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## ARTICLE

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### FACTUAL PRECEDENTS

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*Lawyers and judges speak to each other in a language of precedents—decisions from cases that have come before. The most persuasive precedent to cite, of course, is an on-point decision of the U.S. Supreme Court. But Supreme Court opinions are changing. They contain more factual claims about the world than ever before, and those claims are now rich with empirical data. This Supreme Court factfinding is also highly accessible; fast digital research leads directly to factual language in old cases that is perfect for arguments in new ones. An unacknowledged consequence of all this is the rise of what I call “factual precedents”: the tendency of lower courts to cite Supreme Court cases as authorities on factual subjects, as evidence that the factual claims are indeed true. Rather than citing, for example, evidence from the record to establish that carpal tunnel syndrome regularly resolves without surgery, lower courts instead cite language from a Supreme Court opinion for that point.*

*This Article carefully describes how lower courts are using Supreme Court facts today and then argues that these factual precedents are unwise. The Supreme Court is not a factfinding institution. Facts change over time. And, unlike legal precedents, one cannot be certain that factual statements from the Supreme Court are carefully deliberated and carry the force of law. I argue that Supreme Court statements of fact should not receive any authoritative force separate from the force that attaches to whatever legal conclusions they contributed to originally. If a fact is so central to the legal holding that the two meld together, then the Supreme Court is free to so state and thus insulate the factual conclusion from future challenges by making it*

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part of the legal rule. But the presumption, I suggest, should be no precedential value for generalized factual claims—even if they are facts found in the U.S. Reports.

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## INTRODUCTION

Lawyers and judges speak to each other in a language of precedents—decisions from cases that have come before.<sup>1</sup> The most persuasive precedent to cite—either to a judge in argument or from a judge in explanation—is an on-point decision of the U.S. Supreme Court. Because lower courts in our legal system treat decisions of higher courts with supervisory jurisdiction as

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<sup>1</sup> See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1934-35 (2008) (“[L]aw is, at bottom, an authoritative practice . . . . [T]he law’s practice of using and announcing its authorities . . . is part and parcel of law’s character.”).

binding authority, a precedent from the very highest court effectively takes the issue off the table in the lower court.<sup>2</sup> Supreme Court precedents, therefore, are extremely valuable to all litigants and judges across the country.

But Supreme Court opinions are changing. They are longer.<sup>3</sup> They spawn more concurrences and dissents.<sup>4</sup> They include more citations than ever before.<sup>5</sup> And the citations are changing too. The Justices are not just citing cases. The Supreme Court is in the “throes of a widespread empirical turn”<sup>6</sup>; consequently, its opinions are chock-full of statistics, social science studies, and other general statements of fact about the world.<sup>7</sup>

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<sup>2</sup> See Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 128 (1997) (noting that, because of “[p]rinciples of *stare decisis*,” once a “question is decided in an appellate court, . . . lower courts are then responsible for following that decision”); see also Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 479 (2012) (“Supreme Court holdings are strictly binding on the lower courts.”).

<sup>3</sup> See Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 646 (2008) (documenting the increase in opinion length over time).

<sup>4</sup> See Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 375-76 (2001) (analyzing the increase in dissenting opinions over time and providing empirical evidence for the argument that judges no longer hide their private disagreements from the public as judges in the nineteenth century did); Linda Greenhouse, *The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001, at WK1 (describing the culture of dissent that has become entrenched within the Supreme Court over time).

<sup>5</sup> 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, 531-37 (noting that the increase in citations over time may be the natural result of various factors, including the larger number of cases to cite, the existence of digital databases like LexisNexis and Westlaw, which facilitate the finding of citations, and the increased use of law clerks who seem eager to use citations).

<sup>6</sup> Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 118 (2003); see also Tracy L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 853 (explaining that, over the past decade, judges and lawyers have begun to cite to empirical studies in their work with increasing regularity); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 658-68 (1988) (providing a historical account of the use of facts in judicial opinions and noting that “[o]nce heretical, the belief that empirical studies can influence the content of legal doctrine is now one of the few points of general agreement among jurists” (quoting John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 477 (1986))); cf. Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 912 (2011) (observing how the digital revolution has “blurr[ed] . . . the line between legal and nonlegal authority” in recent judicial opinions).

<sup>7</sup> I have previously considered how Supreme Court Justices inform themselves about these factual questions. See Allison O. Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1286-90 (2012). That article discussed the upstream flow of factual information at the Supreme Court—where the authorities come from. This Article discusses the downstream—what happens in the lower courts after the factual statements become enshrined in the U.S. Reports.

As Supreme Court opinions are fattening up, legal research methods have also changed. Full text searching enables a new emphasis on quotes over holdings and “words over concepts.”<sup>8</sup> Gone are the days of hunting for principles of law in a digest or Shepardizing a case for ones with similar facts.<sup>9</sup> The new digital mode of legal research often leads directly to language in a decided case that is perfect for an argument in a new one—regardless of whether the language was central to the case in which it was offered or whether the holding of the cited case has any relevance to the one at hand. As Fred Schauer put it years ago, “[I]t is not what the Supreme Court held that matters, but what it *said*. In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding.”<sup>10</sup>

An unacknowledged consequence of all this is the rise of what I call “factual precedents”: the tendency of lower courts to over-rely on Supreme Court opinions and to apply generalized statements of fact from old cases to new ones.<sup>11</sup> Rather than citing, for example, evidence from the record to establish that many mild cases of carpal tunnel syndrome resolve without surgery, lower courts instead cite language from a Supreme Court opinion for that point.<sup>12</sup>

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<sup>8</sup> Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 245-48 (2010).

<sup>9</sup> See Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J.L. & TECH. 223, 243-44 (2008) (explaining that, unlike the paradigmatic electronic research process, the “print-only world was largely controlled by case digests and indices,” in which the researcher played an “active role in making matches between the research question and the topics and key numbers”).

<sup>10</sup> Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986).

<sup>11</sup> A handful of others have observed the confusion surrounding the precedential value of factual claims. See, e.g., DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 141-58 (2008) (addressing whether lower courts can “revisit precedent so as to adjust earlier rulings to account for a changed factual landscape”); Stuart M. Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 369-71 (1999) (discussing implications for reviewing courts when facts of a case change); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1236-37 (2013) (discussing that a “common area of confusion that arises when courts address issues of constitutional social fact is a blurring between normative judgments and empirical fact”); Kenneth C. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 970 (1955) (discussing courts’ tendency to apply stare decisis to findings of fact); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 64 (2011) (“Whatever the law might require, lower courts will, as a practical matter, often reflexively follow a statement by a higher court, even if the statement is only dictum or a factual finding that perhaps ought not be binding”).

<sup>12</sup> See, e.g., *Heimann v. Roadway Express, Inc.*, 228 F. Supp. 2d 886, 904 (N.D. Ill. 2002) (citing *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 199 (2002), for the proposition that “one quarter of the carpal tunnel cases resolve within one month without surgical intervention”).

To be sure, factual claims play different roles at the Court. Sometimes the Court's understanding of a generalized fact leads it to adopt one legal rule over another. The holding in *Brown v. Board of Education* relied on the factual assertion that African American children are psychologically harmed by segregated schools.<sup>13</sup> The holding in *Citizens United v. Federal Election Commission* relied on the factual claim that corporate independent expenditures do not corrupt politics.<sup>14</sup> Whether legal holdings *should* rely on factual claims and how vulnerable those decisions are for reversal is a debate for another day. This Article tackles a different question: Namely, should the Court's statements of fact ever receive separate precedential force, distinct from the precedential force of whatever legal conclusions they contributed to originally?

In this Article, I argue no. The traditional arguments favoring strong stare decisis do not apply to statements of fact. The Supreme Court is not a factfinding institution. Facts change over time. And, most troubling, factual authorities employed instrumentally by the Justices—for persuasive rhetoric—may not be carefully deliberated, may not have garnered the support of five Justices, and may be selected for reasons other than that they are the most reliable sources. At bottom, the fear is that lower court judges will take something as authoritative from one who is not an authority on the subject. Factual statements about the way the world works should not be entrenched for the whole country in this way.

A concrete example might help. In 2009, in *Nken v. Holder*, the Supreme Court ruled on the legal standard to apply when a noncitizen sought to stay his deportation pending judicial review of his appeal.<sup>15</sup> At the end of the opinion, Chief Justice Roberts opined that deportation did not result in irreparable injury.<sup>16</sup> He added, "Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal."<sup>17</sup> This statement has a factual component—a true or false assertion about prevalent immigration practices—that was based on assurances from the Solicitor General in his brief that the United States tries to facilitate the return of deported immigrants who later win their appeals.

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<sup>13</sup> 347 U.S. 483, 493-94 (1954).

<sup>14</sup> 558 U.S. 310, 357 (2010).

<sup>15</sup> 556 U.S. 418, 433-46 (2009).

<sup>16</sup> *Id.* at 435.

<sup>17</sup> *Id.*

After inquiries from immigration attorneys, the Solicitor General admitted in a letter to the Supreme Court that he is “not confident” that U.S. policy is as clear as described in the *Nken* brief.<sup>18</sup> Immigration rights groups are not satisfied by this letter, however.<sup>19</sup> Interestingly, they do *not* seek a rehearing of the *Nken* case—perhaps acknowledging that the factual mistake would not cause the Court to alter the result. What they are worried about, instead, is that other courts will rely on this statement of fact in *Nken* to the detriment of noncitizens in other cases.<sup>20</sup> They are, in other words, worried about the factual precedent coming out of *Nken*. And they have reason to worry: at least ten courts to date (federal and state) have quoted the above statement from the Chief Justice about the general tendencies of immigration officials.<sup>21</sup>

*Nken* is not an outlier. Lower courts cite the Supreme Court to establish, for example, that forensic evidence is frequently manipulated,<sup>22</sup> post-abortion depression is exaggerated,<sup>23</sup> Americans attend church more often than citizens of other nations,<sup>24</sup> predatory pricing rarely occurs in the

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<sup>18</sup> See Jess Bravin, *Correct the Record, Rights Groups Say After DoJ Admits Mistake*, WALL ST. J. L. BLOG (May 4, 2012), <http://blogs.wsj.com/law/2012/05/04/correct-the-record-rights-groups-say-after-doj-admits-mistake> (noting that the Solicitor General’s office admitted that it “mistakenly stated that it routinely ‘facilitates’ the return to the U.S. of deported immigrants who later win their appeals”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see also Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1602 (2013) (manuscript at 103) (complaining that “the damage was done . . . lower courts had already revised caselaw about stays in light of the Supreme Court’s pronouncement”).

<sup>21</sup> See, e.g., *Juarez-Chavez v. Holder*, 515 F. App’x 463, 467 (6th Cir. 2013); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011); *Spence v. Holder*, 414 F. App’x 637, 639 n.4 (5th Cir. 2011); *Lezama-Garcia v. Holder*, 666 F.3d 518, 537-38 (9th Cir. 2011); *United States v. Adame-Orozco*, 607 F.3d 647, 655 n.10 (10th Cir. 2010); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 n.3 (5th Cir. 2010); *Jimenez v. Napolitano*, No. 12-3558, 2012 WL 3144026, at \*7 (N.D. Cal. Aug. 1, 2012); *Nat’l Immigration Project of Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec.*, 868 F. Supp. 2d 284, 288 (S.D.N.Y. 2012); *Désiré v. Holder*, No. 08-1329, 2009 WL 4898261, at \*2 (D. Ariz. Dec. 14, 2009); *Villajin v. Mukasey*, No. 08-0839, 2009 WL 1459210, at \*4 (D. Ariz. May 26, 2009).

<sup>22</sup> See, e.g., *Matthies v. State*, 85 So. 3d 838, 845 (Miss. 2012) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009)).

<sup>23</sup> See, e.g., *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 750 (8th Cir. 2008) (citing *Gonzales v. Carhart*, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting)).

<sup>24</sup> See, e.g., *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 n.2 (W.D. Wash. 2005) (citing *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring)).

market,<sup>25</sup> campaign donations lead to biased judges,<sup>26</sup> and psychopaths retain some ability to control their behavior.<sup>27</sup>

Lower courts seem confused about what to do with these Supreme Court findings of fact.<sup>28</sup> Some courts deny being bound by the factual findings of higher courts.<sup>29</sup> Others say it makes no sense to reproduce all of the factual evidence—on abortion procedures or effects of campaign finance laws, for example—in every relevant case.<sup>30</sup> What is clear, however, is that despite what they say about the limits of *stare decisis*, “the tendency of the courts to apply that principle to findings of fact is a rather substantial one.”<sup>31</sup> This particularly holds true for statements of fact that come from the

<sup>25</sup> See, e.g., *McGuire Oil Co. v. Mapco Petroleum, Inc.*, 763 F. Supp. 1103, 1107 (S.D. Ala. 1991) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)), *rev'd sub nom.*, *McGuire Oil Co. v. Pampco, Inc.*, 986 F.2d 444 (11th Cir. 1993).

<sup>26</sup> See, e.g., *Wersal v. Sexton*, 613 F.3d 821, 839 (8th Cir. 2010) (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 789-90 (2002) (O'Connor, J., concurring)), *rev'd*, 674 F.3d 1010 (8th Cir. 2012).

<sup>27</sup> *People v. Williams*, 74 P.3d 779, 782 (Cal. 2003) (citing *Kansas v. Crane*, 534 U.S. 407, 412 (2002)).

<sup>28</sup> See *Davis*, *supra* note 11 (discussing courts' tendency to apply *stare decisis* to findings of fact); *Gorod*, *supra* note 11 (explaining that lower courts “often reflexively follow a statement by a higher court, even if the statement is only dictum or a factual finding that perhaps ought not be binding”); see also FAIGMAN, *supra* note 11, at 114 (“The [Supreme] Court has no overriding theory of when it should be deferential to other bodies—judicial and nonjudicial—that have made findings of constitutional fact.”).

<sup>29</sup> See, e.g., *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 689 (7th Cir. 2002) (“Th[e] admixture of fact and law, sometimes called an issue of ‘constitutional fact,’ is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects.”).

<sup>30</sup> See, e.g., *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 625 (4th Cir. 2005) (“*Carhart* established the health exception requirement as a *per se* constitutional rule. This rule is based on substantial medical authority (from a broad array of sources) recognized by the Supreme Court, and this body of medical authority does not have to be reproduced in every subsequent challenge to a ‘partial birth abortion’ statute lacking a health exception.”), *vacated sub nom. Herring v. Richmond Med. Ctr. for Women*, 550 U.S. 901 (2007); *Hope Clinic v. Ryan*, 195 F.3d 857, 884 (7th Cir. 1999) (Posner, J., dissenting) (“[T]he health effects of ‘partial birth’ abortion . . . should indeed be treated as a legislative fact, rather than an adjudicative fact, in order to avoid inconsistent results arising from the reactions of different district judges . . . to different records . . .”), *vacated sub nom. Christensen v. Doyle*, 530 U.S. 1271 (2000); see also *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 695 (9th Cir. 2010) (“Supreme Court precedent forecloses the City’s argument that independent expenditures by independent expenditure committees (‘IECs’), like the Chamber PACs, raise the specter of corruption or the appearance thereof.”); *Republican Nat’l Comm. v. FEC*, 698 F. Supp. 2d 150, 158 (D.D.C.) (“To the extent the FEC argues that large contributions to the national parties are corrupting and can be limited because they create gratitude, facilitate access, or generate influence, *Citizens United* makes clear that those theories are not viable.”), *aff'd*, 130 S. Ct. 3544 (2010).

<sup>31</sup> *Davis*, *supra* note 11.

Supreme Court—regardless of how central the fact was to the legal rule announced in the original case.<sup>32</sup>

This Article highlights this growing problem and offers one possible solution to the confusion. I argue that lower courts should never give separate precedential force to Supreme Court findings of fact. These generalized factual claims should not even be treated as extra persuasive because they appear in the U.S. Reports. A lower court should not care what Justice O'Connor says about carpal tunnel syndrome or what Justices Kennedy or Ginsburg say about post-abortion depression. There should not, in other words, be precedential force for any factual statement by the Supreme Court distinct from the force attached to the legal holding it helped to create. The creeping temptation in the lower courts to answer factual questions by relying on decisions from the Supreme Court is one that should be resisted.

Accepting my position is most difficult in cases when it seems the Supreme Court is trying to assert its authority on a factual matter and to settle a debate for the country. For example, take the campaign finance finding in *Citizens United*<sup>33</sup> that corporate independent expenditures do not corrupt the political process, and the affirmative action fact found in *Grutter v. Bollinger*<sup>34</sup> that exposure to racially diverse viewpoints is critical to a good law school education. Are these facts open for debate in subsequent litigation in the lower courts?

On this final question, I offer some intentionally preliminary answers. I certainly do not endorse a factual free-for-all in the lower courts. But there are ways for the Supreme Court to control the precedential treatment of its decisions without creating factual precedents. If the Court wants to make something unreviewable by lower courts, it can clearly articulate that any factual claim it endorses is just part of the legal rule. If it does not do that, however, then the factual question should remain open; the presumption should be against precedential value for factual findings.

