constitutionally necessary factual predicates. If corporate directors had this kind of structural conflict of interest, courts would be forced to review the procedure behind their every decision. The reason we do not review a legislature's every decision with the same degree of scrutiny despite its structural conflict of interest brings up another important difference between the corporate context and the legislative context: the special respect owed to a coequal branch of government under the principles of separation of powers, or a state government under the principles of federalism.

Thus, the major difference in the application of this principle in the corporate context and in the legislative context is the trigger for heightened review of the judgment. In the corporate context, this trigger is the existence of some conflict of interest. In the legislative context, the trigger for heightened review of the facts is heightened review of the legislation as a whole. However, once heightened review of the judgment is

[138] *Zapata*, 430 A.2d at 788. The second condition, that only some courts follow, is that "the court, in its discretion, may proceed to a second step of review, which requires the court to 'determine, applying its own independent business judgment, whether the motion should be granted.'" McLaughlin, supra note 137, § 9:17, at 2 (quoting *Zapata*, 430 A.2d at 789).

triggered, the idea of policing procedure before substance is equally applicable in both contexts.

b. Procedures Warranting Deference

This Section will operationalize this theory of judicial review by describing what types of procedures would entitle a legislature to additional deference in fact-finding. For the sake of simplicity, this Section will look specifically at procedures available to Congress, although many analogous procedures are available to state legislatures.

Professor DeCoux suggests that one way for Congress to ensure objective, competent fact-finding is to outsource the decision to a neutral, expert body.[139] Specifically, she suggests "empower[ing] a separate body or agency" to conduct the fact-finding inquiry.[140] This Note agrees with this basic premise, but delves further into the details in order to respond to Professor Devins' critique that procedural review is unworkable in practice.[141]

Professor DeCoux first envisions the creation of a temporary entity designed to review a specific factual issue relevant to the passage of certain legislation. Specifically, she envisions an entity "which would consist of experts in the particular topic in question, [and] would bear at least some resemblance to the Royal Commissions of Inquiry employed in Great Britain."[142] Along the same lines, she suggests creation of "a position similar to that of the special masters employed by courts, usually to make or recommend findings requiring particular expertise."[143] The obvious problem with such a system is that Congress could populate this temporary fact-finding entity with partisan fact-finders, or even prescreen members for their pre-existing factual beliefs. Professor DeCoux anticipates this criticism, at least with regard to the idea of selecting a special master, and responds that "[t]he selection process for the master would be nonpartisan, because any other approach would reintroduce the partisanship that the use of the special master should eliminate."[144] While this is undoubtedly true, Professor DeCoux fails to explain how a temporary commission or special master appointed by Congress, an in-

[139] DeCoux, supra note 105, at 382.
[140] Id.
[141] See Devins, supra note 9, at 1208–09.
[142] DeCoux, supra note 105, at 382.
[143] Id.
[144] Id.

herently partisan entity, could be non-partisan. Perhaps she means that the majority and minority party should be able to appoint an equal number of experts, but this would seem to risk creation of a polarized entity comprised of diametrically opposed experts (or whatever leaders of Congress deem to be experts) that would be unable to reach any kind of factual consensus.

A better system would be to outsource the appointment process itself to a pre-existing, non-partisan entity with experience in creating objective panels of experts. The National Research Council ("NRC"), the operating arm of the National Academies,[145] fits this description. The National Academies and, by incorporation, the NRC have been praised by countless sources as non-partisan, trustworthy entities with expertise in studying scientific questions of all varieties.[146] Importantly, the NRC's current method of committee selection is armed to the teeth with procedural protections designed to maximize expertise and balance while minimizing the risk of bias. The NRC describes "[o]ne of [its] strengths" as a "tradition of bringing together recognized experts from diverse disciplines."[147] It solicits suggestions for committee nominees from a "wide range of sources" and subjects these nominees to multiple levels of review within the National Academies.[148] It then solicits public comment on the list of nominees.[149] Before the committee is finalized, the National Academies hold a meeting to ensure that the committee contains a balance of perspectives and is free from any conflicts of interest.[150] In short, the NRC takes its job of creating fact-finding committees very se-

[145] See The Nat'l Academies, The National Resource Council (May 15, 2013), http://www.nationalacademies.org/nrc/index.html.

