

In Defense of Factual Precedents

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Courts rely on legal precedents to resolve legal questions. Should courts rely on factual precedents to resolve factual questions? The idea is not baseless. Courts often rely on prior courts' decisions to determine general facts, such as recidivism rates, the dangers of a toxin, or the history and tradition of a legal norm. This Article draws attention to this overlooked practice and then poses a key question: How should a court decide about a general fact that another court has previously determined? Should the subsequent court follow the prior court's factual conclusion? Ignore it? Treat it as binding? This is the question of factual precedents.

This Article argues that courts should engage with, but not necessarily follow, prior courts' factual conclusions. Briefly, it argues for presumptive factual precedents. To defend this view, this Article develops a comprehensive framework for understanding and normatively supporting factual precedents. It explains how they structure judicial discretion, guide litigants' strategies, and enhance the legitimacy of judicial decisions about facts. This Article thus complements existing scholarship, which mostly criticizes factual precedents and narrowly focuses on facts determined by the Supreme Court. More broadly, this Article demonstrates how principles of judicial decisions about law can illuminate and improve judicial decisions about facts.

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INTRODUCTION

Courts resolve disputes by applying law to facts. Ordinarily, the law is general and relevant in many cases (e.g., “stop at the red light”), while the facts are specific and relevant to the particular case (e.g., “Joe ran the light last Wednesday”).¹ But courts also determine general facts: facts that transcend the specific circumstances of the case. General facts address broader phenomena about the world and are thus relevant in multiple, unrelated cases.² For example, in *Rando v. Anco Insulations Inc.*,³ the Supreme Court of Louisiana held that “[m]esothelioma can develop after fairly short exposures to asbestos.”⁴ This is a general fact. Many other courts have had to address this general fact when they, in turn, decided cases involving asbestos exposure.⁵

When subsequent courts consider this general fact, how should they treat *Rando*’s factual conclusion? Should they rely on it? Ignore it? Treat it as binding? More broadly, how should a court decide about a general fact that another court has previously determined? Often, when courts encounter a legal question

¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 352–54 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting that decisions about facts are “good for this case and this case only,” while decisions about law apply to many cases).

² See *infra* notes 211–18 and accompanying text (explaining the term “general facts”).

³ 16 So. 3d 1065 (La. 2009).

⁴ *Id.* at 1091.

⁵ See, e.g., *McAskill v. Am. Marine Holding Co.*, 9 So. 3d 264, 268 (La. Ct. App. 2009) (“[B]rief exposures to asbestos have caused mesothelioma.”); *Hutchins v. Anco Insulations, Inc.*, 2023 WL 3055527, at *2 (E.D. La. Apr. 24, 2023) (observing that even a short exposure to asbestos can contribute to mesothelioma); *Fowler v. Akzo Nobel Chems., Inc.*, 276 A.3d 1146, 1159 (N.J. 2022) (finding that the risk of contracting mesothelioma from exposure to asbestos is well-known).

that a prior court has already decided, they rely on that prior case as a precedent.⁶ Should courts also rely on precedents when deciding about general facts?

This is the question of factual precedents. The Article provides an answer. Subsequent courts should not be required to follow the prior court's factual conclusion. Nor should they be free to ignore it. Rather, courts ought to consider a prior court's factual conclusion as a reason, to engage with it, and to explain themselves when they decline to follow it. In other words, courts should treat prior courts' factual conclusions as "presumptive factual precedents."⁷ To support this argument, this Article surveys the surprisingly robust practice of courts relying on prior cases when deciding about general facts. It builds a framework for understanding and using factual precedents. And it explains their desirability and practical implications for courts and litigants.

The question of factual precedents is prevalent across our legal system.⁸ Whenever courts determine general facts, the question of factual precedents immediately follows. It is thus crucial that we get it right. To illustrate, consider a few examples.

In evidence cases, courts often decide about the reliability of a forensic method, for instance breathalyzers or DNA polymerase chain reaction (PCR) comparison, under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁹ or *Frye v. United States*¹⁰ standards. To do that, courts determine various general facts about these methods. For instance, they determine whether the method has gained general acceptance in the scientific community,¹¹ the specific procedures each method follows, and the technology underlying

⁶ See *infra* text accompanying notes 236–52. See generally Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) [hereinafter Schauer, *Precedent*] (analyzing the idea of precedent).

⁷ This term draws on the idea of presumptive authority. See *infra* Part II.B; Schauer, *Precedent*, *supra* note 6, at 591–93; Andrei Marmor, *Presumptive Reasons and Stare Decisis*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT 255, 265 (Timothy Endicott et al. eds., 2023). Presumptive factual precedents are stronger than what are usually called “persuasive precedents,” and close to Professor Chad Flanders’s “super persuasive authority.” See Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 61–67, 74–79 (2009) (discussing persuasive and super persuasive authority).

⁸ See generally *infra* Part I.A (surveying the practice).

⁹ 509 U.S. 579 (1993).

¹⁰ 293 F. 1013 (D.C. Cir. 1923).

¹¹ See *infra* text accompanying notes 51–60; DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE; EXPERT EVIDENCE* § 7.3 (3d ed. Supp. 2024) (discussing the use of prior cases to determine whether a method has gained “general acceptance”).

it.¹² Tort cases also involve general facts. Examples include the link between some toxin (e.g., asbestos) and disease (e.g., mesothelioma),¹³ or knowledge of this link within an industry.¹⁴ Criminal law cases often involve general facts, for instance when courts consider recidivism rates before and after conviction.¹⁵ Public health law determines general facts about a disease's risks, such as COVID-19's risk for people in detention centers.¹⁶ And constitutional law is also immersed in general facts, both "constitutional facts"¹⁷ and more recently facts about history and tradition.¹⁸

Courts struggle with the question of factual precedents. Some fiercely criticize the idea of relying on prior courts' factual conclusions.¹⁹ Others regularly cite prior cases to support their decisions about general facts.²⁰ In one case, the Supreme Court of Illinois considered general facts about the actuarial risk assessment method for assessing recidivism.²¹ The court generally criticized the idea of relying on prior judicial decisions to establish a general fact, which "can be a 'hollow ritual.'"²² Yet, it went on to decide the matter largely based on prior courts' decisions regarding these general facts. The court cited prior cases in Illinois and nineteen other jurisdictions to support its factual conclusion.²³ The court

¹² See *infra* text accompanying notes 61–71.