This Article proceeds in four parts. Part One defines factual precedents, and Part Two describes in detail how lower courts are using Supreme Court statements of fact as authoritative. Part Three then asserts that factual precedents are unwise and argues against their use. Part Four concludes by suggesting that some high-profile Supreme Court factual findings are not

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<sup>32</sup> As one district court noted candidly, “[B]y the way’ statements made by the Supreme Court resonate more forcefully than dicta from other sources.” *United States v. Miller*, 604 F. Supp. 2d 1162, 1167 (W.D. Tenn. 2009).

<sup>33</sup> 558 U.S. 310 (2010).

<sup>34</sup> 539 U.S. 306 (2003).



actually facts but instead are just generalizations that form components of legal rules. This Article calls for lower courts to resist overusing factual statements in Supreme Court opinions and for the Supreme Court to be more precise with its factual labels.

## I. WHAT ARE FACTUAL PRECEDENTS?

### A. Law Versus Fact

The first order of business in defining a factual precedent is to be clear about what constitutes a fact. It is true that the line distinguishing law from fact starts to dissolve if one thinks too deeply about it. Many statements that seem to be pure legal propositions can actually be repackaged as statements of fact without much effort. For example, “separate but equal is not equal” can be restated as “separate schools psychologically harm minority children.”<sup>35</sup> And naked statements of normative preferences or value judgments, such as “abortion is hard on women,” can also easily look like factual assertions once they are followed by a citation with supporting empirical research.

Indeed, differentiating law from fact has spawned a healthy debate about whether there is even a difference between the two concepts. Some, like Ronald Allen, Michael Pardo, and Gary Lawson, claim that the law–fact distinction is a myth and “the quest to find ‘the’ essential difference between the two . . . is doomed from the start.”<sup>36</sup> These scholars argue that so-called issues of fact and law involve both arguing from evidence “and the

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<sup>35</sup> See Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact Based Adjudication*, 106 COLUM. L. REV. 1955, 1961 (2006) (noting that *Brown v. Board of Education* turned on “‘modern authority’ regarding race discrimination’s harmful effects on educational opportunities”). Goldberg states that similar factual assertions were critical in sex equality cases in the 1970s and in gay rights cases today. *Id.* at 1966. For example, she notes the judicial reliance on the “fact” that women lacked the capacity for prolonged labor or the “fact” that children fare better in the homes of heterosexual couples. *Id.* at 1967-68.

<sup>36</sup> Ronald J. Allen & Michael S. Pardo, *The Myth of the Law–Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003); see also Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1172-77 (2001) (challenging the distinction between law and fact in the context of judicial decisions to defer to Congress); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992) (“[T]he law–fact distinction, whatever its utility, is purely a creature of convention.”); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008) (“There is no analytic dichotomy between law and fact. Law is a social fact, just as are the data or statistical analysis that may be relevant to questions such as whether partial abortions are ever medically necessary.”); 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, 379-80 (1984) (calling the line between law and fact a “slippery” one).

attempt to reconstruct some segment of reality.”<sup>37</sup> The only meaningful difference between the two, they say, is a functional one about allocating authority (between judge and jury, trial court and reviewing court, and the like).<sup>38</sup>

Other scholars, however, like Henry Monaghan and Richard Friedman, argue that law and fact are distinct, real, and separate categories. Monaghan concedes that the concepts are not “static, polar opposites. Rather, law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience.”<sup>39</sup> Likewise, Friedman argues that while the line between law and fact is not always easy to draw, it is more than just convention. He claims that “ordinary factual issues relate to constructing some aspect of reality; whereas, the legal issues relate to prescribing the norms that apply and consequences that attach to that constructed reality.”<sup>40</sup>

Thankfully this is not a debate that needs to be resolved today. Instead, it is enough for present purposes to note two uncontroverted truths.

First, wrestling with the distinction between law and fact is a task we ask courts and administrative agencies to master all the time.<sup>41</sup> Even those scholars who decry that there is no analytical distinction between law and fact admit the central importance of the labels in our legal system.<sup>42</sup> Identifying an issue as a factual one matters in terms of whether an issue goes to the jury, whether a reviewing court defers to a lower court, and whether a precedent is ripe for reversal.<sup>43</sup>

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<sup>37</sup> Allen & Pardo, *supra* note 36, at 1792-93.

<sup>38</sup> See Lawson, *supra* note 36, at 862-63 (explaining that one reason for the enduring character of the law-fact distinction is that “it provides a serviceable, if not indispensable, tool for allocating decisionmaking authority in a complex, lawyered legal system”).

<sup>39</sup> Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985).

<sup>40</sup> Allen & Pardo, *supra* note 36, at 1801 (citing Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 917-19 (1992)).

<sup>41</sup> Goldberg, *supra* note 35, at 1964 (describing “fact-based adjudication” and noting that “courts focus on facts alone when evaluating restrictions on social groups,” like minorities in race, gender, or sexual orientation, even if these facts contain normative judgments).

<sup>42</sup> Allen & Pardo, *supra* note 36, at 1778 (noting how the law-fact distinction “appears in the Constitution” and influences judicial “decision-making authority”).

<sup>43</sup> The Supreme Court’s most famous discussion of stare decisis—*Planned Parenthood of Southeastern Pennsylvania v. Casey*—announced that it is appropriate to overrule a prior decision when the facts or our “understanding of the facts” have changed. 505 U.S. 833, 863 (1992). Moreover, standards of review of administrative agencies turn on whether the question at hand is a legal one or a factual one. Compare *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) (setting a standard of review for factual findings of administrative agencies), with *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863 (1984) (setting a standard of review for agency legal interpretations). For other examples of significant consequences that attach to the law-fact distinction, see Allen & Pardo, *supra* note 36, at 1778.

Second, rightly or wrongly, most lawyers and judges have confidence in their ability to distinguish law from fact. This confidence likely comes from the pedigree of the distinction and its centrality in the practice of law.<sup>44</sup> Putting aside the robust academic debate about defining facts, therefore, the reality is that we often intuitively identify factual claims—we know them when we see them. As Fred Schauer and Virginia Wise once explained, “All distinctions potentially have borderline cases, . . . [a]nd although lawyers, particularly, are likely to be preoccupied with dusk when people ask them about the distinction between night and day,” the distinction is still worth making in the first instance.<sup>45</sup> Put differently, I acknowledge the possibility that there may be no clear analytic distinction between law and fact. But due to the practical importance of the line and its entrenched place in our legal system, it is necessary to discuss what leads most of us to label certain statements as facts and other statements as law.<sup>46</sup>

To borrow insight from scientists, factual claims are ones that can be falsified (at least theoretically).<sup>47</sup> “The hallmark of scientific statements is that they are vulnerable to refutation.”<sup>48</sup> As David Faigman helpfully explains, “One example of a falsifiable statement would be the view that criminal penalties operate to deter criminal conduct. As a logical matter,

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<sup>44</sup> See Allen & Pardo, *supra* note 36, at 1778 (attributing the “pedigree and usefulness” of the law–fact distinction to the fact that it “appears in the Constitution and has traditionally helped to allocate decision-making authority”).

<sup>45</sup> Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 498 (2000).

<sup>46</sup> See Pilchen, *supra* note 36 (noting that the distinction between law and fact is “slippery,” but observing that the line seems simple “[u]nder a commonsense analysis”).

<sup>47</sup> At the risk of oversimplifying the very complicated philosophy of science, it is a well-established, even if not universally accepted, idea in this field that “[f]alsifiability is a criterion for demarcating science . . . . A statement is falsifiable, and hence scientific, only if it is incompatible with some basic statement, i.e., a statement reporting the occurrence of an observable event at a specified place and time.” Susan Haack, *Federal Philosophy of Science: A Deconstruction—And a Reconstruction*, 5 N.Y.U. J.L. & LIBERTY 394, 401 (2010) (footnote omitted); see also *id.* at 401 nn.25-27 (describing the philosophy of the late Karl Popper who spent his career attempting to distinguish scientific statements from nonscientific ones using falsifiability).

Even Karl Popper conceded that neither falsifiability “nor any other criterion [c]an distinguish science from pseudo-science on the basis of formal logic alone.” Adina Schwartz, *A “Dogma of Empiricism” Revisited: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the Need to Resurrect the Philosophical Insight of Frye v. United States*, 10 HARV. J.L. & TECH. 149, 176 (1997). For information on Popper, see *Karl Popper*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Stephen Thornton ed., 2009). But although it may not be perfect, I am not the first legal scholar to have borrowed falsifiability as a criterion to distinguish fact from law. See 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, 1017 (1989); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 150 (“I rely on the basic scientific definition of facts as (at least in theory) falsifiable.”).

<sup>48</sup> Faigman, *supra* note 47, at 1017.

this statement is potentially falsifiable by a variety of observations inconsistent with the stated relationship.”<sup>49</sup> By contrast, the normative belief in the retributive value of punishment is not one that can be proven true or false.<sup>50</sup> It is not, in other words, a claim of fact.

To be sure, a legal ruling can also be refuted. It can be an awkward understanding of words or an unfaithful application of precedent. But a factual claim is potentially wrong in a different way. A factual claim can be tested “with a degree of detached certainty.”<sup>51</sup> It is theoretically accurate or inaccurate. When a Supreme Court Justice states that a child’s brain development can be altered by violent video games, that claim is subsequently critiqued by neuroscientists as either true or false—either supported by the evidence or not.<sup>52</sup> Scientists would not critique the claim as illogical, unprecedented, or bad policy—those arguments are instead for lawyers to mount at legal conclusions.

Relatedly, factual statements call out for evidence.<sup>53</sup> In a casual debate with a friend, for example, a factual assertion is often followed by “look it up” (or, more likely, “Google it”), whereas a normative assertion or a proffered legal interpretation is not. As Amy Kapczynski stated when describing a factual inquiry, “Finding the facts involves investigation, and the facts can be more or less certain, depending on the quality of the evidence and the quality of the sleuthing.”<sup>54</sup> Legal inquiries, by contrast, are resolved by tools of the legal trade, such as analogies, logical reasoning, common sense, and, yes, even normative judgments.<sup>55</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1016 (“The subjective belief (or disbelief) in the retributive value of capital punishment does not implicate a fact question that is susceptible to test.”).

<sup>51</sup> Pilchen, *supra* note 36, at 378.

<sup>52</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2768 (2011) (Breyer, J., dissenting) (noting that “[e]xperimental studies in laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent video games”). For a neuroscientist’s critique of Justice Breyer’s claims, see *Violent Brains in the Supreme Court*, NEUROSKEPTIC (July 15, 2011), <http://neuroskeptic.blogspot.com/2011/07/violent-brains-in-supreme-court.html>.

<sup>53</sup> See Faigman, *supra* note 47, at 1020 (“The testing of theories forms the battlefield of the scientific enterprise, and it is in the trenches that science maintains its principal advantages over common sense . . . . [S]cience subjects theories and hypotheses to systematic and constant tests, in order to uncover the outer limits of their strengths or explanatory powers.” (footnote omitted)).

<sup>54</sup> Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1066-67 (2005).

<sup>55</sup> See Faigman, *supra* note 47, at 1007 (discussing how “[s]ome disciplines, those traditionally classified as the humanities (e.g., philosophy, history, and literature), employ methods commonly relied upon by legal analysts, such as logical reasoning, historical analysis, literary interpretation, and common sense” (footnotes omitted)).

To complicate matters, the facts relevant to this Article are a special brand of fact that have come to be known as “legislative facts.”<sup>56</sup> A legislative fact, as I have defined elsewhere and as others have discussed at length, is a generalized fact about the world, as opposed to a “whodunit” fact relating to the parties before a court in any one case.<sup>57</sup> Compared to a so-called “adjudicative fact” that is case specific, a legislative fact “transcend[s] the particular dispute” and provides descriptive information about the world that judges use as foundational building blocks to form and apply legal rules.<sup>58</sup> Judicial opinions are full of these types of generalized facts such as: partial birth abortions are never medically necessary,<sup>59</sup> fleeing from the police in a car leads to fatalities,<sup>60</sup> and violent video games affect the neurological development of a child’s brain.<sup>61</sup>

Generalized statements of fact like these are not subject to the traditional procedural rules that govern adjudicative facts.<sup>62</sup> Legislative facts come to judges’ attention by way of a procedural hodgepodge: sometimes on the record and sometimes not, sometimes briefed by the parties and sometimes not. In fact, legislative facts are specifically exempted from the Federal Rule

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<sup>56</sup> Monaghan, *supra* note 39, at 230 n.16. I admit that the definition of a legislative fact is slippery. However, “[l]ike other legal distinctions, the difference between adjudicative and legislative facts is one of degree, and for that reason the existence of borderline cases does not mean that the distinction is empty.” *Id.*

<sup>57</sup> See Larsen, *supra* note 7, at 1255-56. “Legislative fact” and “adjudicative fact” are phrases coined by Kenneth Davis. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 HARV. L. REV. 364, 402 (1942). Others have subsequently refined the concept and created new labels, but it is the original Davis articulation upon which I rely. See FAIGMAN, *supra* note 11, at 146 (proposing a “taxonomy” of “constitutional facts”); Sherry, *supra* note 47 (discussing a form of legislative facts she calls “foundational facts,” which “are the background facts that are not explicitly at issue in any particular case,” but are instead the factual assumptions on which legal doctrine is based).

<sup>58</sup> David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991); see also Brenda C. See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 GONZ. L. REV. 157, 191 (2004-2005) (asserting that legislative facts are relevant “where 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”).

<sup>59</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 141 (2007).

<sup>60</sup> See *Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011).

<sup>61</sup> See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2768-69 (Breyer, J., dissenting).

<sup>62</sup> See Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 14 (1988) (explaining 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.” See FAIGMAN, *supra* note 11, at xii (“[C]onstitutional facts come to the Court’s attention haphazardly.”).

of Evidence on Judicial Notice—the rule most on point—and the advisory notes actually encourage their “unfettered use.”<sup>63</sup>

This sort of fact can be dispositive to the outcome of a case, but it need not be. As discussed further below, sometimes a judge uses a legislative fact rhetorically to tell a story setting up the pronouncement of a legal rule or to bolster the persuasive power of an argument. I count, for example, the following Supreme Court statements as factual claims: police training on constitutional rights is common across the country,<sup>64</sup> schools in the founding generation required strict obedience,<sup>65</sup> forensic evidence can be and is easily manipulated,<sup>66</sup> and immigration officials routinely try to facilitate the return of noncitizens who win their appeals.<sup>67</sup>

By contrast, there are certain statements that the Court routinely makes that I do *not* count as factual, even if they arguably deserve that label. For example, fifty-state surveys of how the law varies across the country on any one issue could be called factual statements, but I do not categorize them as such because they are principally used as descriptions of the law. Additionally, questions such as “what have the courts said in the past that they would do about situations such as this” might also be called factual, but I do not label them as such (nor have other scholars) because “they concern the past and prospective conduct of legal officials in determining legal norms”—a quality absent from other factual propositions.<sup>68</sup>

For purposes of this Article, I do not consider any account about the state of the law to be a factual claim. My working definition of a fact that could spawn a factual precedent is any claim that can be theoretically

<sup>63</sup> See FED. R. EVID. 201(c)–(e); see also FED. R. EVID. 201 advisory committee’s note.

<sup>64</sup> See *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

<sup>65</sup> See *Morse v. Frederick*, 551 U.S. 393, 412 n.2 (2006) (Thomas, J., concurring) (“The English model fostered absolute institutional control of students by faculty both inside and outside the classroom. At all the early American schools, students lived and worked under a vast array of rules and restrictions.”).

<sup>66</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009).

<sup>67</sup> See *Nken v. Holder*, 556 U.S. 418, 435 (2009) (“Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return . . .”). One could argue that the factual claim in *Nken* is only a borderline factual claim because it is just a description of how legal officials interpret the law they implement. While acknowledging the ambiguity, the factual part of *Nken* to which I refer is the claim underscored by the Solicitor General brief: that it is *common* for immigration officials to facilitate the return of noncitizens who win their appeals. This claim is refutable (as illustrated nicely by what happened after this case) by immigration statistics about what actually takes place on the ground. For more information on the *Nken* story and the fallout that ensued, see generally Morawetz, *supra* note 20.

<sup>68</sup> Friedman, *supra* note 40, at 917.

falsified and is followed by citation to some sort of evidence (not a case and not a statute).<sup>69</sup>

Is the distinction between law and fact airtight? Of course not. But it need not be. The point for now is that the distinction has a dominant role in our legal system and there are enough shared characteristics of what most people call “facts” to justify unique consideration of their precedential value.

### B. *The Emergence of Factual Precedents*

Based on this working definition of a fact, what then makes a factual precedent? In general, precedents are legal principles established in a prior case that are binding or persuasive authority in a subsequent case.<sup>70</sup> In this country, “the authority of precedent is generally thought to be one of the most important institutional characteristics of judicial decision making.”<sup>71</sup>

A factual precedent, as I am using the phrase, refers to the citation in a lower court opinion of a higher court’s generalized factual claim. Granted, it is a defining feature of our common law system for judges to draw analogies from the facts of one case to the facts of another.<sup>72</sup> That is not the phenomenon to which I refer.