[146] See, e.g., Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 735 (M.D. Pa. 2005) (noting that the National Academies was "recognized by experts for both parties as the 'most prestigious' scientific association in this country"); Dov Greenbaum, Is It Really Possible to Do the Kessel Run in Less than Twelve Parsecs and Should It Matter? Science and Film and its Policy Implications, 11 Vand. J. Ent. & Tech. L. 249, 310–11 (2009) (describing the National Academy of Sciences as one of the "foremost" of "a number of organizations that stand out as influential, scientific, and unbiased . . . [and are] well suited to represent mainstream science and promote good and accurate science in the media"); Sherwood Boehlert, Op-Ed., Science the GOP Can't Wish Away, Wash. Post, Nov. 19, 2010, at A21 (referring to the National Academy as the "nation's most authoritative and respected scientific body").

[147] The Nat'l Academies, Our Study Process (May 15, 2013), http://www.nationalacademies.org/studyprocess/index.html.

[148] Id.

[149] Id.

[150] Id.

riously, it has earned a reputation for doing this job well, and it has an interest in protecting this reputation.[151] If Congress were to hand over the selection process for its temporary committees to the NRC, the risk of partisan selection bias would drop substantially and the degree of judicial deference should rise accordingly.

Professor DeCoux also seems to suggest that Congress could outsource a factual judgment to an existing agency within the government. To the extent Professor DeCoux suggests such a procedure, the agency in question could not also be involved in regulation of the problem that the legislation is designed to address without creating a serious financial conflict of interest. For example, in *Brown v. Entertainment Merchants*,[152] the California legislature would not have been entitled to complete deference on the facts if it had outsourced the critical factual inquiry—the degree of psychological harm caused by exposure to violent video games—to the National Institute of Mental Health ("NIMH"). Because NIMH's funding presumably depends in part on the severity and prevalence of America's mental health problems, it may have an incentive to exaggerate the mental health crisis in the hopes of receiving greater resources. Outsourcing to an agency such as this would not accomplish the goal of insulating the decision from bias.

Professor DeCoux also suggests outsourcing the entire fact-finding process to a permanent body such as the Congressional Research Service.[153] She notes, however, that the "highest ranking officers [in this entity] are appointed by the leadership of Congress," which opens the door to partisan influence.[154] Here, again, outsourcing to a non-government body like the National Research Council is a promising alternative. The

[151] See, e.g., The Nat'l Academies, Policy on Committee Composition and Balance and Conflicts of Interest for Committees Used in the Development of Reports (May 12, 2003), http://www.nationalacademies.org/coi/bi-coi_form-0.pdf (explaining that "the National Research Council . . . accord[s] special importance to the policies and procedures established by the institution for assuring the integrity of, and hence the public confidence in, the reports of the institution"); The National Academies, http://www.nationalacademies.org/ (last visited Sept. 11, 2013) (describing the slogan of the National Academies as "Where the Nation Turns for Independent, Expert Advice"); The National Academies Study Process, http://www.nationalacademies.org/studyprocess/index.html (last visited Sept. 11, 2013) (explaining that "[t]he reports of the National Academies are viewed as being valuable and credible because of the institution's reputation for providing independent, objective, and nonpartisan advice with high standards of scientific and technical quality").

[152] 131 S. Ct. 2729 (2011).

[153] DeCoux, supra note 105, at 382.

[154] Id.

Governing Board of the NRC is comprised of members from the National Academies who are not appointed by Congress.[155] Further, the NRC, unlike the CRS, submits its findings to a rigorous peer review process.[156] Specifically, any report from the National Academies "must be reviewed by a diverse group of experts other than its authors before it may be released outside the institution."[157] This review process asks independent experts to comment on whether the report is impartial and fair, and whether any value judgments or opinions in the report are acknowledged, explained, and justified.[158] Accountability to the scientific community is a key feature of the NRC and helps ensure that fact-finding is objective and expertly done. Should Congress submit a factual inquiry to the NRC, a court should therefore view the fact-finding as insulated from bias, and should defer to the substantive judgment.