¹³ See *supra* notes 3–5 and accompanying text.

¹⁴ See *infra* notes 78–91 and accompanying text.

¹⁵ See *infra* text accompanying notes 113–16.

¹⁶ See *infra* text accompanying notes 122–25.

¹⁷ See generally Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

¹⁸ See generally Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699 (2024) [hereinafter Blocher & Garrett, *Originalism and Historical Fact-Finding*]; Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. 633 (2026).

¹⁹ See, e.g., *State v. Alberico*, 861 P.2d 192, 203 (N.M. 1993) (criticizing courts referring to case law to establish facts about what is generally accepted in the scientific community); *Spector v. United States*, 193 F.2d 1002, 1006 (9th Cir. 1952) ("[N]o principle of stare decisis or res judicata makes a finding of fact applicable to persons not parties to the action in which the finding is made."). This explicit rejection has roots in the English common law. See *infra* notes 135–36 and accompanying text.

²⁰ See *infra* Part I.A.

²¹ *In re Commitment of Simons*, 821 N.E.2d 1184, 1191 (Ill. 2004) (finding that actuarial risk assessment is generally accepted to evaluate risk of recidivism).

²² *Id.* at 1193 (quotation marks omitted) (quoting *People v. Basler*, 740 N.E.2d 1, 6 (Ill. 2000) (McMorrow, J., dissenting)).

²³ *Id.* at 1188–93.

also relied on prior cases negatively, noting that no court outside of the state reached an opposing conclusion about the method.²⁴

The confusion is understandable. Factual precedents defy simple solutions because they invoke conflicting intuitions. On the one hand, it seems problematic for courts to reach opposing or inconsistent factual conclusions about similar questions of fact.²⁵ Such inconsistencies make judicial decisions seem arbitrary and unfair, and frustrate predictability. Establishing factual precedents would enhance consistency, thereby reducing such harms.²⁶ On the other hand, relying on factual precedents means limiting future litigants. Despite having no role in shaping these factual conclusions, these future litigants would now have a harder time challenging them.²⁷ This seems misguided.²⁸ Put differently, our adversarial system seems to favor consistency (or, at least disfavor inconsistencies) about facts, but also to favor individualized decisions about facts. Confusingly, factual precedents promote the former while undermining the latter.

Or consider another tension. Efficiency favors factual precedents, for relitigating established general facts over and over again seems unduly burdensome for courts and litigants.²⁹ Yet, such efficiency might come at the expense of accuracy, as factual precedents might entrench factual conclusions that we know (in hindsight) are mistaken.³⁰ Lastly, and most generally, readers

²⁴ *Id.* at 1194; *People v. Luna*, 989 N.E.2d 655, 678 (Ill. App. Ct. 2013) (citing *Simons*, 821 N.E.2d at 1194) (making the same argument).

²⁵ *See, e.g., Mamiye Bros. v. Barber S.S. Lines, Inc.*, 360 F.2d 774, 777 (2d Cir. 1966) (finding it “shocking” to have two courts reaching opposite conclusions about the same general facts).

²⁶ *See infra* text accompanying notes 279–83.

²⁷ *See infra* text accompanying note 355.

²⁸ *See, e.g., Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982) (rejecting application of issue preclusion to the connection between asbestos and mesothelioma because subsequent parties might have specific circumstances and because a prior case involved relatively nominal damages and thus may not have been well litigated).

²⁹ *See State v. Casillas*, 782 N.W.2d 882, 898 (Neb. 2010) (“[C]ourts need not reinvent the wheel each time that specialized evidence is adduced.”); *Hernandez v. State*, 116 S.W.3d 26, 29 (Tex. Crim. App. 2003) (making the same argument); OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 112 (Harvard Univ. Press 2009) (1881) (“[S]upposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever?”).

³⁰ *See Commonwealth v. Shanley*, 919 N.E.2d 1254, 1264 n.15 (Mass. 2010) (stating that judicial decisions should not “grandfather[.]” . . . theories or methods for all time, especially in areas where knowledge is evolving, and new understandings may be expected as more studies and tests are conducted”); *Commonwealth v. Arrington*, 226 N.E.3d 851, 867 (Mass. 2024) (Lowy, J., concurring) (making the same argument).

surely recognize precedents as a core pillar of common law judicial decision-making. We commend judges for deciding based on prior cases and often criticize them when they ignore these cases. Readers also likely know that judges decide about both law and facts. Yet, our convictions about using precedents turn into hesitations and doubts when we imagine utilizing precedents in decisions about facts.

Existing literature provides limited guidance. Most scholarship about precedents rejects the idea of factual precedents off-hand.³¹ Yet, as this Article discusses, it is hard to tell exactly what these scholars mean by that rejection.³² Some scholars have noticed courts' tendency to use prior courts' factual conclusions, but said little about the analytical or normative implications of the phenomenon.³³ There are, of course, outliers. Professors John Monahan and Laurens Walker (with different coauthors) have suggested treating general facts as law (rather than fact). They gestured favorably at the idea of treating some facts as akin to legal precedents, but stopped short of a full analysis of factual precedents.³⁴ Professor Allison Orr Larsen has developed the most elaborate account to date and even coined the term "factual precedents."³⁵ She opposed the idea of factual precedents, and discussed only lower courts' tendency to follow factual decisions by the Supreme Court.³⁶

Against this background, this Article offers several key contributions. First, it highlights the overlooked practice of courts relying on prior cases to determine general facts. The practice is robust, encompassing various jurisdictions and legal fields, and spanning well beyond decisions by the Supreme Court. Yet, it is mostly overlooked and undertheorized. Importantly, this practice raises what I call the "question of factual precedents." Second, the Article develops a comprehensive framework for understanding

³¹ See *infra* notes 132–41 and accompanying text; see also, e.g., BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 382 (2016) ("Stare decisis has no application to findings of fact or to mixed questions of fact and law.").