Instead, a factual precedent is a lower court’s reliance on the Supreme Court’s assertion of legislative fact—a general factual claim—as authority to prove that the observation is indeed true. For example, rather than just using the work of an historian or a psychologist to establish a factual dimension of a case (that the founding generation all owned guns for self-defense<sup>73</sup> or that severely mentally impaired people can still control impulses<sup>74</sup>),

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<sup>69</sup> It is certainly quite common for Supreme Court Justices to make statements of generalized fact without any accompanying supporting citations. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“Maternity, or additional offspring, may force upon the woman a distressful life and future . . . . Mental and physical health may be taxed by child care.”). The wisdom of this judicial technique is worth discussing, but it is beyond the scope of this particular project. Because I am concerned with the use of authorities in judicial decisions, and because my sense is that the trend in the digital age is to pepper opinions with empirical data, I limit my discussion of factual precedents to those factual claims that are accompanied by a supporting authority.

<sup>70</sup> *See, e.g.*, BLACK’S LAW DICTIONARY 1214-15 (8th ed. 2004)

<sup>71</sup> Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1150 (2002).

<sup>72</sup> *See, e.g.*, *Brown v. Peterson*, No. 03-0205, 2006 WL 349805, at \*9 (N.D. Tex. Feb. 3, 2006) (comparing the symbol of a noose to the threatening history behind a burning cross as recounted in oral arguments in *Virginia v. Black*, 538 U.S. 343 (2003)); *Kuketz v. MDC Fitness, Corp.*, No. 98-1004A, 1998 WL 119863, at \*2 (Mass. Sup. Ct. Aug. 10, 1998) (comparing an accommodation required of the Professional Golfers’ Association in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), to an accommodation in handball rules sought by a disabled handball player).

<sup>73</sup> *See People v. Nivar*, 915 N.Y.S.2d 801, 810 (Sup. Ct. 2011).

a lower court quotes relevant language from a Supreme Court decision to make the point. A lower court relies on, in other words, the Supreme Court (or just a single member of the Court) as an authority to settle the truth of the fact in question.

Factual precedents probably owe their existence to any number of causes. But two especially significant changes to the way lawyers and judges process information deserve special mention.

### 1. Dramatic Changes to Legal Research

First, there has been nothing short of an absolute revolution in legal research methods.<sup>75</sup> Before LexisNexis and Westlaw started to offer full-text searching (becoming popularly accessible in 1994), all legal research happened with books.<sup>76</sup> In the old days, print-based legal research looked something like the following:

Step one: go to the law library. Step two: find a case digest. Step three: identify topics and legal principles relevant to your search using a key number system. Step four: read the case summaries that correspond to the key numbers. Step five: physically locate the case reporter and pull the relevant cases to read.<sup>77</sup>

Everyone knows that legal research looks nothing like this anymore. Case digests are a thing of the past. Now, legal research amounts to some creative word searches and a click of the mouse.<sup>78</sup> Electronic researchers do not encounter cases through “the lens of key system information.”<sup>79</sup> They are able to access a far greater number of cases on a wider array of topics. And—most importantly for the present discussion—the emphasis is now on “words over concepts.”<sup>80</sup> As one scholar put it, most lawyers now “spend day

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<sup>74</sup> See *People v. Cheek*, No. Ho31164, 2008 WL 5263647, at \*23 n.11 (Cal. Ct. App. Dec. 18, 2008) (citing *Kansas v. Crane*, 534 U.S. 407, 412 (2002)).

<sup>75</sup> See Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CALIF. L. REV. 615, 618-22 (describing the massive overhaul of legal information from paper to online); Kuh, *supra* note 9, at 225 (“In this new age of electronically manufactured law, the raw materials of law—case texts—increasingly reside in digital form and are studied by legal researchers using digital means.”).

<sup>76</sup> See Paul Hellyer, *Assessing the Influence of Computer-Assisted Legal Research: A Study of California Supreme Court Opinions*, 97 LAW LIBR. J. 285, 286-88 (2005) (recounting the history of computer-assisted legal research).

<sup>77</sup> For a detailed description of print-based research, see Kuh, *supra* note 9, at 241-42.

<sup>78</sup> *Id.* at 242.

<sup>79</sup> *Id.* at 243.

<sup>80</sup> See Stinson, *supra* note 8, at 253 (“[E]lectronic word searching emphasizes, by its very nature, particular words over concepts.” (footnote omitted)).



after day in ‘Google-search’ mode—looking for answers to their questions by typing a word or short phrase into a search box.”<sup>81</sup> They “pay less attention to the reasoning, theory and policy that drive a decision,” and, instead, they “prioritize speed” and the ability to find “a kernel of phraseology that may support their often incorrect preconceived notions.”<sup>82</sup>

Several scholars, particularly law librarians, have observed how this change is negatively impacting legal reasoning, although they lament that their warnings are falling on “deaf ears.”<sup>83</sup> These scholars argue that fewer people read full cases anymore (or even case summaries),<sup>84</sup> that it is easier for researchers to find just what they are looking for and nothing more (exacerbating confirmation bias),<sup>85</sup> and that the distinction between holdings and dicta is eroding.<sup>86</sup>

A common thread in these warnings is that keyword searching perpetuates a misunderstanding of context. Lawyers now look “for isolated word combinations,” causing a fear that the words they find may seem relevant to their argument but do not tell the whole story of the case in which they were uttered.<sup>87</sup> It is very tempting just “to locate language in an opinion that, on its face, supports a particular position, even when the case itself does not stand for that proposition.”<sup>88</sup> This tendency led Molly Lien to

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<sup>81</sup> *Id.* at 250.

<sup>82</sup> Molly W. Lien, *Technocentrism and the Soul of the Common Law Lawyer*, 48 AM. U. L. REV. 85, 89 (1998).

<sup>83</sup> See Kuh, *supra* note 9, at 226 (“Scholars, anthropologists and law librarians caution that the shift from print to electronic research will significantly impact the law in myriad ways. To date, however, these predictions and warnings have fallen on deaf ears.”); see also Robert Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1706-07 (2000) (describing the potential future of legal research as one where “the researcher accords cognitive authority to the search system” and relies on “the algorithm that drives the system” instead of her own analytical skill); Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 LAW. LIBR. J. 338, 342, 345 (1996) (explaining the change in our legal research habits, from one that began with “the specific point of law” to one that begins with “distilling this information into a computer search strategy” based on “words or short phrases”).

<sup>84</sup> See Kuh, *supra* note 9, at 246; Lien, *supra* note 82, at 130-32.

<sup>85</sup> See Thomas L. Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. CENT. L.J. 139, 141 (2003) (noting the temptation legal researchers face when they see “a sentence that says what [they] want it to say” to “conclude that [their] research is done”); Kuh, *supra* note 9, at 254-55.

<sup>86</sup> Stinson, *supra* note 8, at 260 (“Regardless of how one defines holding (and therefore dicta), it is clear that judges and lawyers routinely confuse the two.”).

<sup>87</sup> Lien, *supra* note 82, at 130-31; see also Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 297 (2001) (suggesting that the computer based legal researcher—as opposed to the print researcher—starts with facts and finds cases with facts similar to his own without appreciating different contexts).

<sup>88</sup> Stinson, *supra* note 8, at 222.

argue that just as television created “‘sound bite’ journalism,” so does computerized legal research create “‘law-byte’ reasoning.”<sup>89</sup>

It is not hard to see how this new research method can lead to factual precedents. For one thing, the sheer number of cases to research has vastly expanded. Who cares, for example, about the difference between unpublished and published opinions when both are available on Westlaw and are easily retrieved through the same word search?<sup>90</sup> With more cases to research, it is now easier to find cases with similar facts (even seemingly obscure ones): “[R]esearch in print sources inclines one toward legal principles while keyword searching is more apt to generate groups of cases based on similarities of facts.”<sup>91</sup> Instead of the old way of starting with the legal principle and identifying cases on topic that have similar facts, search strategies now run backwards: we look for factually similar language first and devise the rules after.<sup>92</sup>

Putting aside whether this is a good shift in emphasis or not, the modern way we engage in legal research makes a prior court’s factual statements easier to find and easier to use in legal arguments later. Anything any judge or justice has ever said about any topic (neuroscience, climate change, psychological harm from rape) is only a click of the mouse away.<sup>93</sup>

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<sup>89</sup> Lien, *supra* note 82, at 88.

<sup>90</sup> See F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 579 (2002) (explaining how even unpublished opinions are now available online and, thus, able to be used as precedents).

<sup>91</sup> *Id.* at 583; see also Margolis, *supra* note 6, at 935 (“[E]lectronic search technology pushes the researcher to focus on facts rather than legal concepts.”). Some say the extension of potential precedents with relevant facts leads to better legal arguments, but the expansion is not recognized as a universal good. In Great Britain, for example, there is a concerted effort to stop publication of cases with redundant legal principles (even if the facts are the same). These British efforts, however, have been only moderately successful in the Internet age. In recent years, the number of unpublished cases becoming digitally available in Great Britain has dramatically increased. See Hanson, *supra* note 90, at 565-66.

<sup>92</sup> Margolis, *supra* note 6, at 935 (“Without an understanding of how the source fits into the broad context of legal analysis, the researcher is likely to focus more on the factual content of the information.”).

<sup>93</sup> I acknowledge that the digital revolution also makes it easier for lower courts to access factual sources without resorting to the ones cited in the U.S. Reports. The fact that these courts are still citing the Justices’ endorsement of factual claims (as opposed to just the underlying sources themselves), however, suggests that something more than information access is motivating their search for authorities. For more discussion on this point, see *infra* Section III.B.

## 2. “Fatter” Supreme Court Opinions

Enter the second relevant change that leads to factual precedents: the look and feel of judicial opinions, particularly those of the Supreme Court, are changing. Opinions are longer.<sup>94</sup> They include more citations than ever before.<sup>95</sup> And—of particular relevance for the present discussion—there is a new emphasis on factual claims reinforced by empirical data and secondary authorities.<sup>96</sup> As a result, the information pool of available Supreme Court factual observations has greatly expanded.

Perhaps because we can all access infinite information on our phones, there is a new hunger for empirical support in judicial decisions and legal arguments. There is also a wide-open field of data to support that demand.<sup>97</sup> Fred Schauer and Virginia Wise observed over ten years ago that the advent of computers has led to an increasing number of citations of “nonlegal” sources in Supreme Court opinions.<sup>98</sup> There is no evidence that the trend is losing steam.<sup>99</sup>

Consequently, the factual dimensions of arguments—particularly legislative facts—are taking center stage. This “widespread empirical turn”<sup>100</sup> is particularly visible in Supreme Court decisions, but this trend is not limited there.<sup>101</sup> In fact one commentator has observed that there is a new tendency

<sup>94</sup> See Black & Spriggs, *supra* note 3, at 645, 663 fig.7 (documenting the Court’s “general increase in opinion length”).

<sup>95</sup> See Cross et al., *supra* note 5, at 532 fig.1 (charting an increase in the number of case citations in U.S. Supreme Court opinions over time).

<sup>96</sup> I am not alone in noticing this trend. See, e.g., Faigman, *supra* note 58, at 550 (“Increasingly, commentators and litigants are checking the modern Court’s fact-finding on the basis of empirical research that only sometimes supports, and often contradicts, the Court’s ‘best guesses’ about the world.”); Meares, *supra* note 6, at 851 (“Recent studies show that, over the past decade, judges and lawyers have begun to cite to empirical studies in their work with increasing regularity.”); Zick, *supra* note 6, at 129 (describing and critiquing the increased use of empirical methods and data to decide constitutional cases).

<sup>97</sup> See Schauer & Wise, *supra* note 45, at 497 (stating that “[s]ince 1990, the Supreme Court’s citation of nonlegal sources has increased dramatically”); see also Berring, *supra* note 83, at 1690 (“Today’s Court can turn to a world of sources from all corners of scholarship . . . .”); *id.* at 1689 (“Hundreds of cases are cited, but so are authorities from all corners of the information galaxy.”).

<sup>98</sup> See Berring, *supra* note 83, at 1683-89 (noting that a review of the 1899 U.S. Reports shows the Court relying on statutes, cases, and the record below but little else, whereas a review of the 1999 U.S. Reports shows “an infinite universe” of authorities); Wes Daniels, “*Far Beyond the Law Reports*”: *Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1, 4 (1983) (noting a significant increase in the Supreme Court’s use of secondary sources over the twentieth century).

<sup>99</sup> See Margolis, *supra* note 6, at 937 (noting the rise in internet citations and citations to nonlegal authorities in judicial opinions).

<sup>100</sup> Zick, *supra* note 6.

<sup>101</sup> See, e.g., Hanson, *supra* note 90, at 587-88 (showing samples from the New Jersey Supreme Court with similar patterns); Hellyer, *supra* note 76, at 293-94 tbls.1-2 (noting that the highest

of lower courts to “mimic” the style of the Supreme Court<sup>102</sup>—including the way the Justices tell long narratives that are peppered with facts. As Second Circuit Judge Leval has characterized: “[W]ith the central role courts have increasingly played in resolving important social questions, we have come to see ourselves as something considerably grander—as lawgivers, teachers, founts of wisdom, even keepers of the national conscience. This change of image has helped transform dicta from trivia into a force.”<sup>103</sup>

There is no reason to think factual precedents are limited to Supreme Court factual claims (as opposed to lower courts quoting language coming from courts in other jurisdictions). This Article, however, limits its discussion of factual precedents to citations in the U.S. Reports because of the attention those opinions draw across jurisdictions and because the Supreme Court—perhaps more than any other court—gives reasons for its decisions that are rich with factual assertions.

One more change to Supreme Court opinions merits consideration. The emphasis on empiricism and the ease with which information can be accessed means Justices are not just making bald factual claims about the world; instead, their claims are commonly backed up with supporting evidence from numerous sources, such as law review articles, medical journals, newspapers, and websites, to name a few.<sup>104</sup> Some speculate this is due to the increased role of law clerks, who—as Judge Posner famously put it—“feel naked” without an authority to quote and cite.<sup>105</sup> But whatever the reason, the Court’s factual statements about the world are now commonly accompanied by nonlegal authorities.<sup>106</sup>

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court in California is handing down longer opinions, citing more cases, and relying on more secondary authorities than ever before, but concluding that there is not enough evidence to attribute the changes to computer-based legal research alone).

<sup>102</sup> Stinson, *supra* note 8, at 221-22.

<sup>103</sup> Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006).

<sup>104</sup> For a collection of authorities the Court uses to support its factual claims, see generally my prior work on the subject. Larsen, *supra* note 7.

<sup>105</sup> Judge Posner explained, “Law clerks, however, feel naked unless they are quoting and citing cases and other authorities.” RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 148 (1996).

<sup>106</sup> In *Roe v. Wade*, for example, the Court asserted without citation that “[m]aternity, or additional offspring, may force upon the woman a distressful life and future . . . . Mental and physical health may be taxed by child care.” 410 U.S. 113, 153 (1973). The Court just left it at that. By contrast, more recently, in *Gonzales v. Carhart*, the Court made the same observation and followed it with fourteen citations to fact-based authorities, from medical journals to *New York Times Magazine* articles to briefing papers from the American Psychiatric Association. 550 U.S. 124, 183 n.7 (2007). See also Schauer & Wise, *supra* note 45, at 497, for documentation on the rise of nonlegal authorities in Supreme Court opinions.

Why is that change relevant? It is quite possible that the addition of a factual authority makes a Justice's statement seem more precedent worthy and, therefore, more likely to be true or safer for a lower court to cite. To evoke a familiar analogy, when a law professor makes a claim about physics in an article, a dutiful law review editor will ask her for a footnote. That editor takes comfort if the physics footnote comes from another law review article, even if that second law professor has no relevant expertise with physics.

Likewise, a statistical study on neuroscience or climate change, if approved by the U.S. Supreme Court, can seem safely vetted to a lower court that knows nothing about the subject. Authority from a familiar source can be persuasive even if it is misplaced.<sup>107</sup> And the question for the day is whether the confidence lower courts place in Supreme Court factfinding is appropriate.

## II. EXAMPLES OF FACTUAL PRECEDENTS

So exactly which Supreme Court factual statements are repeated by lower courts and for what purpose are they being used? The following Part attempts to answer that question with a list of illustrative examples.

Bear in mind there are two variables at play in an in-depth exploration of factual precedents: (1) the way the Supreme Court used the fact originally, and (2) the way a lower court reuses it later. As I have detailed elsewhere, Supreme Court Justices use generalized facts in many different ways: to set the stage, to highlight the importance of an issue, to refute or underscore an argument with empirical ammunition, and sometimes to answer a dispositive question in the case.<sup>108</sup> Lower courts follow suit; they use facts with the same variation, and they do so by citing language from Supreme Court opinions as authority—often without regard to how the Court employed the fact originally.

To narrow the focus of the present discussion, let us hold one variable constant or rather put one type of factual precedent to the side. I exclude from my discussion examples of lower courts citing facts to tell a narrative or to anchor a discussion with rhetorical flourish. For example, several lower courts cite the Supreme Court for the fact that the Food and Drug Administration

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<sup>107</sup> See Schauer, *supra* note 1, 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.”).

<sup>108</sup> I have previously provided illustrations of these different uses of Supreme Court facts. See generally Larsen, *supra* note 7.