Professor DeCoux suggests, as an alternative to conditioning deference on outsourcing the decision completely, conditioning deference on the adoption of rules of evidence for congressional hearings that would help "check unbridled discretion in fact-finding."[159] Professor DeCoux does not delve deeply into the details of what evidentiary rules would be required, but acknowledges at the outset that adoption of the Federal Rules of Evidence for congressional hearings "would be senseless."[160]

Whatever these evidentiary rules may be, they would be unlikely to effectively restrain congressional bias. The most glaring inadequacy of such rules is that they would only affect the quality of the evidence, not the impartiality of the committee members who ultimately choose the witnesses and judge the evidence. Higher quality evidence only has the potential for higher quality decisions if the decision-makers are genuinely interested in obtaining the right answer. As described above, members of Congress are often motivated by forces other than a quest for the truth.[161] Also, even assuming that the committee would make the most rational factual finding based on the evidence before it, evidentiary rules do not ensure that the evidence presented at a hearing will be balanced.

[155] National Research Council, Articles of Organization (June 15, 2007), available at http://www.nationalacademies.org/nrc/na_070358.html.

[156] Report Review Committee, The National Academies, Guidelines for Review, available at http://www.nationalacademies.org/xpedio/groups/nasite/documents/webpage/na_067076.pdf.

[157] Id.

[158] Id.

[159] DeCoux, supra note 105, at 326.

[160] Id. at 380.

[161] See supra Subsection II.B.1.

As described above, committee chairs have the ability to pack their committee with biased members, who can then screen witnesses to make sure they only get the testimony that their political party wants to hear.[162] When factual issues are complex and contestable, a biased committee could likely find witnesses to support whatever factual position they are inclined to favor. In short, rules of evidence may tend to increase the competency of the decision, but they do little to remove the threat of bias and manipulation.

Should the fact-finding decision remain within Congress, more than improved rules of evidence would be needed to earn deference. Specifically, Congress would need to take additional steps to remove the threat of partisan bias. Congress could structure the committee in a more bipartisan manner, and perhaps give representatives of each political party an opportunity to influence what evidence ends up in the committee report. However, as noted above, the minority political party may not be a satisfactory advocate for the rights of disfavored minority groups. Going back to the example given above, both Democrats and Republicans may have incentives to find facts to justify a law that effectively abridges the constitutional rights of unpopular groups with no political influence (for example, convicted felons) as long as their political base benefits.[163] In order to earn deference, a congressional hearing would have to be restructured to remove not just partisan bias, but *majoritarian* bias, and it is unclear how this is possible. Thus, while restructuring congressional hearings could increase the degree of judicial deference, it would never be appropriate to defer completely to a factual decision made by members of Congress (as opposed to apolitical actors).

c. Case Study: Gonzales v. Carhart

The rules proposed by this Note are best illustrated by example. Recall the legislative fact-finding reviewed in *Gonzales v. Carhart*.[164] Even before the Court pointed to substantive errors in the legislature's fact-finding, there were plenty of procedural indications that the legislature was not utilizing its fact-finding tools appropriately. As noted above, the relevant factual conclusion—that this abortion procedure was never medically necessary—was made before any of the hearings actually took

[162] Id.; see also Devins, supra note 9, at 1183–84.
[163] See supra Subsection II.A.2.
[164] 550 U.S. at 165–66.

place.[165] Although some argument could be made that Congress was relying on fact-finding that had taken place when it passed abortion bans in 1995 and 1997, Professor DeCoux has noted several reasons why this information could not have been relied upon.[166] Most importantly, the procedures banned in these prior laws were different than the procedure being banned in 2003.[167] Secondly, in the course of six to eight years, most of the representatives who heard the evidence in the prior proceedings would have been up for reelection, and the congressional composition may have changed in the interim.[168] Finally, medical technology changes so quickly that evidence that is six to eight years old may not accurately represent the current state of the industry.[169] When Congress makes a factual finding without using *any* of the fact-finding tools at its disposal, this is the clearest case for *de novo* judicial review. There is little reason to believe that Congress's intuitions about a complex medical fact would be any more accurate than a Court's judgment after hearing from expert witnesses and amici on the issue. The fact that Congress conducted hearings after its decision had already been made should carry little weight in deciding whether to defer.