³² See *infra* Part I.B.

³³ See, e.g., Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 970–71 (1955) [hereinafter Davis, *Judicial Notice*]; see also *infra* text accompanying notes 142–49.

³⁴ See, e.g., John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1718 (2008) [hereinafter Monahan et al., *Gender Discrimination*]; see also *infra* notes 156–58 and accompanying text.

³⁵ See generally Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013) [hereinafter Larsen, *Factual Precedents*].

³⁶ See *infra* notes 147–52 and accompanying text.

factual precedents. It proposes a refined definition for factual precedents and lays the analytical foundations for normative discussions about them. Third, the Article normatively argues for (presumptive) factual precedents, countering the prevailing skepticism about them.

My suggested approach has important practical implications for courts and litigants. Factual precedents would change how judges determine general facts. *Ex post*, courts would be required to engage with their predecessors' factual conclusions and explain themselves when they deviate. *Ex ante*, courts would be more careful in determining general facts, knowing that their decisions would affect future courts and be scrutinized by them.³⁷ By promoting such engagement, factual precedents would foster robust deliberations about general facts across cases. These deliberations would cultivate a shared knowledge base about these general facts—a case law dedicated to general facts. In turn, future litigants and courts could rely on this knowledge base when considering these general facts in future cases. This is especially desirable for litigants with fewer resources, for whom some general facts may be too expensive to prove in court. These litigants could read the case law to learn about these general facts and then use the factual precedents to support their arguments in future cases.³⁸

The Article continues as follows. Part I explains the status quo. Part I.A surveys the practice of courts relying on their predecessors when determining general facts, illustrating the potential effects of recognizing factual precedents. Part I.B discusses existing views in the literature about this phenomenon. Next, Part II sets the analytical foundations for a renewed debate about factual precedents. Part II.A explains what it means for courts to treat their predecessors' factual conclusions as precedents. It also distinguishes between “overriding” and “presumptive” factual precedents. Part II.B presents and defends my definition for factual precedents. Briefly, a factual precedent is a general factual conclusion that a court determines in one case, which subsequent courts ought to treat as guidance.

Part III develops my normative case for factual precedents. It begins by unpacking the practical implications of recognizing

³⁷ See *infra* Part III.A, III.B.2.

³⁸ See *infra* text accompanying notes 307–10 (discussing the concept of a shared knowledge base and its equalizing epistemic effect).

factual precedents, for courts, litigants, and more broadly (Part III.A0). Then, it explains how factual precedents would make judicial decisions about facts better—more politically and epistemically justified (Part III.B). Next, it discusses and responds to major objections to my suggestion, including concerns about accuracy, the dynamic nature of facts, potential judicial overreach, and litigants' interests in arguing their own case (Part III.C). Part IV illustrates how factual precedents would work in practice. Part IV.A details what it means for courts to engage with factual precedents. Part IV.B explains what makes factual precedents stronger or weaker. Part IV.C shows how factual precedents fit into—and change—evidence law doctrines. I conclude by outlining directions for future research.

A key insight animating this Article is that legal decisions about facts, especially general facts, have a dual nature. As decisions *about facts*, they inevitably raise epistemic considerations that are not apparent in other legal decisions. And as *legal* decisions, they invoke considerations and methods that are central to legal decision-making, including reliance on precedents. By recognizing this dual nature of legal decisions about facts, we see that the idea of factual precedents is not as odd as it may first appear. On the contrary, it has deep roots in the common law. More broadly, this Article illustrates how principles animating judicial decision-making about law (e.g., precedents) can enrich our understanding and improve judicial decision-making about facts.

Before we begin, a few points about scope and terminology. This Article explores how judicial decisions about general facts affect subsequent decisions in unrelated cases. Hence, I set aside discussions about issue and party preclusion, and about appellate review of lower courts' fact-finding.³⁹ Similarly, use of prior judgments as evidence about the same exact occurrence (e.g., using

³⁹ See generally Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251 (2016). Some of the normative arguments in favor of factual precedents that I develop in this Article are connected to arguments about nonmutual offensive issue preclusion. See generally *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). I point out these similarities along the way. Note, however, a key distinction between preclusion and factual precedents: With factual precedents, unlike preclusion, we do not assume that there is any relationship between parties to the different cases. This matters because it renders considerations that are very significant to preclusion—such as how to incentivize the parties to join cases *ex ante*, or a party's incentive to invest in litigating the prior

facts from a criminal conviction in a following civil suit) are also beyond my scope.⁴⁰ Complex litigation, including multidistrict litigation and mass torts, in which courts often set up particular procedures to determine facts that apply to thousands of cases, are also set aside.⁴¹ In a similar vein, other institutions sometimes determine general facts that govern legal disputes, but these are beyond my scope as well.⁴²

Next, the word “precedent,” properly understood, denotes both binding and nonbinding precedents.⁴³ My analytical discussion applies to all kinds of factual precedents. But the normative argument is for nonbinding (more specifically, presumptive) factual precedents. For brevity, the term “factual precedents” refers to the latter. When talking about binding precedents (i.e., the doctrine of precedent, *stare decisis*) or about all kinds of factual precedents (binding and nonbinding), I say so explicitly. Next, this Article focuses on general facts. To preempt a longer discussion, “facts” refer to claims that courts determine about reality and the way things are.⁴⁴ And “general” refers to the broad scope that these facts have, transcending the specific circumstances of the parties in a case.⁴⁵ To simplify, the words “facts” and “factual”

case—far less relevant for factual precedents. In addition, while preclusion estops a litigant from arguing against the prior decision, *see infra* note 393, factual precedents allow the party to do so.