(FDA) is an understaffed agency with limited resources.<sup>109</sup> They do this for rhetorical purposes: to show the need for drug manufacturers to monitor the safety of their own products. But the fact that the FDA is understaffed likely is not the lynchpin in these decisions, or at least the opinions do not read as if this fact were outcome-determinative. It seems less controversial that lower courts would use language from Supreme Court opinions in this way.

I therefore do not discuss a lower court's gratuitous use of factual precedents. Instead, the examples below are all factual precedents somehow used to address dispositive questions that the lower court must answer before resolving the case.<sup>110</sup> Put bluntly, these examples are not window-dressing factual precedents; they are citations to the Supreme Court for facts that matter.<sup>111</sup> It is perhaps more surprising that lower courts use Supreme Court factual assertions in this way, but it is not at all rare.

There are surely many types of factual precedent—many ways a lower court can reuse factual language from a higher court. Examples are plentiful, but the ones I discuss below are organized into five categories: “imported factual precedents” (facts imported from one context to another); “strategic factual precedents” (facts to supplement the record for a calculated purpose); “aftermath factual precedents” (facts from a landmark opinion used by a lower court to answer residual questions); “historical factual precedents” (facts about how the world existed in a prior time); and “premise facts” (facts that form the premise of a legal rule).

These categories are not meant to be exhaustive nor are they mutually exclusive. I offer them purely for the ease of explaining the typical ways that lower courts are using Supreme Court factual assertions as authorities to decide outcome-determinative questions in the cases before them.

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<sup>109</sup> See, e.g., *Lefavre v. KV Pharm. Co.*, 636 F.3d 935, 940 (8th Cir. 2011); *Demahy v. Actavis, Inc.*, 593 F.3d 428, 448-49 (5th Cir. 2010).

<sup>110</sup> Of course, a reader of judicial opinions can never know for sure what influence the factual precedent had on the lower court's decisionmaking process. In all of the following cases, however, the court cites a Supreme Court opinion for a factual proposition that it must answer to resolve the dispute. For reasons discussed further below, that is enough to cause alarm.

<sup>111</sup> As we shall see, on occasion, a lower court will reuse a Supreme Court fact to answer a dispositive question that was originally employed by a Justice only rhetorically as window-dressing.

A. “Imported Factual Precedents”: Facts Imported from  
One Context to Another

Sometimes a lower court takes a factual claim made by a Supreme Court Justice in one context and uses it to make a different point in a separate context. These are what I call “imported factual precedents.”

The Supreme Court of Wisconsin provides an excellent example in a case called *State v. Ninham*.<sup>112</sup> Omer Ninham was convicted of murder and sentenced to life in prison without parole. He was fourteen at the time of the murder, and Ninham argued that fourteen is too young to justify a life sentence without parole (a position eventually vindicated by the U.S. Supreme Court in June 2012<sup>113</sup>). Ninham brought to the court’s attention psychological and neurological studies demonstrating that fourteen-year-olds generally have immature brain development and are less capable of responsible decisionmaking.<sup>114</sup>

The Wisconsin court rejected this factual claim because, “in other contexts, psychologists have promoted scientific evidence that arrives at the precise opposite conclusions about 14-year-olds.”<sup>115</sup> In support, the court cited Justice Scalia’s dissent in *Roper v. Simmons*.<sup>116</sup> Justice Scalia, in turn, cited an amicus brief filed by the American Psychological Association (APA) in a completely separate abortion case for the conclusion that “numerous psychological treatises and studies” demonstrated that “14 and 15-year-old juveniles are mature enough to decide whether to obtain an abortion without parental involvement.”<sup>117</sup>

Justice Scalia’s dissent, which relied on an amicus brief from an abortion case, is the only piece of counter evidence the Wisconsin court used to reject Ninham’s claim. This factual precedent does not come from a majority of the Supreme Court, was obviously used by Justice Scalia as a barb about the APA’s alleged inconsistency, and is based on studies that are at least twenty years old and were selected to make an entirely different point about juvenile maturity. It is hard to believe that the Wisconsin court read the APA studies in the abortion amicus brief, nor is it likely that the APA had any indication that the studies on brain development it highlighted in a

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<sup>112</sup> 797 N.W.2d 451 (Wis. 2011).

<sup>113</sup> See *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (holding that “mandatory life without parole” for those under eighteen at the time of their crimes violates the Eighth Amendment).

<sup>114</sup> *Ninham*, 797 N.W.2d at 478-79.

<sup>115</sup> *Id.* at 473.

<sup>116</sup> 543 U.S. 551, 568 (2005) (prohibiting the imposition of the death penalty for juvenile offenders).

<sup>117</sup> *Ninham*, 797 N.W.2d at 473 (citing *Roper*, 543 U.S. at 617-18) (Scalia, J., dissenting).

Supreme Court abortion brief in 1990 would be used twenty-one years later by a lower court to justify a juvenile life sentence without parole.

Wisconsin jurists are not alone in importing facts from Supreme Court opinions into new contexts. In a 2011 multiparty insurance dispute, a district court in West Virginia was asked to interpret a “bodily injury exclusion” to an insurance policy.<sup>118</sup> The court had to decide whether two women who were sexually molested by an employee had suffered “bodily injuries” under West Virginia law. The court held that “while the trauma of sexual assault and sexual abuse cannot be understated, the injuries resulting from a sexual assault are often largely emotional.”<sup>119</sup> For support, it cited a law review article and the majority opinion from the Supreme Court in *Kennedy v. Louisiana*.<sup>120</sup> The district court quoted language from *Kennedy* that rape has a permanent emotional and *sometimes* physical impact on the victim.<sup>121</sup> The district court italicized the word “sometimes” and used the quote to emphasize that rape is more often emotionally damaging as opposed to physically damaging.<sup>122</sup>

In this example, the lower court not only imported a fact to a new context, but it also gave it a new emphasis. In *Kennedy*, the Supreme Court invalidated the death penalty as a punishment for someone who rapes a child.<sup>123</sup> The language picked up by the district court came from Justice Kennedy as he expressed sympathy for the victim in the case.<sup>124</sup> The studies in question on the emotional trauma of rape came from the book *The Search for Healing*. It is hard to believe that either Justice Kennedy or the authors of those studies expected that their words would later be used to downplay the likelihood of rape’s physical damage.

Once one starts to look for them, examples of imported factual precedents are everywhere. They include: data on brain development originally cited in a Supreme Court case discussing juvenile offenders and subsequently

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<sup>118</sup> See *Charleston Area Med. Ctr. v. Nat’l Union Fire Ins.*, No. 09-0573, 2011 WL 2161534, at \*1, \*7 (S.D. W. Va. June 1, 2011) (finding that an insurer failed to demonstrate that a policyholder’s claim fell under the bodily injury exclusion).

<sup>119</sup> *Id.* at \*8.

<sup>120</sup> 554 U.S. 407 (2008).

<sup>121</sup> *Charleston Area Med. Ctr.*, 2011 WL 2161534 at \*8 n.10.

<sup>122</sup> The district court used this assertion from the Supreme Court to supplement its review of the record and in order to conclude that no bodily injury took place in the case before it. *Id.*

<sup>123</sup> 554 U.S. at 446-47.

<sup>124</sup> *Id.* at 435 (“Rape has a permanent psychological, emotional, and sometimes physical impact on the child.” (citing CHRISTOPHER BAGLEY & KATHLEEN KING, *CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING* 2-24, 111-12 (1990))).



used to justify striking down an overbroad speech restriction by a university;<sup>125</sup> statistics on mild cases of carpal tunnel syndrome originally collected by Justice O'Connor in an American with Disabilities Act case and subsequently used to justify a ruling for the defense under a different statute;<sup>126</sup> and information about GPS tracking technology from Justice Alito's concurrence in *United States v. Jones*, which was later used by a trial court to suppress evidence gained from a different technology that enables police to see the basic geographic location where cell phone calls are made.<sup>127</sup>

As explained above, new digital research modes make these factual claims from Supreme Court decisions easy to find. It does not seem to matter if the studies or statistics were assembled in the same context, used with the same emphasis, or have subsequently been repudiated by newer findings.

B. “Strategic Factual Precedents”: Facts to Supplement the Record for a Calculated Purpose

The next category of factual precedents should not be surprising given human nature. As anyone who has ever written a high school term paper can confirm, it is very tempting for an author to use facts the way “drunks use lampposts . . . more for support and not illumination.”<sup>128</sup> A judge, in other words, can use factual precedents strategically—not to inform herself about the world, but to bolster a preexisting view with something to cite. I call this a “strategic factual precedent.”<sup>129</sup>

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<sup>125</sup> *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 253 (3d Cir. 2010).

<sup>126</sup> *Artega v. Brink's, Inc.*, 77 Cal. Rptr. 3d 654, 671 (2008) (citing *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), for the proposition that “[s]tudies have further shown that, even without surgical treatment, one quarter of carpal tunnel cases resolve in one month,” and using that finding to hold that a mere diagnosis of carpal tunnel syndrome does not mean that the plaintiff was disabled during employment and entitled to relief under the Fair Employment and Housing Act).

<sup>127</sup> See *Commonwealth v. Pitt*, 29 Mass. L. Rptr. 445, 447 (Super. Ct. 2012) (“[S]ociety’s expectation has been that law enforcement agents and others would not . . . secretly monitor and catalogue every single movement of an individual’s car for a very long period.” (citing Justice Alito’s concurrence in *United States v. Jones*, 132 S. Ct. 945, 964 (2012))); see also *Lomack v. City of Newark*, No. 04-6085, 2005 WL 2077479, at \*5 (D.N.J. Aug. 25, 2005) (using social science data originally relied upon in *Grutter v. Bollinger*, 539 U.S. 306 (2003), for the importance of diversity in the law school classroom to justify an affirmative action program designed for firefighters), *rev’d*, 463 F.3d 303 (3d Cir. 2006).

<sup>128</sup> See Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8 (quoting Second Circuit Judge Robert D. Sack).

<sup>129</sup> Many of the other categories I have identified overlap with this one. An imported precedent, for example, can also be a strategic one.

A great example of a strategic factual precedent is an example and a counterexample all in one. In *Amigos Bravos v. U.S. Bureau of Land Management*, environmental groups sued to challenge a federal agency's approval of oil and gas lease sales.<sup>130</sup> The question before the district court was whether those groups had standing to proceed.<sup>131</sup> The plaintiffs argued that they were injured because the agency's decision led to an increased risk of environmental harm due to climate change.<sup>132</sup> They cited the "clear scientific consensus" of climate change documented by the Supreme Court in *Massachusetts v. EPA*.<sup>133</sup> This was not enough, however, for the district court: "At this stage of the litigation, plaintiffs must come forward with more than just bare assertions of perceived climate change."<sup>134</sup> Accordingly, the data gleaned from Justice Stevens's opinion in *Massachusetts v. EPA* was insufficient to create an injury in fact—no factual precedent.

Several pages later, however, the district court sang a different tune. When it arrived at the causation prong of its standing analysis—the question of whether climate change (if true) could be caused by the defendant's conduct—the court *then* cited statistics pulled from *Massachusetts v. EPA* on the relative paucity of the U.S. transportation sector's contribution to global warming.<sup>135</sup> In other words, the facts from *Massachusetts v. EPA* bound the lower court when that court wanted to be bound but did not pose an obstacle when the court wanted to ignore them.

A similar strategic use of a factual precedent is to declare an issue settled when it is not obviously so. In *Crawford v. Marion County Election Board*, the Supreme Court upheld an Indiana law that required voters to present photo identification.<sup>136</sup> The state justification behind the law was to prevent in-person voter fraud. Justice Stevens, writing for the majority, acknowledged that there was slim evidence of in-person voter fraud on the record in Indiana, but he reasoned that the theoretical possibility of such conduct justified the law.<sup>137</sup>

A year following *Crawford*, litigation emerged in New Jersey over similar "ballot security" initiatives.<sup>138</sup> The Republicans argued that the measures

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<sup>130</sup> 816 F. Supp. 2d 1118 (D.N.M. 2011).

<sup>131</sup> *Id.* at 1123.

<sup>132</sup> *Id.* at 1123-24.

<sup>133</sup> *Id.* at 1127 (citing *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007)).

<sup>134</sup> *Id.* at 1128.

<sup>135</sup> *Id.* at 1136.

<sup>136</sup> 553 U.S. 181, 204 (2008).

<sup>137</sup> *Id.*

<sup>138</sup> *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575 (2009).

were justified because of the real risk of in-person voter fraud, and the Democrats countered that cries of such fraud were exaggerated and that the security led to voter intimidation. Currently, there is a robust debate among election law scholars and empiricists about whether in-person voter fraud actually happens today.<sup>139</sup> Indeed, the New Jersey District Court received “mountains of documentary evidence” from both sides on precisely that factual question.<sup>140</sup>

The court resolved the controversy not by relying on the evidence it admitted, but by closely scrutinizing the separate opinions in *Crawford*. It cited Justice Souter’s dissent for the fact that in-person voter fraud is very rare (citing studies to that effect).<sup>141</sup> Next, it inspected the three footnotes from Justice Stevens in which he provided examples of voter fraud that were “documented by respected historians.”<sup>142</sup> After debunking Justice Stevens’s examples and counting the number of Justices who signed on to the dissent, the New Jersey District Court declared that

the rulings by Justices Stevens and Souter in *Crawford* refute the RNC’s argument that in-person voter fraud poses a danger to the integrity of modern elections . . . . Five Justices—a binding majority of the Court—joined in those Opinions. Accordingly, it is settled that in-person fraud is extremely rare, and any argument . . . to the contrary must be rejected.<sup>143</sup>

Thus, the New Jersey District Court declared that the Justices of the U.S. Supreme Court would be the final arbiters of this ongoing debate instead of examining the record before it about the existence of voter fraud in its state. It made this decision despite the fact that the Justices were clear

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<sup>139</sup> Compare JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 6 (2004) (“Election fraud whether it’s phony voter registrations, illegal absentee ballots, shady recounts or old-fashioned ballot-box stuffing can be found in every part of the United States.”), and Hans A. von Spakovsky, *Stolen Identities, Stolen Votes: A Case Study in Voter Impersonation*, LEGAL MEMORANDUM, Mar. 10, 2008, at 1, 1 (“Contrary to claims made by prominent newspapers and attorneys, in person voting fraud is a real problem.”), with Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 110 (2012) (“[A]ll of the available evidence demonstrates that the incidence of any fraud that identification rules could prevent is extraordinarily rare.”), and Richard L. Hasen, *Fraud Reform?*, SLATE MAG. (Feb. 22, 2006), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2006/02/fraud\\_reform.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2006/02/fraud_reform.html) (“Beyond a few isolated instances and anecdotes, there is precious little evidence of the kind of voter fraud a state voter ID card requirement would deter.”).

<sup>140</sup> *Democratic Nat’l Comm.*, 671 F. Supp. 2d at 578.

<sup>141</sup> *Id.* at 608.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 609-10 (footnote omitted).

in *Crawford* that their decision was based solely on the Indiana record before them.<sup>144</sup>

It is worth noting that although a lower court may be reticent to cite a dissenting opinion from the Supreme Court as legal precedent, the same reluctance does not hold true for facts. Factual precedents often involve language from concurring and dissenting Supreme Court opinions. Justice Thomas's dissent in *Grutter*, for example, reciting evidence on the benefit of historically black colleges to African American student success, has been relied on by a district court to uphold a race-conscious admissions policy of an all Native Hawaiian school.<sup>145</sup> Justice Breyer's concurrence "documenting" the increased rate of race-based stereotypes in jury selection was used by the Seventh Circuit to justify finding a *Batson* violation in a state's use of preemptory strikes.<sup>146</sup> And statistics from a Justice Ginsburg dissent that found that students who participated in extracurricular activities were less likely to do drugs were used by two different lower courts to strike down the drug-testing policies for school sports as underinclusive, simply because they did not target "student slackers."<sup>147</sup> One of those courts, in fact, used the statistics to rebut contrary evidence on the record given by the school therapist who ran the drug diversion program.<sup>148</sup>

At a bare minimum, the popularity of strategic factual precedents reveals the lack of uniformity in the lower courts about the proper authoritative force Supreme Court facts should carry. The current rule seems to be to use them when it is convenient and to avoid them when it is not.

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<sup>144</sup> This use of *Crawford* by the lower courts is particularly worrisome given a recent statement by Justice Stevens on the issue. After Judge Posner, the Seventh Circuit opinion writer in *Crawford*, recently announced that he made a mistake in the case, Justice Stevens told a reporter that he too harbored doubts about whether voter ID laws actually deter voter fraud: "My opinion should not be taken as authority that voter-ID laws are always OK. . . . The decision in the case is state-specific and record specific." See Jess Bravin, *Voter-ID Laws Worry Jurist*, WALL ST. J. (Oct. 17, 2013), <http://online.wsj.com/news/articles/SB10001424052702304384104579141701228734132>.

<sup>145</sup> See *Doe v. Kamehameha Schools/Bernice Pauahi Bishop*, 295 F. Supp. 2d 1141, 1169 (D. Haw. 2003) (citing *Grutter v. Bollinger*, 539 U.S. 306, 364-65 (2003) (Thomas, J., dissenting)).

<sup>146</sup> See *United States v. Stephens*, 421 F.3d 503, 515 (7th Cir. 2005) (citing *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring)).