Even if Congress had conducted these hearings before coming to its conclusion, other procedural red flags should have forfeited any additional deference. For example, recall that there were no medical witnesses called to testify for the factual position opposing the bill (that is, that this particular partial-birth abortion procedure was sometimes medically necessary to ensure the safety of the woman).[170] At a minimum, serious fact-finding would include testimony on both sides of the issue. A one-sided hearing like the one in *Gonzales* should raise suspicions that Congress is not attempting to find the facts, but merely presenting the facts necessary to uphold this politically charged law. Furthermore, recall that the experts that did end up testifying were not required to establish that they were competent to answer the questions asked.[171] Courts should not defer to legislative fact-finding on a complicated medical issue when

[165] DeCoux, supra note 105, at 370–71.
[166] Id. at 371.
[167] Id.
[168] Id.
[169] Id.
[170] Id. at 373. The minority party chose a constitutional law expert instead of a medical witness, so the committee only ended up hearing from experts on one side of the medical issue. Id.
[171] Id. at 372.

there are no assurances that the medical experts that provide evidence are qualified to do so. If a hearing consists of only anecdotal evidence from laymen, for example, the legislature is not taking fact-finding seriously.

III. SUBSTANTIVE REVIEW

When a legislature has not employed deference-worthy procedures, the reviewing court must review the substance of the decision. As discussed above, courts have a duty to ensure that the factual predicates for a piece of legislation are constitutionally sufficient.[172] When a legislature does not take appropriate steps to ensure that these predicates have been established in an objective, expert manner, courts have no choice but to review the substance themselves. Given that courts are not structured to accurately evaluate legislative facts, how should they go about performing this duty? This Section argues that if judges cannot defer to the legislature's factual judgment, they should, to the extent possible, defer to the scientific community.

A. Problems with Substantive Review

Observers have noted that judges often cite to extra-record materials when conducting this substantive review,[173] a phenomenon that has been facilitated by the advent of the Internet and the instant availability of a host of empirical studies at the click of a mouse.[174] Currently, there are no rules governing when and how judges can look outside the record to decide case-critical legislative facts,[175] and therefore they look to myriad sources, some less credible than others.[176]

Going outside the record has the advantage of allowing judges full access to relevant data that the parties or amici may not have provided. The parties and amici may have simply missed relevant information, or they may have only provided data that best supports their respective po-

[172] See supra Section II.A.

[173] See, e.g., Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Fact-finding, 61 Duke L.J. 1, 26–35 (2011); Larsen, supra note 10, at 1271–77.

[174] Larsen, supra note 10, at 1290–91.

[175] See Fed. R. Evid. 201(a) and accompanying advisory committee note.

[176] See, e.g., Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2770–71 (2011) (Breyer, J., dissenting) (citing to a YouTube video); United States v. Stevens, 559 U.S. 460, 476 (2010) (citing to a magazine article).

sition, creating a polarized record lacking data that falls in the middle of the two extremes.

However, extra-record research increases the risk of judicial error. When a judge goes outside the record in search of empirical studies, she removes the ability of the adversarial process to check the quality of the data.[177] Often parties will not know what facts and studies a judge is relying on to make her decision until an opinion is issued. This practice also introduces the possibility of the judge's personal bias going unchecked, and increases the risk that critical legislative facts are decided based on individual political or moral beliefs rather than an objective evaluation of the evidence.[178]

B. Daubert *Principles*

To mitigate the risks inherent in extra-record research, judges should make use of lessons from *Daubert*, a seminal case in which the Supreme Court announced a new standard for admissibility of expert testimony.[179] Although *Daubert* was only intended to govern the admissibility of expert testimony concerning adjudicative facts, some of its factors could assist judges who are confronted with conflicting evidence regarding a legislative fact.