⁴⁰ See FED. R. EVID. 803(22). See also generally Note, *Judgments as Evidence*, 46 IOWA L. REV. 400 (1961); Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979 (1986).

⁴¹ See, e.g., *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019–21 (5th Cir. 1997) (setting up “bellwether trials” to decide some issues pertaining to many future cases); *In re E.I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 918–19 (6th Cir. 2022) (noting that parties agreed to a particular procedure of fact-finding by scientific board, which would bind future litigation). See also generally Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439 (2013).

⁴² See generally Adam S. Zimmerman, *Presidential Settlements*, 163 U. PA. L. REV. 1393 (2015); Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017).

⁴³ I defer here to common usage. See *Precedent*, BLACK’S LAW DICTIONARY (12th ed. 2024). As I explain below, all precedents bind, in the sense that they require subsequent courts to treat the prior court’s decision in some way. They differ in what they require subsequent courts to do—to follow the prior court’s decision (so-called binding) or to consider and engage with the prior court’s decision (so-called nonbinding).

⁴⁴ See *infra* notes 218–34 and accompanying text. “Facts” here is shorthand for what I have previously called “legal-truths.” See Tomer Kenneth, *A Political Approach to Legal Evidence*, 35 YALE J.L. & HUMANS. 82, 96–97, 107–10 (2024).

⁴⁵ See *infra* text accompanying notes 213, 221. General facts are therefore mostly similar to legislative facts, though the latter term has additional complications that the former sidesteps. See *infra* notes 194–201.

should be understood as referring to general facts, unless explicitly stated otherwise.

Finally, factual precedents raise myriad complications. This Article aims to develop an analytical framework and a defensible normative account for factual precedents. It therefore focuses on a basic case of horizontal factual precedents within the same jurisdiction in bench trials. Think of two federal appellate courts, or courts of appeal in the same state. This is a simplification. In practice, vertical factual precedents (between lower and higher courts) surely are an important part of the picture. In addition, interesting questions arise about the application of factual precedents across jurisdictional lines,⁴⁶ and about the interactions between factual precedents and juries.⁴⁷ But these questions introduce additional complications that distract from an already dense topic. And besides, if the basic case for factual precedents fails, these complications might be merely academic. So, I mostly bracket these complications and focus on the basic case. That said, I reiterate that my analytical account aims to explain all factual precedents. And that most of the normative considerations I discuss generalize to all factual precedents, *mutatis mutandis*.⁴⁸

I. A PRACTICE LOOKING FOR A THEORY

A. Robust Legal Practice

This Section surveys the practice of courts relying on their predecessors when determining general facts. It illustrates the gravitational pull that prior decisions about general facts have on courts. Note that this is not a comprehensive survey of the practice, which would be impossible within the confines of this Article. (Indeed, the real scope of the practice is hard to determine, because legal databases neither index nor track courts' reliance on

⁴⁶ See *infra* text accompanying notes 394–96.

⁴⁷ For instance: Can jury trials create factual precedents? See *infra* note 193. How should judges' decisions to follow a prior case's factual conclusion affect the jury? Cf. FED. R. EVID. 201(f). Assuming factual precedents will affect jurors, how does this effect align with the right to jury trial in the Sixth and Seventh Amendments? This Article sets all these questions aside.

⁴⁸ These normative considerations will likely have different weight in different contexts, and additional considerations may become relevant. For instance, considerations of consistency will carry more weight within the same jurisdiction than across jurisdictional lines.

prior courts' factual conclusions.) The following is also *not* a survey of factual precedents—as I explain in depth later.⁴⁹ Instead, this survey is a proof of concept for the stakes of this Article. As noted, the question of factual precedents arises whenever courts determine general facts. Hence, introducing factual precedents into our legal practice, as this Article suggests, would impact all the following instances of courts determining general facts, and many more.

In evidence law, courts analyze the reliability of an expert's method using *Daubert* or *Frye* standards.⁵⁰ This analysis involves determining all sorts of general facts about this method. And courts regularly rely on their predecessors to determine these general facts. A prominent example is a method's general acceptance in the relevant expert community.⁵¹ As one court explained, "Because '[t]he general acceptance of a scientific technique does not change from one courtroom to another,' the legal assessment of that general acceptance should not change from

⁴⁹ See *infra* Part II.A.

⁵⁰ Reliability of a method is, arguably, itself a factual question. See, e.g., FED. R. EVID. 702 advisory committee's note to 2023 amendment (using the term "finding of reliability"). And courts regularly rely on prior courts' decisions about this issue. See, e.g., *People v. Joehnk*, 42 Cal. Rptr. 2d 6, 12 n.3 (Cal. Ct. App. 1995) (citing *Emerson v. State*, 880 S.W.2d 759, 764–70 (Tex. Crim. App. 1994)) (looking to other jurisdictions to determine the reliability of a sobriety test); *State v. Dahood*, 814 A.2d 159, 164 (N.H. 2002) (citing *Joehnk*, 42 Cal. Rptr. 2d 6) (same); *United States v. Wright*, 215 F.3d 1020, 1027 (9th Cir. 2000) (stating that the court had "already recognized" DNA PCR and RFLP tests as reliable under *Daubert*, citing other cases).

⁵¹ The term "general acceptance" has two relevant and closely related meanings. One meaning is the name of a legal standard for determining the admissibility of expert testimony, set out in *Frye*. The other, as a factual question—whether some method has in fact gained general acceptance in the relevant field. The latter is a general fact, corresponding roughly with the level of agreement about the method within the expert community. Courts often rely on their predecessors to establish this general fact. See KAYE ET AL., *supra* note 11, § 7.3.3 ("When other courts have evaluated the general acceptance of a form of scientific evidence, their opinions and decisions may provide useful precedent. Indeed, where the published indications of general acceptance are unequivocal and undisputed, courts have taken judicial notice of this acceptance.").