<sup>147</sup> See *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 92 (Pa. 2003) (citing Bd. of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. *Earls*, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting)); see also *Brown v. Shasta Union High Sch. Dist.*, No. C061972, 2010 WL 3442147, at \*11 n.13 (Cal. Ct. App. 2010) (citing *Earls*, 536 U.S. at 853).

<sup>148</sup> *Brown*, 2010 WL 3442147, at \*11.

C. “Aftermath Factual Precedents”: Facts to Answer Residual Questions  
Following Landmark Legal Decisions

If strategic factual precedents are used the way “drunks use lamp-posts”—for support only—one is left to wonder if there are any “sober” examples of lower courts using Supreme Court facts. Of course, it is impossible to know for sure what influence any authority has on a judge, but there is one particular type of Supreme Court fact that lower courts seem to carefully scrutinize for “illumination” purposes.

When the Supreme Court issues a landmark decision, it often reserves follow-up questions for a later day. This inevitably spawns litigation on these residual questions, and, it turns out, lower courts look to what the Justices originally said about the relevant facts to predict how they might answer the new legal question. Lower courts will readily admit that the new question was not addressed by the Supreme Court; nonetheless, they claim that the Justices have “winked at the issue.”<sup>149</sup> I call this use of factual claims “aftermath factual precedents.”

Two prominent examples of aftermath factual precedents come to mind. The first group of cases follows the Supreme Court’s decision in *District of Columbia v. Heller*, which held that the Second Amendment protects an individual’s right to own a firearm for lawful purposes.<sup>150</sup> Following this landmark decision, lower courts were confronted with many new legal questions, such as: Is the right to possess a firearm fundamental so that it should be incorporated against the states?<sup>151</sup> Does the Second Amendment protect the right to own weapons not at issue in *Heller* (like air pistols or knives)?<sup>152</sup> And, does the Second Amendment invalidate other laws criminalizing certain gun possession?<sup>153</sup> The Supreme Court specifically made

<sup>149</sup> *People v. Carreira*, 893 N.Y.S.2d 844, 846 n.1 (City Ct. of Watertown 2010), *abrogated by* *People v. Pealer*, 985 N.E.2d 903 (N.Y. 2013). In *Carreira*, a New York court found a DUI breath test to be inadmissible. *Id.* The court relied on a study about the manipulation of forensic evidence highlighted by the Supreme Court. *Id.* (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318-19 (2009)). It applied the study’s findings to the facts at hand, while admitting that the *Melendez-Diaz* Court did not apply its holding to testing records. The Supreme Court instead “wink[ed] at the issue” and “excruciatingly avoid[ed]” it. *Id.*

<sup>150</sup> 554 U.S. 570, 595 (2008).

<sup>151</sup> *See, e.g., Nordyke v. King*, 563 F.3d 439, 446 (9th Cir. 2009) (“[W]e must decide whether the Second Amendment applies to the states through the Fourteenth [Amendment], a question that *Heller* explicitly left open.”).

<sup>152</sup> *See, e.g., Wooden v. United States*, 6 A.3d 833, 839 (D.C. 2010) (“[W]e cannot find it ‘plain’—‘clear’ or ‘obvious’—that the *Heller* Court would extend its ruling to knives.”); *People v. Nivar*, 915 N.Y.S.2d 801, 808-10 (Sup. Ct. 2011) (determining that air pistols were not defined within the ambiguous definition of *Heller*).

<sup>153</sup> *See, e.g., United States v. Miller*, 604 F. Supp. 2d 1162, 1164-68 (W.D. Tenn. 2009) (evaluating whether the *Heller* decision extended to all laws restricting firearm ownership).

clear that it was not addressing some of these questions in *Heller*, while others it just ignored.<sup>154</sup>

As post-*Heller* litigation made its way through the lower courts, the Supreme Court's historical account of how and why the Second Amendment was adopted (which is, after all, a question of fact) became very important in answering follow-up legal questions. One plaintiff, for example, challenged a New York law banning air pistols (which differed from the handgun ban at issue in *Heller*).<sup>155</sup> The trial court first recited the *Heller* majority's historical account of what eighteenth-century citizens thought "arms" meant, and then it concluded that air pistols were not arms because they are not used in self-defense as members of the founding generation had assumed their arms to be.<sup>156</sup> The lower court did not rely on the holding of *Heller*, but its historical evidence came straight from the U.S. Reports.

Other courts looked to the facts contained in the *Heller* dissent for guidance in answering these aftermath legal questions. In a constitutional challenge to the federal statute prohibiting firearm possession by felons, a district court in Tennessee cited statistics on gun violence from Justice Breyer's *Heller* dissent in order to establish that the government's interest behind the law is "not only 'legitimate,' but also 'important.'"<sup>157</sup>

Finally, the historical facts in *Heller* were also used by at least one lower court to anticipate the obvious follow-up legal question (later answered by the Supreme Court in *McDonald v. Chicago*<sup>158</sup>) about whether the Second Amendment should be incorporated against the states. To answer that question, the Ninth Circuit explained that "*Heller* reveals evidence . . . [that] the right to keep and bear arms shares ancestry" with other fundamental rights.<sup>159</sup> It uses *Heller*'s description of the "behavior and words of the colonists" to demonstrate the importance of the right and ultimately to conclude from the Court's "survey of our history" that the right to bear arms is "deeply rooted in this Nation's history and tradition."<sup>160</sup>

The point is not to criticize the Supreme Court's historical account, but merely to note that the history mounted in *Heller* to answer one question was then used subsequently by lower courts to answer separate legal questions

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<sup>154</sup> *Heller*, 554 U.S. at 681.

<sup>155</sup> *Nivar*, 915 N.Y.S.2d at 802-03.

<sup>156</sup> *Id.* at 808-09.

<sup>157</sup> *Miller*, 604 F. Supp. 2d at 1172 (citation omitted).

<sup>158</sup> 561 S. Ct. 3020, 3026 (2010) (holding that the Second Amendment should be incorporated against the states by the Fourteenth Amendment).

<sup>159</sup> *Nordyke v. King*, 563 F.3d 439, 451-52 (9th Cir. 2009).

<sup>160</sup> *Id.* at 452-54.

that followed. The Court's historical work, in other words, serves two purposes: to answer today's legal question in the U.S. Reports and tomorrow's legal question in the Federal Reporter.

A second example of aftermath factual precedents involves questions that followed the Supreme Court's decision in *Atkins v. Virginia* banning the execution of individuals who are "mentally retarded."<sup>161</sup> Justice Stevens, writing for the *Atkins* majority, specifically left it to the states to define "mental retardation" for purposes of applying the death penalty.<sup>162</sup> Although he declined to set a national definition, however, Justice Stevens did have words to say on the subject.<sup>163</sup> In explaining the defense's evidence that *Atkins* was "mildly mentally retarded," Justice Stevens referred to definitions from the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA).<sup>164</sup> Although the AAMR's definition had eliminated the classification based on IQ score, the APA definition still retained it.<sup>165</sup> Thus, Justice Stevens combined both authorities and explained: "[M]ental retardation require[s] not only subaverage intellectual functioning, but also significant limitations in adaptive skills."<sup>166</sup> He further noted that the "cutoff IQ score for the intellectual function" of a mentally retarded person is "between 70 and 75 or lower."<sup>167</sup>

Following *Atkins*, whether or not someone qualifies as mentally retarded can literally be a question of life and death. As documented by Peggy Tobolowsky, "assessment procedures vary considerably" by state; some are set by statute, while others are set by court decision.<sup>168</sup> This variation has spawned many challenges to the adequacy of any given state's rule on how much mental evaluation is necessary. Prisoners often seek additional evidentiary hearings on their mental state.<sup>169</sup>

Interestingly, to answer these challenges, some lower courts have relied on the dicta in *Atkins* about the definition of mental retardation—even though Justice Stevens specifically disclaimed settling the issue.<sup>170</sup> These

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<sup>161</sup> 536 U.S. 304 (2002).

<sup>162</sup> *Id.* at 317.

<sup>163</sup> *Id.* at 308.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 308 n.3.

<sup>166</sup> *Id.* at 318.

<sup>167</sup> *Id.* at 309 n.5.

<sup>168</sup> See Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 78, 102 (2003) (noting that ten of the twenty capital punishment states have legislatively or judicially adopted procedures to implement *Atkins* and that these procedures require varying degrees of expert input and evaluation).

<sup>169</sup> *Id.* at 138-40.

<sup>170</sup> See *Atkins*, 536 U.S. at 317-18.

courts quote Justice Stevens for the proposition that the IQ test is the “standard instrument” for assessing mental retardation, and then they use that language about the IQ cutoff to deny requests for additional clinical assessment.<sup>171</sup>

Death penalty scholars and psychologists have warned that strict adherence to an IQ test alone does not adequately measure mental retardation—particularly without reference to the standard measurement of error of these tests.<sup>172</sup> In addition, the AAMR—the authority relied on by the *Atkins* Court—now specifically “cautions against the use of a fixed cutoff point regarding IQ scores in the determination of mental retardation.”<sup>173</sup> But whether those arguments are right or wrong is not the point. What matters instead is that lower courts are using dicta in landmark decisions to answer follow-up questions *specifically reserved* by the Supreme Court for another day. They are, in effect, attributing precedential power to language not meant to be precedential.

#### D. Historical Factual Precedents

One special brand of factual precedent merits a pause: the “historical factual precedent.” This precedent is evident when courts invoke what the Supreme Court has said about history without re-examining the relevant historical account.

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<sup>171</sup> See, e.g., *Hearn v. Thaler*, 669 F.3d 265, 273 (5th Cir. 2012) (stating that “relying primarily on the [full-scale] IQ tests here is reasonable and more likely to result in consistent mental retardation determinations because the tests have been widely acknowledged as ‘the standard instrument in the United States for assessing intellectual functioning’”); *Thomas v. Quarterman*, 335 F. App’x 386, 391 (5th Cir. 2009) (same); *Carroll v. Crosby*, No. 05-0857, 2008 WL 2557555, at \*15 (M.D. Fla. June 20, 2008) (denying prisoner’s request for evidentiary hearing on mental retardation and upholding the trial court’s conclusion that he was not mentally retarded based upon “a reasonable application of the *Atkins* criteria”).

<sup>172</sup> See Tobolowsky, *supra* note 168, at 139 (“[S]tates that use a rigid IQ cutoff score of seventy for the intellectual functioning component may be excluding some individuals otherwise falling within the accepted clinical definition.”); see also John M. Fabian et al., *Life, Death, and IQ: It’s Much More Than Just a Score*, 59 CLEV. ST. L. REV. 399, 413 (2011) (pointing out the standard deviation in IQ tests, and arguing that the APA never intended to enshrine an IQ cutoff for mental retardation); Geraldine W. Young, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 VAND. L. REV. 615, 617, 629 (2012) (describing “the Flynn effect” as the theory that IQ scores rise over time, and arguing that IQ cutoffs in *Atkins* determinations are therefore inaccurate and unjust); see generally Stephen J. Ceci et al., *The Difficulty of Basing Death Penalty Eligibility on IQ Cutoff Scores for Mental Retardation*, ETHICS & BEHAV., 2003, at 11, 12.

<sup>173</sup> Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders’ Post-Atkins Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 75 (2011).



Examples of historical factual precedents are familiar.<sup>174</sup> For instance, the Supreme Court's explanation in *Hans v. Louisiana*<sup>175</sup> of the origin of the Eleventh Amendment has sparked tremendous debate among historians and jurists as to its accuracy.<sup>176</sup> Some historians suggest that the *Hans* Court strategically selected statements from the Framers to justify its historical account, ignoring original evidence to support the opposite constitutional understanding.<sup>177</sup> Right or wrong, however, the Supreme Court's history on the Eleventh Amendment is *the only* historical account on the subject that matters now because it is the one that binds lower courts for questions of state sovereign immunity.<sup>178</sup>

To be sure, historical facts are unique creatures. Some say history is an interpretive act and not an assertion of fact at all. These scholars claim "it is not possible to know history scientifically . . . through the mere accumulation of facts."<sup>179</sup> As Amy Kapczynski explains, "The central act of the historian is one of imagination, rather than recitation or excavation . . . ."<sup>180</sup> And yet others, like David Faigman, point out that original intent is "almost wholly fact based."<sup>181</sup> Questions of history, he tells us, boil

<sup>174</sup> One historical precedent showcased in constitutional law is the history of habeas corpus in pre-revolutionary England. For a detailed account of how one lopsided version of this history has oriented our understanding of the U.S. Constitution's Suspension Clause, see Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (reviewing PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010)).

<sup>175</sup> 134 U.S. 1 (1890).

<sup>176</sup> See, e.g., Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 68 (1989) (describing the "metamorphosis" of Eleventh Amendment interpretation that began with *Hans*); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260, 1271-72 (1990) (challenging the accuracy of the historical account in *Hans*); Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212, 232-34 (1988) (reviewing JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES—THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987)) (discussing whether the *Hans* historical account was correct).

<sup>177</sup> See Collins, *supra* note 176, at 233.

<sup>178</sup> See David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 71 (1984) (noting that the Court's "ambiguous language" in *Hans* "has been folded into the eleventh amendment itself"); see also John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1687 (2004) ("In particular, the Rehnquist Court has not merely adhered to *Hans* as a matter of stare decisis, but rather has continued to rely on its strongly purposive technique as a means to resolve unsettled questions about the very reach and implications of *Hans* and its progeny."); Sherry, *supra* note 176, at 1261-63 (discussing the stare decisis implications of *Hans*). For some examples of lower court cases that rely on the history as reported in *Hans*, see *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 844 (9th Cir. 2004), and *Employees of Department of Public Health & Welfare v. Department of Public Health & Welfare*, 452 F.2d 820, 823 (8th Cir. 1971).

<sup>179</sup> Kapczynski, *supra* note 54, at 1043.

<sup>180</sup> *Id.* at 1051.

<sup>181</sup> FAIGMAN, *supra* note 11, at 46.

down to questions about what the Framers understood the word “arms” to mean, or whether the ratifiers of the Fourteenth Amendment intended schools to remain segregated.<sup>182</sup>

Although historical facts contain a strong element of interpretation, they still meet my working definition of a fact. Like other facts, historical accounts can be right or wrong, true or false. They, too, are supported by evidence from nonlegal sources. And, like other facts, historical accounts are used in various ways. Sometimes they form the backbone of legal rules and legal decisions (particularly those driven by originalism). But, “[m]ore likely,” as historian Paul Finkelman argues, “Justices will rummage around in history, looking for a factoid or some historical anecdote to support the outcome they want to reach.”<sup>183</sup> In this sense, historical facts differ little from other factual claims.

The precedential treatment of history in Supreme Court opinions is complicated because one needs to disentangle the precedential power of the legal rule (perhaps informed by historical facts) from the separate precedential force of the historical account itself.

To understand the difference, consider the decision of the D.C. Circuit in *United States v. Maple*.<sup>184</sup> There, a policeman had opened a closed compartment in Maple’s car to put away a cell phone, and he discovered a gun inside; the pivotal question was whether that “purely inadvertent” discovery by the officer constituted a “search” within the meaning of the Fourth Amendment.<sup>185</sup>

To answer that question, the court looked to the Supreme Court’s historical account of what the word “search” meant at the time the Fourth Amendment was adopted.<sup>186</sup> It concluded that to search meant to “look over or through *for the purpose* of finding something.”<sup>187</sup> The D.C. Circuit’s definition came from *Kyllo v. United States*.<sup>188</sup> The D.C. Circuit was *not* citing the holding of *Kyllo*—indeed, it admitted that the “holding [was] not particularly relevant.”<sup>189</sup> What mattered instead was purely the historical account in *Kyllo* and what the Justices said the word “search” meant to

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<sup>182</sup> *Id.*

<sup>183</sup> Paul Finkelman, *The Constitution, the Supreme Court, and History*, 88 TEX. L. REV. 353, 356 (2009) (reviewing LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE* (2009), and PETER C. HOFFER, *THE SUPREME COURT: AN ESSENTIAL HISTORY* (2007)).

<sup>184</sup> 334 F.3d 15 (D.C. Cir. 2003).

<sup>185</sup> *Id.* at 20-21.

<sup>186</sup> *Id.* at 19.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (citing *Kyllo v. United States*, 533 U.S. 27, 33 n.1 (2001)).

<sup>189</sup> *Id.*

people living in 1787. The D.C. Circuit, in other words, relied on the Justices as historians rather than as a source of legal rules.

Relying on the Justices as historians has its costs, however. Whatever the proper nature and precedential effect of historical facts may be, one thing is certain: on numerous occasions, historical accounts authored by Supreme Court Justices have been subsequently (and sometimes contemporaneously) refuted by world-class historians.