The main holding of *Daubert* was that expert testimony is only admissible at trial if "the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue,"[180] but its guidance as to how to apply this standard is also relevant here. Specifically, *Daubert* counseled that a "pertinent consideration [for deciding whether to admit expert testimony] is whether the theory or technique has been subjected to peer review and publication."[181] Another consideration was whether the scientific theory enjoyed "widespread acceptance" within the scientific community, and *Daubert* counseled that "'a known technique which has been able to attract only minimal support within the community' . . . may properly be viewed with skepticism."[182]

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[177] Larsen, supra note 10, at 1292–93.
[178] See, e.g., id. at 1291–95.
[179] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1993).
[180] Id. at 592.
[181] Id. at 593.
[182] Id. at 594 (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

Daubert's guidance can be understood as a call for judges to accord some level of deference to the scientific community's judgment on the reliability of the expert's proposed testimony. This guidance is equally helpful for judges who are weighing evidence of a legislative fact off the record. Given their relative lack of experience with analyzing complex empirical issues, judges should give great weight to the judgments of the scientific community on a question of legislative fact. Evidence that bears on a legislative fact at issue and has not been subjected to peer review or widely accepted by the scientific community should be viewed with skepticism. Evidence that has survived peer review and has received greater acceptance should be accorded more weight. To the extent possible, the scientific community should be the judge of the facts.

C. Justice Breyer's Proposals

In addition, courts could benefit from some of Justice Breyer's proposals designed to increase the quality of judicial review of legislative facts. Most broadly, Breyer urges the Supreme Court to wait until an extrajudicial scientific debate has ripened before it takes the case.[183] Breyer's idea is that the majority of the empirical heavy lifting in areas of scientific or technical expertise should be borne by the experts themselves prior to judicial resolution. This approach seems sensible, as the sciences can resolve empirical issues in an open and flexible forum, while a court that wishes to amend a fundamental empirical assumption is confronted with issues of reliance and stare decisis. Of course, the benefits of obtaining a well-developed body of research have to be weighed against the costs of waiting for it to develop. For example, the longer the judiciary waits for the scientific community to hash out the facts, the longer an unconstitutional statute may remain on the books.

Breyer also advocates for the ability of courts to call their own experts, instead of relying on experts hired by the parties.[184] Breyer hopes that courts can make increased use of special masters and specially trained law clerks to aid in the resolution of complex empirical issues.[185] According to Breyer, part of the problem can also be addressed at the trial level, through the use of pretrial conferences to narrow the scientific

[183] Frederick Schauer, The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin, 2001 Sup. Ct. Rev. 267, 293 (2001).
[184] Id.
[185] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 149 (1997) (Breyer, J., concurring).

issues in dispute, or pretrial hearings to subject experts to direct examination by the courts.[186] Overall, Breyer seeks improvement in the quality of a scientific debate before it reaches the Court, so that the justices will be able to assess a coherent and well-developed body of empirical evidence.

CONCLUSION

The question of how judges should review the factual predicate to a piece of legislation is complex and multifaceted, but the approach advocated by this Note is, at its core, simple: strive to put the decision in the hands of the most competent, most objective parties. Legislatures are better equipped to decide these facts than the judiciary, and judges should defer to a legislative judgment when they are convinced that the legislature arrived at it objectively. The best way for judges to evaluate objectivity is to review the procedures behind the judgment.

If a legislature has failed to demonstrate objectivity or competence, the judiciary has no choice but undertake its own review of the substance. To do this, judges may need to go outside the record provided by the parties, which removes the adversarial check on the accuracy of the evidence they examine. However, judges can effectively use the scientific community as a check on the evidence they examine: by looking at whether the evidence has survived peer review and obtained a widespread acceptance.

Applying these principles will not resolve all the issues inherent in judicial review of difficult empirical judgments. Science itself is uncertain, and often there is no clearly right answer to a question of legislative fact. What this approach hopes to accomplish is that legislative facts be evaluated in a more ordered, reasoned way than they are under the current system. With so much riding on these facts, the courts have an obligation to do the best they possibly can.

[186] Id.