Confusingly, legal determinations about a method's reliability turn on this factual question (under both *Frye* and *Daubert*). Further complicating matters, some courts analyze general acceptance as a mixed question of law and fact for purposes of reviewing lower court decisions. See, e.g., *People v. Reilly*, 242 Cal. Rptr. 496, 500 (Cal. Ct. App. 1987) ("The issue, recently paraphrased as whether 'a consensus of scientific opinion has been achieved,' is factual but not entirely so for purposes of review." (quoting *People v. Brown*, 40 Cal. 3d 512, 532 (1985))). But even then, courts recognize that whether or not a consensus among scientists exists is a factual question, and that "a court should examine relevant decisions from other jurisdictions on the question of consensus." *Id.* To reiterate, this Article focuses on the factual aspect.

court to court either.”⁵² In *People v. Stevey*,⁵³ a California court held that a DNA test known as Y-STR is generally accepted in the scientific community.⁵⁴ The court relied on prior cases to support this factual claim,⁵⁵ and *Stevy* was later cited by other courts for the same.⁵⁶ Similarly, in *United States v. Gissantaner*,⁵⁷ the Sixth Circuit decided about the general acceptance of another DNA method, STRmix, which combines DNA and statistical analysis.⁵⁸ To do so, it cited “numerous courts” that had decided this general fact previously.⁵⁹ In turn, later federal and state courts relied on *Gissantaner* to decide that the method had gained general acceptance.⁶⁰

Courts also regularly determine various general facts about the procedures and technologies underlying experts’ methods.⁶¹ And they regularly rely on prior cases to do so. For example, when discussing STRmix in *People v. Gholston*,⁶² the Court of Appeals of Michigan relied on prior cases to determine the method’s error rates.⁶³ Courts in Delaware,⁶⁴ Nebraska,⁶⁵ and Texas⁶⁶ engaged in similar analysis when they, in turn, determined that method’s error rates. In a similar vein, courts also rely on prior cases to

⁵² *In re Commitment of Simons*, 821 N.E.2d 1184, 1190 (Ill. 2004) (alteration in original) (quoting *People v. Miller*, 670 N.E.2d 721, 739 (Ill. 1996) (McMorrow, J., concurring)).

⁵³ 148 Cal. Rptr. 3d 1 (Cal. Ct. App. 2012).

⁵⁴ *Id.* at 9.

⁵⁵ *See id.* at 9–12 (collecting cases).

⁵⁶ *See, e.g., People v. Locklin*, 2021 WL 1115852, at *1 (Cal. Ct. App. Mar. 24, 2021); *People v. Zapata*, 8 N.E.3d 1188, 1193 (Ill. App. Ct. 2014); *In re M.R.*, 63 Misc. 3d 916, 920 (N.Y. Cnty. Ct. 2019).

⁵⁷ 990 F.3d 457 (6th Cir. 2021).

⁵⁸ *See generally id.*

⁵⁹ *Id.* at 466 (citing federal district courts in New York, Minnesota, Illinois, Nebraska and the Superior Court of the Virgin Islands for this general fact).

⁶⁰ *See, e.g., United States v. Anderson*, 673 F. Supp. 3d 671, 677–79 (M.D. Pa. 2023); *People v. Gholston*, 2021 WL 2181079, at *6 (Mich. Ct. App. May 27, 2021); *Whitley v. State*, 2022 WL 3645589, at *7 (Tex. App. Aug. 24, 2022).

⁶¹ *State v. Vliet*, 19 P.3d 42, 60 (Haw. 2001) (stating that appellate courts should not hesitate “to take judicial notice [on appeal] of the validity of underlying scientific principles and the reliability of scientific techniques” and may rely on case law from other jurisdictions to do so (alteration in original) (quoting *State v. Ito*, 978 P.2d 191, 209 (Haw. 1999))).

⁶² 2021 WL 2181079 (Mich. Ct. App. May 27, 2021).

⁶³ *See id.* at *6 (first citing *People v. Muhammad*, 931 N.W.2d 20, 29 (Mich. Ct. App. 2018); then citing *Gissantaner*, 990 F.3d at 467–68).

⁶⁴ *See, e.g., Hudson v. State*, 312 A.3d 615, 628 (Del. 2024) (relying on two other cases to determine STRmix’s error rates).

⁶⁵ *See, e.g., United States v. Washington*, 2020 WL 3265142, at *3 (D. Neb. June 16, 2020) (relying on a prior court’s decision about STRmix’s error rates).

⁶⁶ *See, e.g., Whitley*, 2022 WL 3645589, at *7 (relying on a prior court’s decision about STRmix’s error rates).

determine general facts about the method itself. Examples include that DNA is a genetic material found in the nucleus of human cells,⁶⁷ that PCR testing amplifies some sample of the DNA,⁶⁸ and that determining the number of contributors to a DNA mixture involves a subjective evaluation.⁶⁹ Of course, this phenomenon is not limited to DNA evidence. Courts rely on prior cases when determining general facts about many evidentiary methods, including the horizontal gaze nystagmus (HGN) method to test intoxication⁷⁰ and others.⁷¹

Still within evidence law, when deciding whether to admit expert testimony, courts consider how helpful the expert will be. That is, courts evaluate whether an expert is needed to educate the jury about an issue on which the jury lacks knowledge.⁷² To decide, courts must determine general facts about what the jurors know (or do not know). And sure enough, courts rely on prior cases to determine these general facts.⁷³ For instance, in *United States v. Foster*,⁷⁴ the Seventh Circuit relied on prior cases to determine that “jurors are not well versed in the behavior of drug dealers.”⁷⁵

⁶⁷ See, e.g., *People v. Venegas*, 954 P.2d 525, 531 (Cal. 1998) (explaining the nature of DNA); *People v. Davis*, 290 Cal. Rptr. 3d 661, 670 (Cal. Ct. App. 2022) (citing *Venegas*, 954 P.2d at 531); see also, e.g., *People v. Reeves*, 109 Cal. Rptr. 2d 728, 735–36 (Cal. Ct. App. 2001); *People v. Silva*, 2006 WL 1756066, at *8 (Cal. Ct. App. June 28, 2006) (citing *Reeves*, 109 Cal. Rptr. 2d at 735–36).