Justice Black's account of the original understanding of the Establishment Clause in *Everson v. Board of Education of the Township of Ewing* provides one such example.<sup>190</sup> Justice Black highlighted Thomas Jefferson's phrase "separation of church and state" and claimed it was a widely accepted notion at the time of the nation's founding.<sup>191</sup> His account, however, has been generally debunked by religious historians who instead claim that the "wisdom and influence of Jefferson's words regarding separation have developed largely as part of a twentieth-century myth—an account that has become popular precisely because it has seemed to provide constitutional authority for separation."<sup>192</sup>

Or, to take another example, in *Prigg v. Pennsylvania*, Justice Story tells the tale of how the Fugitive Slave Clause developed as part of a sacred compromise that enabled the South to join the Union.<sup>193</sup> Modern historians, such as Paul Finkelman, believe this account is flatly wrong.<sup>194</sup> Likewise, Justice Taney's retelling in *Dred Scott v. Sandford*<sup>195</sup> of the Founding-era conceptions of free black citizenship is at the very least highly contestable, and, according to some historians, flies in the face of "overwhelming" evidence to the contrary.<sup>196</sup>

The point, of course, is not to beat up on the Justices as amateur historians, but merely to highlight the costs that come with using the Supreme Court as the ultimate authority on history. Because the Supreme Court's historical accounts are elevated in prestige, they become influential in and

<sup>190</sup> 330 U.S. 1 (1947).

<sup>191</sup> *Id.* at 16.

<sup>192</sup> PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 11 (2002). For a contemporaneous historical critique of Justice Black's opinion, see Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 5-6 (1949).

<sup>193</sup> 41 U.S. (16 Pet.) 539, 540 (1842).

<sup>194</sup> See generally Paul Finkelman, *Story Telling on the Supreme Court: Prigg v Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247, 259-63 (1994) (telling "the real history of the fugitive slave clause").

<sup>195</sup> 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend XIV.

<sup>196</sup> See DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 349-54 (1978).

out of the courtroom.<sup>197</sup> But these examples demonstrate that the Court is fallible when it interprets history, just like it is vulnerable with respect to other types of factfinding.

E. “Premise Facts”: Facts that Form the Premise  
of a New Legal Rule

I call the final type of factual precedent “premise facts”<sup>198</sup> because they are beliefs about the state of the world that serve as the premise for a legal rule. All legislative facts share this characteristic to some extent, but some Supreme Court legal decisions fundamentally depend on a factual claim. In these cases, lower courts must determine whether the underlying fact itself is immune from challenges later.

Two examples of constitutional premise facts come to mind: (1) the factual claim in *Citizens United v. Federal Election Commission* that corporate independent expenditures do not corrupt politics,<sup>199</sup> and (2) the factual claim in *Grutter v. Bollinger* that racially diverse viewpoints improve a law school education.<sup>200</sup> In both cases, legislative facts were critical to the decision reached. And future lower courts, faced with subsequent litigation implementing the legal rules, must decide whether to give stare decisis effect to the factual aspects of the decisions or to reassess each factual claim according to the record of each case. They must decide, in other words, if a factual question remains open to challenge with new evidence or if it is effectively off the table after being settled by the Supreme Court.

*Citizens United* and the litigation it spawned provide a great example. *Citizens United* evaluated a First Amendment challenge to the Bipartisan Campaign Reform Act, which prohibited corporations from paying for independent electioneering communications shortly before elections.<sup>201</sup>

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<sup>197</sup> See generally John H. Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 613 (1954) (discussing the assumption of authoritative value attributed to sources cited by the California Supreme Court’s decisions; presumably, this assumption is even stronger for the U.S. Supreme Court).

<sup>198</sup> I borrow the phrase “premise facts” from Todd Aagaard’s fascinating administrative law article about such facts in agency statutory interpretation cases. See Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 372 (2009); see also Keeton, *supra* note 62, at 13 (explaining the scope, influence, and nature of facts that serve as premises for deciding an issue of law, or “premise facts”).

<sup>199</sup> 558 U.S. 310, 360 (2010).

<sup>200</sup> 539 U.S. 306, 325-30 (2003).

<sup>201</sup> For a recap of the case and its procedural history (with particular emphasis on the role of facts), see Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal*

Writing for the majority, Justice Kennedy denied that independent corporate spending corrupts politics.<sup>202</sup> Looking at both the record before him and the record before the Court in *McConnell v. Federal Election Commission*,<sup>203</sup> an earlier campaign finance case based on a facial challenge to the same law, Justice Kennedy found there was “scant evidence” that independent corporate expenditures lead to political corruption.<sup>204</sup>

A year or so later, the Montana Supreme Court had to decide whether that factual finding bound its court in *Western Tradition v. Attorney General*.<sup>205</sup> In this case, the court evaluated the validity of a 1912 Montana law that was substantially similar to the federal law in *Citizens United*—it forbade corporate campaign expenditures.<sup>206</sup> Despite the similarity of the two laws, the Montana Supreme Court upheld the Montana campaign finance law.<sup>207</sup> Chief Justice McGrath, writing for the majority, explained that “*Citizens United* was a case decided under its facts or lack of facts.”<sup>208</sup> He distinguished the case with a history of how corporate expenditures negatively affected Montana elections, complete with studies of how election spending in Montana was relatively low due to its bar on corporate election spending.<sup>209</sup>

Not all of the Montana Justices agreed that a new factual record meant they were out from under the thumb of *Citizens United*. Even though Justice James Nelson dissented, he criticized *Citizens United* as “utter nonsense.”<sup>210</sup> Nevertheless, he felt he was duty-bound to apply it: “The Supreme Court in *Citizens United* . . . rejected several asserted governmental interests; and this Court has now come along, retrieved those interests from the garbage can, dusted them off, slapped a ‘Made in Montana’ sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute.”<sup>211</sup>

Justice Nelson predicted that the U.S. Supreme Court would be quick to reverse the Montana Court. And he was right. Soon after, in a two-paragraph

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Election Commission, 42 LOY. U. CHI. L.J. 295, 300-02 (2011). Of course, defining what amounts to corruption is a thorny legal question that is still controversial.

<sup>202</sup> See *Citizens United*, 558 U.S. at 360.

<sup>203</sup> 540 U.S. 93 (2003), overruled by *Citizens United*, 558 U.S. 310.

<sup>204</sup> *Citizens United*, 558 U.S. at 360.

<sup>205</sup> 271 P.3d 1 (Mont. 2011), *rev'd sub nom.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).

<sup>206</sup> *Id.* at 3.

<sup>207</sup> *Id.* at 13.

<sup>208</sup> *Id.* at 6.

<sup>209</sup> *Id.* at 6-8.

<sup>210</sup> *Id.* at 35 (Nelson, J., dissenting).

<sup>211</sup> *Id.* at 33.

per curiam opinion, the Supreme Court summarily reversed the Montana Supreme Court, holding that there could be “no serious doubt” that such a result was compelled by *Citizens United*.<sup>212</sup> One way to interpret that message (although, as explained in Part IV below, not the only way) is to assume that the U.S. Supreme Court Justices established a factual precedent that settled once and for all the question about the potentially corrupting nature of corporate campaign expenditures.

Another example of a premise fact—one embraced perhaps by those with different ideological preferences—is the premise fact in *Grutter v. Bollinger* that a racially diverse class improves a law school education.<sup>213</sup> In *Grutter*, Justice O’Connor affirmed Michigan Law School’s affirmative action program by relying on classroom diversity as a compelling government interest and by deferring to the law school’s assessment on that score.<sup>214</sup> She supported her legal conclusion with empirical social science research connecting student diversity and educational achievement.<sup>215</sup> Similar to the facts in *Citizens United*, this claim is controversial and not without competing authority for the opposite claim.<sup>216</sup> But the relevant observation here is that the Court’s holding depends on a factual understanding of the world: that students exposed to more racial diversity possess greater active thinking processes and academic skills.<sup>217</sup>

How should lower courts evaluate affirmative action programs post-*Grutter*? Can a record before a lower court citing social science research that downplays the educational benefits of racial diversity—like the studies recited by Justice Thomas in his *Grutter* dissent<sup>218</sup>—justify a different legal ruling?

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<sup>212</sup> *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam).

<sup>213</sup> 539 U.S. 306, 325 (2003). This premise fact was reaffirmed in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

<sup>214</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

<sup>215</sup> *Id.* at 330. For a collection of the social science research used by Justice O’Connor in *Grutter* and for examples of countervailing authority, see Michael Heise, *Brown Undone?: The Future of Integration in Seattle After PICS v. Seattle School District No. 1*, 31 SEATTLE U. L. REV. 863, 878-80 (2008).

<sup>216</sup> See, e.g., Mikyong M. Kim & Clifton F. Conrad, *The Impact of Historically Black Colleges and Universities on the Academic Success of African-American Students*, 47 RES. IN HIGHER EDUC. 399, 421 (2006) (finding that African American students had a similar probability of obtaining a bachelor’s degree whether they attended a historically Black college or university or a historically White college or university).

<sup>217</sup> See Heise, *supra* note 215, at 878 (discussing how the majority in *Grutter* relied on findings from the expert witness report of Patricia Y. Gurin).

<sup>218</sup> *Grutter*, 539 U.S. at 349 (Thomas, J., dissenting).

The Fifth Circuit, at least, did not think so. In *Fisher v. University of Texas at Austin*, the litigants and interested parties marshaled factual evidence that disclaimed any connection between racial diversity and educational success.<sup>219</sup> The Fifth Circuit did not bite, explaining “it is neither our role nor purpose to dance from *Grutter’s* firm holding that diversity is an interest supporting compelling necessity.”<sup>220</sup> Like *Citizens United*, *Grutter* thus appears to accomplish two things: it established a rule of law and settled a debatable factual question to bind the lower courts.

### III. WHAT SORT OF AUTHORITATIVE FORCE SHOULD ATTACH TO SUPREME COURT STATEMENTS OF FACT?

With some examples now in mind, we must tackle the question that lurks behind any discussion of precedent: How *should* judges treat statements from the past in making decisions in the present? And specifically, how much weight, if any, should lower courts give to prior Supreme Court statements of fact?

First, an important clarification is in order. Fred Schauer has effectively refined the concept of precedent to explain that there is a difference between precedent as a rule and precedent as valuable experience.<sup>221</sup> The latter type of precedent (although perhaps misnamed) is when one decisionmaker is “[u]nwilling or unable to do as much thinking, looking, or testing as a previous decisionmaker . . . . ‘If Cardozo decided this way who am I to disagree?’”<sup>222</sup> For that type of precedent, if we truly believe the first decision was incorrect, we will reject the value of the experience. By contrast, a true rule of precedent is a “norm limiting the decisionmaker’s flexibility,” which means that “the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.”<sup>223</sup>

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<sup>219</sup> 133 S. Ct. 2411 (2013). The U.S. Supreme Court was presented with much of this research in the *Fisher* litigation. See, e.g., Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioner at 13, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (“The diversity rationale adopted by the *Grutter* Court was created out of social science-backed whole cloth; it was dubious then, and has not withstood the test of time. In particular, the rationale and evidence underlying the educational benefits that flow from a diverse student body have been significantly undercut since the Court’s decision.”); Brief for Gail Heriot et al. as Amici Curiae Supporting Petitioner at 8, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

<sup>220</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411.

<sup>221</sup> See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

This distinction is critical to bear in mind when confronting factual precedents. Unless a court tells us (which it often does not), it is impossible to know what weight a judge gives to a Supreme Court statement of fact. Even if, as in all of the examples discussed in Part II, the judge uses the Court's old factual claim to answer a dispositive question before it, we still do not know whether she felt bound to do so, or merely did so because the words were easy to find and had a special, prestigious U.S. Reports citation attached to them.

At the end of the day, however, this uncertainty should not detract from the normative concerns one has about factual precedents. We know that lower courts rely on Supreme Court facts as authority because they cite to these facts to explain how they reached important aspects of their decisions. And that citation to authority matters in and of itself.

Law is, after all, "an authoritative practice": what matters is not just the reason, but also from where it comes.<sup>224</sup> "[T]he fabric of law," as Abbe Gluck explains, is formed through judicial opinions.<sup>225</sup> Thus, she states, methodology within those opinions matters, "[e]ven if one cannot prove that methodology dictates outcomes."<sup>226</sup>

The reasons a court gives for its decision and what it cites to support those reasons matter to litigants (particularly if their arguments are refuted by such authorities).<sup>227</sup> Those authorities also matter to future litigants who present the same issue later. Whether a judge felt bound by a factual authority that he cites, future lawyers and future judges know not and care not. That authority becomes part of the legal decision, with explanatory power now and persuasive power later. In the words of Fred Schauer, "[T]o say 'x because of y' is not only to say x, but to say y as well."<sup>228</sup> There are consequences, in other words, and commitments that attach when a legal decisionmaker gives reasons for her decision.<sup>229</sup> To fret about authorities,

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<sup>224</sup> Schauer, *supra* note 1, at 1934 (noting that in law, more so than in other disciplines, there is a reliance on the source rather than the content of arguments and ideas); *see also* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 5 (1st ed. 1979).

<sup>225</sup> Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1855 (2010).

<sup>226</sup> *Id.* at 1768.

<sup>227</sup> *See* Merryman, *supra* note 197 ("Presumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to a reader."); Schauer, *supra* note 1, at 1934 (finding a focus on authority to be behind the renewed attention to citations in court opinions); *see also* Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 633-34 (1995) (concluding that the practice of providing reasons for decisions is considered an essential aspect of legal culture).

<sup>228</sup> Schauer, *supra* note 227, at 642 (italics added).

<sup>229</sup> *Id.*



therefore, even if they are not binding on the decisionmaker, is to worry about the very backbone of the legal process itself.<sup>230</sup>

This next Part addresses what sort of authoritative force Supreme Court facts should carry. Two potential weights are considered: factual statements could be binding on lower courts, or they could be especially persuasive by virtue of having been decided by the Justices. I reject both possibilities and argue against recognizing factual precedents at all. In short, generalized factual claims from the Supreme Court should not receive any precedential value separate and apart from the legal rules they helped to create.

#### A. *Binding Authority: A Stare Decisis of Fact?*

One possibility is that factual claims adopted and approved by the Supreme Court should bind lower courts faced with those same factual questions later—a “factual stare decisis” if you will.<sup>231</sup> To my knowledge, no scholar has argued that a factual precedent should bind lower courts in any formal sense,<sup>232</sup> but it appears some lower courts are treating Supreme Court factual claims in precisely this manner, even if they are doing so in an unthinking and undefended way. It is a useful exercise, therefore, to consider the possibility of a factual stare decisis and then to identify precisely what problems it creates.

The argument for factual stare decisis, an argument that would approve all of the factual precedents discussed above, would be about efficiency and institutional competence. The Supreme Court is better equipped than lower courts to handle questions of fact—such as social science data on juvenile brain development—because the Justices hear fewer cases than any other court and thus have the luxury of time and the benefit of extensive briefing by experts, often as amici. If we want better judicial decisionmaking on tough empirical questions of fact, the argument goes, then we should assign the responsibility to the judges with the time and resources to evaluate multiple studies, look into methodological strengths and weaknesses across them, and evaluate their credibility. Given these institutional advantages, at least relative to other courts,<sup>233</sup> the Supreme Court is the best judicial institution to settle generalized questions of fact that affect litigation.

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<sup>230</sup> See Schauer, *supra* note 1, at 1960 (“If law is an authoritative practice, then a great deal turns on what the authorities are.”)

<sup>231</sup> See Gorod, *supra* note 11, at 63.

<sup>232</sup> See Borgmann, *supra* note 11, at 1190-91 (arguing the reverse: that a reviewing court should defer to the trial court’s findings of social facts).

<sup>233</sup> The question of the Court’s factfinding competence as compared to that of legislative bodies is a separate question that many have debated before. See, e.g., Devins, *supra* note 36, at

Benefits of this approach are similar to the benefits of stare decisis generally: uniformity, efficiency, and predictability.<sup>234</sup> Most of these justifications for stare decisis, both vertical (the obligation of lower courts to follow rules of higher courts) and horizontal (the obligation of one court to follow its own precedent), share the common goal of furthering the rule of law.<sup>235</sup>

Scholars debate whether a strong conception of stare decisis is worth it: What good is predictable uniform law if it is wrong?<sup>236</sup> Without wading into those waters, however, note that virtually everybody believes that legal precedents subject to stare decisis are made carefully: they are powerfully argued, slowly deliberated, and meticulously justified by multiple people. Even if one thinks a legal rule handed down by the Supreme Court is wrong, one can at least be assured that it was the product of much process and deliberate thought. This careful deliberation alone buttresses the rule of law, which, Fred Schauer explains, makes us “feel better.”<sup>237</sup>

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1180 (comparing Congress’s ability to “gather and assess information” with the manner in which courts are “shackled by the temporal and reactive nature of litigation”). It is a debate, however, that I do not enter today.

<sup>234</sup> See, e.g., Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2024 (2011) (“When the Court considers the work of past Courts, the key concept is *stare decisis* while the key attitude recognizes the importance of *reliance*.”); Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1855-57 (2013) (cataloguing common justifications for precedent and arguing that views on stare decisis must be integrated with a broader interpretive philosophy); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 93-94 (1989) (arguing that stare decisis is efficient because it minimizes error and judicial review costs, maximizes the public good aspect of judicial decisionmaking, and increases societal demand for judge-made rules).

<sup>235</sup> Indeed, this phrase is commonly used by the Supreme Court when discussing stare decisis. See *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (noting that “the greatest purpose [of stare decisis] is to serve a constitutional ideal—the rule of law”); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987) (“The rule of law depends in large part on adherence to the doctrine of *stare decisis*. Indeed, the doctrine is ‘a natural evolution from the very nature of our institutions.’” (citation omitted)). But see Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach* 34-35 (N.Y.U. Sch. of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 11-75, 2011), available at [http://papers.ssrn.com/abstract\\_id=1942557](http://papers.ssrn.com/abstract_id=1942557) (“I do not endorse the position . . . that ‘[t]he rule of law depends in large part on adherence to the doctrine of stare decisis.’ But it might be true the other way around: the justification of stare decisis might depend to a large extent on the rule of law.” (alteration in original) (footnote omitted)).

<sup>236</sup> See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 3-4 (2001) (developing a theory of stare decisis based on the principle that there is no harm in dispelling the presumption against overruling manifestly erroneous decisions).

<sup>237</sup> See Schauer, *supra* note 221, at 598 (“Much of what we value about predictability is psychological. I feel better knowing that the letter carrier will come at the same time every day, that faculty meetings will not be scheduled on short notice, and that April brings the opening of the baseball season. Predictability thus often has value even when we cannot quantify it.”).

Factual precedents cannot claim the same thing. They may not be the product of careful deliberation. Facts—at least the type of generalized facts about the world I am concerned with—are often marshaled by Supreme Court Justices to build arguments and to tell a “story.”<sup>238</sup> This has several implications. For one thing, it means that factual authorities are selected for a reason distinct from how likely they are to be accurate. As one judge candidly explained, a judge “picks her rhetoric to foreshadow the result.”<sup>239</sup> And she picks her factual claims the same way. “Motivated reasoning” and “confirmation bias” are terms psychologists use to describe this phenomenon—we look for sources to support what we already think we know.<sup>240</sup>

A consequence is that there is less trust that the authorities are correct, particularly for factual questions that are controversial and the subject of easily accessible data from sources with highly variable reliability. Supreme Court factfinding has changed since the dawn of the digital revolution. As I have observed elsewhere, Supreme Court Justices, like the rest of us, are now surrounded by factual information literally at their fingertips.<sup>241</sup> They no longer need to rely predominately on the adversarial system to supply evidence on factual questions; they can just Google for data, empirical studies, claims in secondary sources, and newspaper accounts. Of course, some information on the Internet is reliable, but some of it is not. And the tremendous increase of data available to research means there is almost always evidence to support a preexisting view regardless of its reliability.<sup>242</sup> To the extent Justices are researching factual questions on their own, the resulting claims can suffer from unrealized bias or be just plainly incorrect.<sup>243</sup>

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<sup>238</sup> See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1386 (1995) (“When an appellate judge sits down to write up a case, she knows how the case will come out and she consciously relates a ‘story’ that will convince the reader it has come out right.”).

<sup>239</sup> *Id.* at 1377.

<sup>240</sup> See Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT’L L. 405, 434 (2012) (“Confirmation bias refers to the tendency for people to search for, interpret, and remember information in a way that systematically impedes their ability to reject a preexisting hypothesis. In other words, under certain circumstances people tend to search for, recall, and interpret information in a way that has a tendency to confirm their existing beliefs.” (footnotes omitted)); *id.* at 420-21 (“The central tenet of motivated reasoning is that [p]eople are more likely to arrive at those conclusions that they want to arrive at.” (alternation in original)).

<sup>241</sup> See Larsen, *supra* note 7, at 1260-61.

<sup>242</sup> See Berring, *supra* note 83, at 1690.

<sup>243</sup> See *id.* (“For the modern Supreme Court there is no final primary authority, only a kaleidoscope of sources that one can shift to provide any of a number of pictures.”). As others have noted, and as I hope to explore in future work, the risk of bias and unreliability can come from within the adversary process as well, particularly in light of the recent rise in Supreme Court

Exacerbating this situation, factual authorities cited in a Supreme Court opinion are very likely selected solely by the Justice writing the opinion to make his case to his colleagues. While we can be sure that a legal holding that garners five votes at the Court is debated by all of the Justices, the same assumption cannot be made about the factual claims that pepper the footnotes. Most of the time, presumably, facts mounted to frame an argument are not discussed at conference; they are added later by the opinion writer at the time the opinion is written. While it is fair to assume all Justices who sign on to an opinion have read the factual claims it contains, we cannot have the same confidence that the Justices have critically examined every factual source cited in the footnotes given the time constraints of litigation.<sup>244</sup> Particularly for factual claims that are not central to the dispute, it seems unlikely that a source selected for its rhetorical appeal will be subject to careful scrutiny by all of the Justices who sign on to the opinion.

Another reason to fret about a practice of binding factual precedents is that our understanding of the world changes over time. A fact considered true in 1955 may seem laughable in 2015. Take, for example, the seemingly progressive factual claim, made famous in the Brandeis brief relied on in *Muller v. Oregon* in 1908, that long working hours jeopardize the “general welfare, health and morals” of women.<sup>245</sup> It is too easy with the benefit of hindsight to criticize the Supreme Court for relying on this social science which has since been widely refuted.<sup>246</sup> It is impossible and unfair to task the Justices with the responsibility of seeing into the future on factual claims. But the reality is that facts are fickle, and it is unwise to entrench them into the law when tomorrow’s science can reveal their flaws.

At bottom, my concerns with factual precedents are similar to the concerns others have expressed about conflating the line between dicta and holdings.<sup>247</sup> Generally speaking, a dictum is an assertion in a court opinion that is superfluous to the decision. Although identifying this line is sometimes

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amicus briefs. See Borgmann, *supra* note 11, at 1216-18 (arguing that amicus briefs are often written as part of a “deliberate campaign” by interest groups and are not a good source for unbiased factfinding).

<sup>244</sup> Cf. Wald, *supra* note 238, at 1374 (“Time does not allow for the same careful, thoughtful analysis and writing to be poured into all cases.”).

<sup>245</sup> 208 U.S. 412, 414 (1908).

<sup>246</sup> See Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 106 (1993) (“Brandeis’s brief would be assessed harshly as junk social science by today’s standards.”).

<sup>247</sup> By making this analogy, I do not mean to imply that facts are always dicta in Supreme Court opinions. To be sure, sometimes a factual finding can be critical to a legal holding.

challenging,<sup>248</sup> the basic notion is that if the judgment would be unaffected by the proposition in question, then the proposition is just dicta.<sup>249</sup>

As Judge Pierre Leval remarked several years ago, however, “The distinction between dictum and holding is more and more frequently disregarded.”<sup>250</sup> Although, he explained, “most agree in the abstract with the proposition that dictum does not establish binding law, this rule is now honored in the breach with alarming frequency.”<sup>251</sup> This temptation is even greater when the dictum comes from the U.S. Supreme Court. Many lower courts have explicitly stated that Supreme Court dictum is different, and that statements by the Supreme Court, even in dicta, should not be idly ignored and are more than just “casual suggestion[s].”<sup>252</sup>

Why the alarm for the erosion of this dicta line? Judge Leval worries that treating dicta as binding makes judges “more likely to exercise flawed, ill-considered judgment[s], more likely to overlook salutary cautions and contraindications, [and] more likely to pronounce flawed rules.”<sup>253</sup> When a court comments on issues outside the scope of the judgment, in many instances, it does so “with no briefing whatsoever on the issue” and, as Judge Leval speculates, with “insufficient judicial scrutiny.”<sup>254</sup>

His fear is not new. Michael Dorf has explained that jurists dating back at least to Chief Justice Marshall have provided two dominant reasons for disregarding dicta: (1) a fear that dicta are less carefully considered than holdings and therefore less likely to be accurate, and (2) an Article III

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<sup>248</sup> I do not mean to undersell the confusion in the courts about how to distinguish holdings from dicta. As others have documented, this confusion is significant and pervasive. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994) (“No universal agreement exists as to how to measure the scope of judicial holdings.”).

<sup>249</sup> See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1056 (2005) (offering a definition of dicta).

<sup>250</sup> Leval, *supra* note 103, at 1250. See also David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2041 (2013) (arguing that the dictum–holding distinction plays a significant role in fewer than 1 in every 2000 federal district court cases).

<sup>251</sup> Leval, *supra* note 103, at 1250.

<sup>252</sup> See *United States v. Miller*, 604 F. Supp. 2d 1162, 1167 (W.D. Tenn. 2009) (“Most federal circuits have recognized that ‘by the way’ statements made by the Supreme Court resonate more forcefully than dicta from other sources.”); *id.* (“It would be disingenuous” to say that statements made by the Supreme Court in dicta “amount[] to no more than a casual suggestion.”); see also Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003) (“[W]e should not idly ignore considered statements the Supreme Court makes in dicta.” (alteration in original) (citation omitted)).

<sup>253</sup> Leval, *supra* note 103, at 1255.

<sup>254</sup> *Id.* at 1262–63.

concern that courts have “legitimate authority only to decide cases, not to make law in the abstract.”<sup>255</sup>

Both concerns about dicta hold equally true for allocating precedential force to generalized factual claims. Factual authorities are less likely to be scrutinized than are their legal counterparts and are not always central to the question presented. Thus, for the risks about accuracy it creates and the legitimacy concerns it exacerbates, factual stare decisis is unwise; a lower court should ordinarily not feel bound by a Supreme Court factual claim.

B. *Persuasive Authority: Skidmore Deference to the Supreme Court as Factfinder?*

A second possibility is to consider Supreme Court factual statements as only persuasive authority. Persuasive authority is the phrase generally given to an authority that is not binding on a court but which “depends for its influence upon its own merits.”<sup>256</sup> This type of authoritative force could take two forms.

One option is that a trial judge cites a historical source or a psychological study because he read it and was persuaded by it. Perhaps that study was brought to his attention by a Supreme Court opinion, but the U.S. Reports are just a convenient place to research. This use of an authority does not involve deference at all; the factual authority is only persuasive to the extent it has the power to persuade on its own.

This is not, however, an accurate description of the way lower courts cite Supreme Court factual claims. In the cases described in Part II above, the courts cite the actual Supreme Court language in the U.S. Reports without always including the original factual source. It must matter to these lower courts that the Justices used the authority once before—the Supreme Court citation gives the source an extra bump of persuasive power supplemental to the power it contains independently.<sup>257</sup>

This is more than just the power to persuade. One way to think about this is to consider the Supreme Court as a default factfinder that offers a presumptive, but rebuttable, answer to factual questions. For administrative

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<sup>255</sup> Dorf, *supra* note 248, at 2001.

<sup>256</sup> Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 632 (1990).

<sup>257</sup> Once a factual authority is cited in the U.S. Reports, the source automatically becomes more prestigious. As John Merryman observed over sixty years ago this has “an unavoidable effect on future decisions. As a work increases in stature it becomes more authoritative—more capable of influencing the actual consideration of cases by judges.” Merryman, *supra* note 197, at 619.

law types, this is *Skidmore*<sup>258</sup> deference, which lies “somewhere between the poles of independent judgment and controlling deference.”<sup>259</sup> On this view, a lower court judge does more than apply her own judgment about the merits of the factual source; she defers to the first decisionmaker (here, the Supreme Court) because there are contextual reasons surrounding the first decision that justify the deference. Just as an agency’s expertise deserves some deference, Supreme Court factual findings, the argument goes, should generate the same respect.<sup>260</sup>

Put differently, because lower courts are overburdened and underfunded, it may make sense to offer them a shortcut through Supreme Court factfinding. That shortcut is desirable, however, only if the Supreme Court is competent to be an authority on the factual claims it makes. And there are significant reasons to doubt that conclusion.

By way of illustration, for almost every factual claim discussed in Part II above, there is some countervailing authority that could have been selected to make the opposite point. Recall Justice O’Connor’s assertion in *Toyota Motor Manufacturing v. Williams* that carpal tunnel typically heals on its own without surgery. Indeed, she found legitimate authority to support this claim; but a click of the mouse reveals a range of authorities to support the opposite proposition.<sup>261</sup> Likewise, Justice Ginsburg’s assertion in her

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<sup>258</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>259</sup> Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1241 (2007); see also Jim Rossi, *Respecting Deference: Conceptualizing Skidmore within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1127 (2001) (discussing the Supreme Court’s use of *Skidmore* deference in a case in which the Court “summarily dismisses any notion of deference for the agency . . . [and] refers to its own independent reading of the statute”).

<sup>260</sup> There are competing conceptions of *Skidmore* and what it precisely means when a lower court reviews agency decisionmaking. Compare Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 564 (1985), with Thomas W. Merrill, *The Mead Doctrine*, 54 ADMIN L. REV. 807, 812 (2002). Some say *Skidmore* deference is nothing more than independent judgment. Others say it involves more than independent judgment and embodies some sort of actual deference to the first decisionmaker, although less than would be given under *Chevron*. For purposes of this Article, I adopt the second conception of *Skidmore*, which seems to be the one that dominates in the lower courts. See Hickman & Krueger, *supra* note 259, at 1281 (describing how courts of appeals “overwhelmingly” use the standards-based approach of *Skidmore* deference).

<sup>261</sup> See Joshua Tucker, *When Will That Carpal Tunnel Go Away? The Correct Questions Is, Will It Ever Go Away?*, EZINE ARTICLES, <http://ezinearticles.com/?When-Will-That-Carpal-Tunnel-Go-Away?—The-Correct-Questions-Is,-Will-it-Ever-Go-Away?&id=2187115> (last visited Oct. 25, 2013) (“Carpal Tunnel won’t just go away. It’s not an injury that needs to ‘heal’. Waiting it out is a losing strategy.”); Dr. Younai, *Preventing Carpal Tunnel*, ARTICLESBASE (Dec. 14, 2010), <http://www.articlesbase.com/alternative-medicine-articles/preventing-carpal-tunnel-3842709.html> (“[The] fact is carpal tunnel does not go away on its own[.] [I]nstead the signs and symptoms are persistent and need to be treated immediately because carpal tunnel is [a] progressive disease.”).

*Carhart* dissent that reports of postabortion depression are exaggerated is supported by a string cite to articles in many reputable journals.<sup>262</sup> But someone attempting to prove the opposite point could easily construct her own long string cite including articles that, to the untrained eye, appear reputable and purport to be peer-reviewed and the result of long-term studies.<sup>263</sup>

And giving credence to the line that “history is [an] argument without end,”<sup>264</sup> the Supreme Court’s ventures into history are likewise subject to challenge by countervailing factual authorities. For example, the Court’s factual account of the history of the Second Amendment and the founding generation’s attitudes towards guns in *District of Columbia v. Heller*<sup>265</sup> could have been radically different depending on the one recounting the tale.<sup>266</sup>

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<sup>262</sup> *Gonzales v. Carhart*, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting).

<sup>263</sup> See, e.g., Jesse R. Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-term Analysis of the NLSY Cohort*, 9 MED. SCI. MONIT. CR157, CR162 (2003), available at <http://www.vozvictimas.org/pdf/documentos/cougles2003.pdf> (“At an average of eight years after their first pregnancy, women who aborted their first pregnancy have significantly higher likelihood of being at risk for clinical depression than childbearing women who do not report a history of abortion.”); Jonathan Gornall, *Where Do We Draw the Line*, 334 BMJ 285, 288 (2007) (discussing a study by David Fergusson and his colleagues that tracked 500 women up to age 25 and found that “those who had had abortions had higher rates of depression, suicidal behavior, and other mental problems that could not be explained by conditions that existed before the pregnancy” (citing David M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16 (2006))); Steve Ertelt, *Recent Studies Confirm Women Face Depression After Abortion, Other Problems*, LIFENEWS.COM (Sept. 28, 2010), <http://www.lifenews.com/2010/09/28/nat-6733> (“An August study published in the Journal of Pregnancy and involving 374 women who had abortions—more than five times the number of women who appeared in the new study—found women having high rates of post-traumatic stress disorder (PTSD) symptoms for women having both early and late abortions.”).

<sup>264</sup> This common saying is generally attributed to Pieter Geyl. See, e.g., Jeffrey Kimball, *The Influence of Ideology on Interpretive Disagreement: A Report on a Survey of Diplomatic, Military and Peace Historians on the Causes of 20th Century U.S. Wars*, 17 HIST. TEACHER 355, 355 (1984) (quoting Geyl).

<sup>265</sup> 554 U.S. 570 (2008).

<sup>266</sup> Historians have challenged the accuracy of the account in *Heller* which grounds the Second Amendment in the founding generation’s alleged desire to bear arms for personal self-defense. See, e.g., Akhil R. Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 171 (2008) (questioning the history of the Second Amendment as recounted in *Heller*); Akhil R. Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 904 (“[A]t the Founding, the Second [Amendment] was primarily a military amendment.”); H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 433-34 (2000) (discussing how the Ratifiers interpreted the Second Amendment in the context of “communal military units,” not in the context of a private right to bear arms); see also Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246-47 (2008) (“[T]here is a radically different



The point here is not a “gotcha” one; for purposes of this Article it does not matter to me which side of these factual debates has it right. The point instead is that today’s digital world makes it very easy to find factual authorities—even authorities making completely opposite claims—and discerning which one is right (particularly outside one’s area of expertise) is no easy task.

There is no good reason, therefore, to trust that one Justice one afternoon has stumbled upon the accurate side of a factual debate while trying to convince his colleagues of a legal position. If the *authorities* she cites are persuasive to a lower court, then they are persuasive to a lower court. But no supplemental authoritative force—no extra persuasive bump—should attach to the factual sources because they appeared in the U.S. Reports.