⁶⁸ See, e.g., *United States v. Trala*, 162 F. Supp. 2d 336, 340–41 (D. Del. 2001); *People v. Smith*, 132 Cal. Rptr. 2d 230, 235–37 (Cal. Ct. App. 2003) (citing *Trala*, 162 F. Supp. 2d at 341–42); see also, e.g., *Davis*, 290 Cal. Rptr. 3d at 671 (citing *Smith*, 132 Cal. Rptr. 2d at 235).

⁶⁹ See, e.g., *United States v. Lewis*, 442 F. Supp. 3d 1122, 1141 (D. Minn. 2020); *United States v. Ferguson*, 2024 WL 1928776, at *9 (D. Minn. May 2, 2024) (citing *Lewis*, 442 F. Supp. 3d at 1141).

⁷⁰ See, e.g., *Emerson*, 880 S.W.2d at 763–67 (discussing the underlying theory and reliability of the technique); *Williams v. State*, 525 S.W.3d 316, 323–24 (Tex. App. 2017) (citing *Emerson*, 880 S.W.2d at 763, 766, 768); *Bryant v. State*, 2010 WL 2813494, at *3–4 (Tex. App. July 15, 2010) (citing *Emerson*, 880 S.W.2d at 766, 768–69); see also, e.g., *Joehnk*, 42 Cal. Rptr. 2d at 11–15 (discussing the general acceptance of HGN in the scientific community based on prior cases); *Dahood*, 814 A.2d at 164 (citing *Joehnk*, 42 Cal. Rptr. 2d 6); *People v. McKown*, 924 N.E.2d 941, 955 (Ill. 2010) (citing *Joehnk*, 42 Cal. Rptr. 2d 6).

⁷¹ See, e.g., *People v. Luna*, 989 N.E.2d 655, 671–79 (Ill. App. Ct. 2013) (taking judicial notice of the general acceptance of the ACE-V technique for fingerprint matching, based on prior cases).

⁷² See KAYE ET AL., *supra* note 11, § 2.6.

⁷³ See, e.g., *Linn v. State*, 929 N.W.2d 717, 742 (Iowa 2019) (discussing juries’ misconceptions about women suffering from battered woman syndrome); *Commonwealth v. Anestai*, 978 N.E.2d 37, 41 n.5 (Mass. 2012) (relying on prior cases to find that the effects of battered woman syndrome are not common knowledge).

⁷⁴ 939 F.2d 445 (7th Cir. 1991).

⁷⁵ *Id.* at 452 (relying on prior cases to determine this fact).

Subsequent courts have since relied on *Foster* (and other cases) to determine a similar general fact.⁷⁶ These examples are just the tip of the iceberg. As we'll see, there are many more general facts animating evidence cases,⁷⁷ and courts do not hesitate to rely on prior courts when determining them.

Shifting focus, in tort cases, proving general causation often involves general facts about the relationship between two elements. Because many different courts address the same general facts about this relationship, Oliver Wendell Holmes suggested that subsequent courts should rely on prior cases to determine general causation.⁷⁸ Courts seem to agree that “[b]ecause general causation is something all plaintiffs have in common, individualized proof cannot be necessary.”⁷⁹ To further illustrate, consider asbestos litigation. According to one estimate, by 2007, roughly a million asbestos-related cases were filed, and at least two thousand were tried on the merits.⁸⁰ Naturally, similar general facts about asbestos and its risks animated these cases. And courts have frequently relied on one another’s factual conclusions in determining these general facts. For example, the Louisiana Supreme Court decision discussed in the Introduction—holding that “[m]esothelioma can develop after fairly short exposures to asbestos”⁸¹—was cited by many other courts to support the same general fact.⁸²

Relatedly, consider the product liability context. The Supreme Court of New Jersey recently held that “[t]he risk of contracting

⁷⁶ See, e.g., *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008) (citing *Foster*, 939 F.2d at 452); *United States v. Winbush*, 580 F.3d 503, 511 (7th Cir. 2009) (relying on *Foster* and other cases); see also *United States v. Hinton*, 983 F.2d 1058, 1992 WL 385240, at *2 (4th Cir. 1992) (unpublished table decision) (holding that “[t]his Court has found that evidence relating to drug distribution is often out of the sphere of knowledge of most jurors,” and citing *Foster* as support).

⁷⁷ See *infra* Part IV.C.

⁷⁸ HOLMES, *supra* note 29, at 112–13; cf. Laurens Walker & John Monahan, *Scientific Authority: The Breast Implant Litigation and Beyond*, 86 VA. L. REV. 801, 830 (2000) [hereinafter Walker & Monahan, *Scientific Authority*] (suggesting treating cases discussing general causation as precedent for future cases within the same circuit).

⁷⁹ *Adkisson v. Jacobs Eng’g Grp., Inc.*, 342 F. Supp. 3d 791, 799 (E.D. Tenn. 2018).

⁸⁰ Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 593 (2007).

⁸¹ *Rando*, 16 So. 3d at 1091; accord *McAskill v. Am. Marine Holding Co.*, 9 So. 3d 264, 268 (La. Ct. App. 2009).

⁸² See, e.g., *Pete v. Boland Marine & Mfg. Co.*, 356 So. 3d 1147, 1160 (La. Ct. App. 2023) (citing *Rando*, 16 So. 3d at 1091); *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 168 So. 3d 556, 564 (La. Ct. App. 2014) (citing *Rando*, 16 So. 3d at 1091); see also, e.g., *Holcomb v. Ga. Pac., LLC*, 289 P.3d 188, 196 n.9 (Nev. 2012) (citing *McAskill*, 9 So. 3d at 268).

‘serious and often deadly asbestos-related illnesses, such as asbestosis and mesothelioma,’ from exposure to asbestos dust is well known.”⁸³ To support this claim, it referred to two previous cases—*Whelan v. Armstrong International, Inc.*⁸⁴ and *Beshada v. Johns-Manville Products Corp.*⁸⁵ *Whelan* also relied on *Beshada* to determine the same general fact. And *Beshada* itself relied on a range of factual conclusions determined in *Borel v. Fibreboard Paper Products Corp.*⁸⁶ Indeed, *Borel* determined an array of general facts about asbestos-related illnesses, and those facts were widely cited by courts in state and federal cases.⁸⁷ One court even relied on *Borel* to determine that “[a]s a matter of law asbestos dust is a producing cause of certain lung diseases, including asbestosis and mesothelioma.”⁸⁸

Another common issue in product liability cases is *when* the dangers of the toxin were knowable in the industry.⁸⁹ As Judge Edward Becker in the Third Circuit explained, this is a general fact: “By deciding that even one company in the industry . . . knew of asbestosis, the Supreme Court of New Jersey . . . found that the harms were knowable to the industry as a whole.”⁹⁰ And thus “it was not inappropriate for the court to rely on this determination” in future cases, to establish a general fact about the danger being knowable.⁹¹

⁸³ *Fowler v. Akzo Nobel Chems., Inc.*, 276 A.3d 1146, 1159 (N.J. 2022) (quoting *Whelan v. Armstrong Int’l Inc.*, 231 A.3d 640, 656 (N.J. 2020) (citing *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 542–43 (N.J. 1982))).

⁸⁴ 231 A.3d 640 (N.J. 2020); *See id.* at 655–56.

⁸⁵ 447 A.2d 539 (N.J. 1982); *See id.* at 542–43.

⁸⁶ 493 F.2d 1076 (5th Cir. 1973); *see id.* at 1083–85 (“[I]nhaling asbestos dust in industrial conditions, even with relatively light exposure, can produce the disease of asbestosis.”); *Beshada*, 447 A.2d at 542 (citing *Borel*, 493 F.2d at 1083).

⁸⁷ *See, e.g., In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 834 (E.D.N.Y. 1984) (“[A]sbestosis is alleged to be uniquely associated with asbestos exposure.” (citing *Borel*, 493 F.2d at 1083)); *Pottratz v. Davis*, 588 F. Supp. 949, 956 (D. Md. 1984) (“There is usually a long period of latency of up to more than 30 years before onset of the diseases.” (citing *Borel*, 493 F.2d at 1083)); *Harville v. Johns-Manville Prods. Corp.*, 731 F.2d 775, 777 (11th Cir. 1984) (citing *Borel*, 493 F.2d at 1083) (describing the pathologies of pulmonary diseases as a result of exposure to asbestos).

⁸⁸ *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836, 841 (E.D. Tex. 1980).

⁸⁹ *See, e.g., In re Asbestos Litig.*, 829 F.2d 1233, 1246 (3d Cir. 1987) (Becker, J., concurring).

⁹⁰ *Id.* at 1247.

⁹¹ *Id.*; *see also id.* at 1248–49 (finding knowability of the harm of asbestos to be a legislative fact).

Next, general facts are also ubiquitous in constitutional cases.⁹² And courts often rely on prior cases to determine these general facts. Larsen has surveyed lower courts' tendency to rely on the U.S. Supreme Court's factual conclusions. She discussed general facts in many constitutional cases, such as the impact of affirmative action on student admissions, the prevalence of in-person voter fraud, and the effect of corporate expenditure on political corruption, among others.⁹³ Or, take another example. In *Gonzales v. Carhart*,⁹⁴ Justice Anthony Kennedy, on behalf of the Court, observed that some women tend to regret their choice to have an abortion.⁹⁵ Later, both federal courts in their decisions⁹⁶ and litigants in their briefs⁹⁷ relied on this case to establish this general fact. Indeed, many facts that courts rely on in constitutional cases originate from the Supreme Court. But some do not. In *Perry v. Schwarzenegger*,⁹⁸ Judge Vaughn Walker determined a series of general facts about the similarities between same-sex and heterosexual couples, finding them equally likely to be good parents, contribute to society, have successful marital unions, and much more.⁹⁹ Later, state¹⁰⁰ and federal¹⁰¹ courts used these general facts in their opinions, as did litigants in their briefs.¹⁰²

General facts appear to be on the rise in constitutional law. In *New York State Rifle & Pistol Ass'n v. Bruen*,¹⁰³ the Court adopted a methodology of constitutional interpretation that relies

⁹² See generally DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008).

⁹³ Larsen, *Factual Precedents*, *supra* note 35, at 81–97.

⁹⁴ 550 U.S. 124 (2007).

⁹⁵ *Id.* at 159.

⁹⁶ See, e.g., *Whole Woman's Health v. Paxton*, 10 F.4th 430, 444 (5th Cir. 2021); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 430 (6th Cir. 2019); *Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1045 (D. Neb. 2010).

⁹⁷ See, e.g., Brief of 2,556 Operation Outcry Women Injured by Abortion and the Justice Foundation as Amici Curiae in Support of Cross-Petitioner at 9, *Gee v. June Med. Servs. L.L.C.*, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460); Brief of CatholicVote.org as Amicus Curiae in Support of Petitioners at 15, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (No. 18-483).

⁹⁸ 704 F. Supp. 2d 921 (N.D. Cal. 2010).