The analogy to *Skidmore* deference is therefore quite helpful. The level of deference due to an agency under *Skidmore* depends on certain contextual circumstances: “the degree of the agency’s care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency’s position.”<sup>267</sup>

Very few of those factors apply to the Supreme Court’s assertions of legislative facts. As described above, the Court’s factual statements—the ones that are then used by lower courts as authorities later—are often found off the record, sometimes without the vote of five Justices, and without assurance that the factual authorities were deliberated or carefully inspected. Indeed it is also quite possible that the factual source was discovered by the author of a Supreme Court opinion, not in a search for a truth, but instead to make a rhetorical argument more persuasive.<sup>268</sup> Applying a *Skidmore*-type deference to Supreme Court factfinding, therefore, is inappropriate because the contextual circumstances surrounding the factfinding do not merit the extra deference.

What, then, should a trial judge do with a new case and a new factual record when faced with an on-point statement of generalized fact from the nation’s highest court? The best choice, I think, is to ignore it. Of course, the U.S. Reports are fair game to research, and if a factual authority

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reading of *Heller*. The constitutional text is ambiguous, and many historians believe that the Second Amendment does not, in fact, create a right to use guns for nonmilitary purposes.”).

<sup>267</sup> *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (footnotes omitted) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). For a helpful analysis of *Skidmore* deference as it has evolved, see Hickman & Krueger, *supra* note 259, at 1258.

<sup>268</sup> See Borgmann, *supra* note 11, at 1190 (asserting that “appellate courts’ ‘factfinding’ is often less a search for the truth than for good rhetorical sound bites to support a court’s favored outcome”).

unearthed by a Justice is persuasive to the lower court judge at face value, then certainly he should feel free to rely on it. But the influence that authority has on the judge should not depend on the fact that it once appeared in an opinion authored by a Supreme Court Justice. The default rule, in other words, should be to give no authoritative force to Supreme Court statements of fact.

This rule would assuage the concerns outlined above: the risk that a factual claim is selected by the Justices for reasons other than that it is the most accurate source among a sea of sources; the distinct possibility that the fact will change over time; the legitimacy concern (tied up with the nature of dicta) that the factual claim may not be properly before the Court and is therefore beyond its authority to decide; and, even putting aside those worries, the likelihood that a lower court will take the factual claim out of context.

#### IV. WHAT TO DO WITH “PREMISE FACTS”?

Assuming I have built a convincing case against most types of factual precedents, one difficult puzzle persists to which I offer some preliminary thoughts. As described above, there are times where the Supreme Court’s legal pronouncement depends quite explicitly on a factual claim—a factual premise to the legal decision. When the Court makes one of those claims, like in *Citizens United* or *Grutter*, it seems to be authoritatively answering a factual question for the nation. In these cases the risk is not that lower courts will take the Supreme Court’s language out of context; instead, we are confronting a factual precedent that seems purposely set.

What should lower courts do when parties come to court with new evidence that challenges one of those factual claims? If those factual claims are off limits, then we have condoned at least one type of factual precedent, even if it seems odd for nine Justices to be the final arbiter of a fact. If the answer, however, is that those factual claims are up for debate in any lower court in subsequent litigation, then we run the risk of chaos or at least a serious weak spot in the Supreme Court’s authority.

Consider the recent exchange between the U.S. Supreme Court and the Montana Supreme Court over the potentially corrupting nature of corporate campaign expenditures.<sup>269</sup> Recall that Justice Kennedy found no reliable evidence (on either the record before him or on Supreme Court records

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<sup>269</sup> See *supra* Section II.E for a discussion of *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Western Tradition Partnership, Inc. v. Attorney General*, 271 P.3d 1 (Mont. 2011).

previously built on the subject) that independent corporate campaign expenditures corrupt the political process.<sup>270</sup> Undeterred, the Montana litigants built a new record and successfully argued the opposite factual claim to the highest court in their state; the Montana Supreme Court upheld Montana's campaign finance law because the case before it had "different facts" from those in *Citizens United*.<sup>271</sup>

What lessons do we draw from the quick summary reversal handed down by the U.S. Supreme Court six months later?<sup>272</sup> In a two paragraph per curiam opinion, the Court explained "there [could] be no serious doubt" that *Citizens United* applied to the Montana law.<sup>273</sup> Four Justices dissented from the per curiam opinion, but even they seemed to admit that the new factual record did not relieve Montana from the force of the precedent; their plea, instead, was to reconsider *Citizens United* itself.<sup>274</sup>

One possible explanation of this sequence of events is that the *Citizens United* majority believed it was settling—nationally—the factual question of whether independent corporate expenditures corrupt politics. On this view, five Justices created a factual precedent, and the Montana challenge to that precedent got the back of the Court's hand. Tabling the difficult question about whether the Supreme Court has the power to conclusively answer factual questions about the world and command that its answer bind all other courts, allow me to offer a different explanation for the Montana summary reversal.

Perhaps the "factual finding" in *Citizens United* about corporate election expenditures was not actually a finding of fact but, instead, was just part of the Court's legal rule. To be sure, the Court talks like it is making a factual finding. Justice Kennedy, remember, scanned the "records" and discovered "scant evidence" of political corruption.<sup>275</sup> But although this sounds like an empirical or quasi-empirical finding, I submit that with premise facts like these the Court is not really finding facts but is rather building bright line rules. Rather than embracing, for example, a standard that corporate election expenditures are protected by the First Amendment when it is

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<sup>270</sup> *Citizens United*, 558 U.S. at 360.

<sup>271</sup> *W. Tradition P'ship*, 271 P.3d at 6.

<sup>272</sup> *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam).

<sup>273</sup> *Id.* at 2491-92.

<sup>274</sup> *See id.* (Breyer, J., dissenting) ("Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so. Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider *Citizens United* or, at least, its application in this case.").

<sup>275</sup> *Citizens United*, 558 U.S. at 360.

reasonably doubtful they will corrupt, the Court instead adopted a rule that corporate election spending is protected because it generally does not cause corruption.

The Court's rule was fueled by a factual understanding of the world—a generalization about politics and money. Surely, that understanding is not always accurate, as was apparently the case in Montana. But this overinclusive nature is the very essence of the distinction between a rule and a standard. When reading *Citizens United*, it sounds like the Court is establishing a fact (corporate money does not create corruption) and reasoning a rule from it (therefore the First Amendment protects it). I think, however, that the Court is working in the other direction—choosing a rule over a standard and expressing the generalized factual observations that led it to make that choice.

This would not be extraordinary because the Supreme Court frequently embeds factual generalizations in legal rules. In *Gonzales v. Carhart*, for example, the Supreme Court considered the factual question of whether a particular method of partial-birth abortion was ever medically necessary.<sup>276</sup> Under my definition, this is a question of fact: it can be refuted and is supported by testable evidence. But it would be odd for the Court to provide an authoritative answer to this question as a pure factual matter. Would any doctor who testified otherwise be wrong because five Justices of the Supreme Court said so?

Instead of viewing the Court as factfinder on this question, a closer look at *Carhart* reveals something more complex. The *Carhart* Court created a legal rule granting government discretion to legislate within the medical uncertainty of whether partial-birth abortions are ever necessary to preserve the health of the mother.<sup>277</sup> This answer entangles law and fact; it melds the two together to form a legal rule.

We thus find ourselves back where this project began with the tricky endeavor of distinguishing factual questions from legal ones. Perhaps the best way to understand the precedential value of “premise facts,” therefore, is to recognize that with premise facts we have left the land of facts altogether. These “facts” have precedential value because they are not facts, but rather part of a legal rule.

The Montana litigation following *Citizens United* is best understood this way: by reversing the Montana Court, the Supreme Court was flexing its

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<sup>276</sup> 550 U.S. 124, 165-66 (2007).

<sup>277</sup> *See id.* at 163 (“The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”).

muscles as the final authority on the dispute. It was not, however, using its authoritative muscles to settle the empirical dispute about the effect of corporate money on elections. *Citizens United* is binding on Montana not because the Court settled the factual question about election practices for everyone; it is precedent because it is part of a legal rule that, by its nature, is overinclusive.

*Grutter v. Bollinger* can be read the same way.<sup>278</sup> One way to understand *Grutter* is to read Justice O'Connor's opinion as finding, as a factual matter, that a racially diverse class enriches a law school education and benefits society as a whole. Indeed, the part of the opinion making this point sounds like a factual recitation: she cites data-rich empirical studies and states that "[t]hese benefits are not theoretical but real."<sup>279</sup> Should lower courts quickly dismiss studies on the other side of this debate because the Supreme Court made a conclusive factual claim that went the other way?

I do not think that is the best way to understand *Grutter's* mandate. Like *Citizens United*, *Grutter* used factual claims to form a legal rule: the data indicating the benefits of a racially diverse class justifies deference to university officials as a matter of law.<sup>280</sup> On this read, just like in *Citizens United*, the legislative fact is embedded in the legal rule; the precedential effect stems from the legal component of the decision, not the factual one.

So what happens to our lower court judge who must decide whether to hear evidence on a factual question the Supreme Court has purported to answer? How does he know whether to hold a hearing on the benefits of a racially diverse class or to consider the issue resolved by fiat due to its intrinsic relationship to a legal rule?

To solve this problem, I propose a clear statement rule.<sup>281</sup> If the Supreme Court is clear that its factual statements are part of a legal rule, then the statements are authoritative due to their legal component. Absent such a

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<sup>278</sup> 539 U.S. 306 (2003).

<sup>279</sup> *Id.* at 330.

<sup>280</sup> *See id.* ("In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning . . .").

<sup>281</sup> A clear statement rule tells courts they should not read a statute in a way that will have certain consequences unless Congress has been clear it intended those consequences to ensue. *See generally* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 946 (1992) ("The tendency of courts to require clear legislative articulation of changes in private liberty or property interests is not without its critics . . ."); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 407-08 (2010); Thomas B. Bennett, Note, *The Canon at the Water's Edge*, 87 N.Y.U. L. REV. 207, 210 (2012). A clear statement rule about factual precedents would similarly instruct courts to limit their reliance on Supreme Court factual claims, unless the Court is specific about the mixed legal-factual component of such statements.

clear label, a lower court should assume that the factual dispute is open for debate.

Consider the following example of how a clear statement rule could operate. In *New York v. Belton*, the Supreme Court considered whether the police could search the passenger compartment of a car as incident to the driver's arrest.<sup>282</sup> The Court noted as a factual matter—or as the dissent called it, a “fiction”—that, most of the time, items in the passenger side of a car are within arm's reach of the arrestee.<sup>283</sup> It admitted this observation was a “generalization” but stressed the need for the categorical approach in order to produce a result that was “workable.”<sup>284</sup> The Court thus explicitly made its factual observation a critical part of a bright line rule.

Subsequent to *Belton*, many defendants brought challenges to the rule on the basis that the factual claim it embraced—that most passenger compartments of a car are within the driver's reach—was simply not true in their specific cases.<sup>285</sup> Indeed, the frequency of the challenges and the size of the “chorus” that had called for the Court to reconsider *Belton* ultimately prevailed.<sup>286</sup> In 2009, in *Arizona v. Gant*, the Court disavowed the “broad” reading of *Belton*—the one that had been embraced by the lower courts and widely taught in police academies.<sup>287</sup> Instead, it announced a rule of reason so that the facts of each specific case would determine whether articles inside a car are in fact within arm's reach of the arrestee.<sup>288</sup>

What does *Belton* teach us about factual precedents? In *Belton*, the Court used a legislative fact (a generalized observation about car design) to set a legal rule. Challenges to that fact were largely unsuccessful until the Court changed course, but *not* because the Court had set a factual precedent. When a majority of the Court either no longer believed in the factual premise or thought the rule stemming from the factual claim was unwise, it changed its mind by abandoning the legal rule and instead adopting a standard.

One can criticize *Belton* as an inappropriate context for a rule over a standard, but, regardless, I applaud the Court for the candor it used about

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<sup>282</sup> 453 U.S. 454, 455-57 (1981).

<sup>283</sup> *Id.* at 460.

<sup>284</sup> *Id.*

<sup>285</sup> For a discussion of the lower court decisions on this issue, see *Arizona v. Gant*, 556 U.S. 332, 342-43 (2009).

<sup>286</sup> *Id.* at 338.

<sup>287</sup> *Id.* at 347.

<sup>288</sup> See *id.* at 351 (“Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”).

the role facts played in the opinion. Helpfully for lower courts faced with interpreting *Belton*, the Court was precise that its factual observation was a “generalization,” producing a “workable rule.”<sup>289</sup> Love it or hate it, the *Belton* rule was precedential as a rule of law—one implanted with factual claims for sure but a rule of law nonetheless. Without such a clear statement, courts cannot know whether they should independently examine whether passenger compartments are within a driver’s reach. I propose that absent a clear statement from the Supreme Court announcing a rule informed by a factual generalization, a lower court should assume it is not bound by the Court’s factual statement.

Adopting this interpretive rule would produce several positive results. First, it would presumably limit the creation of factual precedents. To the extent a lower court judge is confused about the authoritative force attached to Supreme Court factual claims, the interpretive rule would provide guidance: when in doubt, assume you are not bound. This result is beneficial because of the risks associated with the unfettered practice of citing the Court on factual claims. In addition, it provides clarity to judges who are unsure whether the factual question remains open.

Granted, my proposed clear statement rule cannot prevent judges who want to cite to the Court’s facts for calculated reasons—indeed, there is little that can be done about. But, an additional benefit of the clear statement rule lies in its signaling power. Like other clear statement rules, this one would be fueled by normative concerns: a nervousness about relying on authorities (the Justices) who are not authoritative on the subject at hand. Presumably, a jurisdiction that adopted this interpretive rule would send a message that factual precedents are disfavored. Thus, in theory at least, there would be a decrease in the use of factual precedents out of context by lower courts seeking to value Supreme Court factual claims beyond their actual worth.

Second, putting aside its effect on lower courts, an interpretive rule could serve to encourage candor and precision on the Supreme Court itself with respect to facts. Currently, the Court finds facts unabashedly and often cavalierly. As in *Citizens United*, it is very difficult to tell from reading its opinions when the Court is finding a fact and when the Court is articulating a legal rule. Exacerbating the already challenging task of distinguishing fact from law, the Court often speaks in “factfinding” phrases when it announces rules—evaluating “evidence” on the record and supporting observations

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<sup>289</sup> *Belton*, 453 U.S. at 460. Of course, one can always fault the Court (and some have) for not being precise enough.

about the world with empirical data and published studies.<sup>290</sup> It is easy to understand why a lower court, like Montana, might think *Citizens United* was a case “decided upon its facts or lack of facts.”<sup>291</sup>

My clear statement rule would provide an incentive for the Supreme Court to be precise on the role facts play in its decisions. The Court would be able to insulate its decision from future factual challenge only if it is clear that the fact is blended with the legal rule. The surest way to make something unreviewable is for the Court to adopt a rule that makes factfinding irrelevant: to hold, for example, that the Constitution is colorblind or that there is no possible justification for banning corporate speech. But the Justices need not go so far as to abandon all factual dimensions of their analysis; they simply need to be clear about what role the facts are playing. And, if they are not clear, then lower courts should assume the facts are *not* part of a legal rule and consequently get no precedential effect.

There are risks to this approach, to be sure. It is possible that an erroneous factual premise will become enshrined with a legal rule and, consequently, entrenched nationwide. It is also possible that the Justices will be tempted to obscure the role the fact plays and be less than candid when a legal rule depends on a factual claim. What if, for example, the Court is wrong on a premise fact like the one in *Citizens United* and, because it says it is part of a legal rule, it becomes immune to challenge in other forums?

But this objection—although legitimate—already exists and will persist to the extent facts have any role to play in Supreme Court doctrine. Moreover, the response to this risk is one familiar to discussions of *stare decisis*: the Court will have to wait and correct its course another day. Indeed, when the Court revisits a precedent, it already considers changed understandings of the facts.<sup>292</sup> At least with a default rule against factual precedents, the factual question is more often open to challenge in lower courts on new records with new evidence. Litigation can form a valuable vehicle for the Court to revisit its rule if the factual predicate changes over time.

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<sup>290</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 360-61 (2010) (stating there is only “scant evidence” that independent corporate expenditures lead to political corruption); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing social science studies and other empirical evidence to establish the substantial benefits “that diversity is designed to produce”). For a thoughtful consideration of the role social science played in the *Grutter* opinion, see Heise, *supra* note 215, at 877-80, and Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761, 804-06 (2006).

<sup>291</sup> *W. Tradition P’ship, Inc. v. Attorney Gen.*, 271 P.3d 1, 6 (Mont. 2011).

<sup>292</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992) (discussing how the Court had overturned its own precedent based on “an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions”).



## CONCLUSION

New technological changes in how we access information will inevitably affect how judges use facts to explain their decisions. There is much to be gained from firmly rooting judicial opinions in facts about the world. Our challenge, however, as we embrace this useful new tool is to safeguard against unintended sloppy results that can come from being surrounded by infinite information. Limiting factual precedents is one such solution. Lower courts should look to the Supreme Court for guidance on the law, but they should not treat the Justices as experts on everything—particularly on subjects on which they are not and do not claim to be the ultimate authority.