⁹⁹ See *id.* at 967, 980.

¹⁰⁰ E.g., *Donaldson v. State*, 292 P.3d 364, 400 (Mont. 2012) (Nelson, J., dissenting).

¹⁰¹ E.g., *De Leon v. Perry*, 975 F. Supp. 2d 632, 651–55 (W.D. Tex. 2014); *Pedersen v. Off. of Pers. Mgmt.*, 881 F. Supp. 2d 294, 317–19 (D. Conn. 2012); *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 938 (S.D. Miss. 2014).

¹⁰² See generally Brief of Kristin M. Perry et al. as Amici Curiae in Support of Petitioners, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

¹⁰³ 142 S. Ct. 2111 (2022).

heavily on establishing general facts about history and tradition.¹⁰⁴ In addition to the Second Amendment, courts have relied on general facts about history and tradition in the context of the Fourteenth¹⁰⁵ and First¹⁰⁶ Amendments.¹⁰⁷ And courts use these general facts for interpreting as well as applying constitutional norms.¹⁰⁸ Courts following this methodology gladly rely on their predecessors to establish such general facts.¹⁰⁹ In *United States v. Villalobos*,¹¹⁰ a court relied on historical analysis done in two prior cases.¹¹¹ The court was so confident in relying on prior decisions about general facts regarding history and tradition that it noted:

The Court could fill pages with the law review articles, treatises, and dissertations outlining the historical analogs and traditions of disarming those who failed to uphold the virtuous citizenry that our founders envisioned. But to what end? It has been exhaustively outlined before. There is no need for the Court to recite the same things again here just for the sake of saying it did it in this case.¹¹²

¹⁰⁴ *Id.* at 2126, 2130 (holding that regulation of conduct covered by the Second Amendment must be consistent with “this Nation’s historical tradition”).

¹⁰⁵ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2267 (2022) (referencing “the most important historical fact—how the States regulated abortion when the Fourteenth Amendment was adopted”).

¹⁰⁶ *Vidal v. Elster*, 144 S. Ct. 1507, 1518 (2024) (“[I]n evaluating a solely content-based trademark restriction, we can consider its history and tradition, as we have done before when considering the scope of the First Amendment.”); *Nat’l Republican Senatorial Comm. v. FEC*, 117 F.4th 389, 399 (6th Cir. 2024) (Thapar, J., concurring) (noting that following *Bruen*, “[h]istory should therefore guide [the court’s] First Amendment jurisprudence”). *But see Vidal* 144 S. Ct. at 1525 (Barrett, J., concurring in part) (“[T]he Court never explains why hunting for historical forebears on a restriction-by-restriction basis is the right way to analyze the constitutional question.”); *id.* at 1533–35 (Sotomayor, J., concurring in the judgment).

¹⁰⁷ *See generally* Blocher & Siegel, *supra* note 18.

¹⁰⁸ *See generally* Blocher & Garrett, *Originalism and Historical Fact-Finding*, *supra* note 18; Joseph Blocher & Brandon L. Garrett, *Applying History as Law: The Role of Historical Facts in Implementing Constitutional Doctrine*, 104 TEX. L. REV. 679 (2026).

¹⁰⁹ *See, e.g.*, *United States v. Smith*, 2023 WL 2215779, at *3 (E.D. Mich. Feb. 24, 2023) (“[A]s several courts have observed, felon-in-possession prohibitions have sufficient grounding in historical tradition.”); *United States v. Yates*, 2023 WL 5016971, at *2 (D. Idaho Aug. 7, 2023) (observing that courts adopt “the recitations of history set forth by sister courts,” and “[m]ore than 120 other courts since *Bruen* reached the same conclusion using similar methods”).

¹¹⁰ 2023 WL 3044770 (D. Idaho Apr. 21, 2023).

¹¹¹ *See id.* at *11.

¹¹² *Id.* at *11 n.15.

Now consider criminal law. Courts regularly assess recidivism risks in sentencing and bail hearings. To do that, courts often refer to general facts about recidivism rates for certain groups of offenders. And courts often rely on prior judicial decisions to determine these general facts. For example, courts have relied on prior cases to determine that nonviolent offenders have higher recidivism rates,¹¹³ that terrorists have uniquely high recidivism rates,¹¹⁴ that sex offenders have “frightening and high” recidivism rates,¹¹⁵ and that older individuals are less likely to recidivate.¹¹⁶

Moreover, several states have enacted post-conviction relief measures. These allow convicted persons to challenge a conviction that was based on false evidence—evidence that is unreliable in hindsight.¹¹⁷ The Supreme Court recently highlighted this trend, encouraging states to enact such legislation.¹¹⁸ Importantly for our purposes, these cases turn on discussions about general facts, which other courts tend to later use.¹¹⁹ For example, after one post-conviction relief case in Texas opined on the (un)reliability of specific bite-mark comparisons,¹²⁰ others soon followed.¹²¹

¹¹³ *E.g.*, *Banks v. United States*, 490 F.3d 1178, 1191 (10th Cir. 2007) (relying on another case); *United States v. Kriesel*, 508 F.3d 941, 949–50 (9th Cir. 2007) (citing *Banks*, 490 F.3d at 1191).

¹¹⁴ *E.g.*, *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011) (relying on another case); *United States v. Ressim*, 679 F.3d 1069, 1091 (9th Cir. 2012) (citing *Jayyousi*, 657 F.3d at 1117).

¹¹⁵ Ira Mark Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 495–97 (2015) (quoting *McKune v. Lile*, 536 U.S. 24, 33 (2002)).

¹¹⁶ *E.g.*, *United States v. Payton*, 754 F.3d 375, 379 (6th Cir. 2014); *United States v. Taylor*, 800 F.3d 701, 716 (6th Cir. 2015) (citing *Payton*, 754 F.3d at 379); *United States v. Figueroa*, 2018 WL 5099227, at *4 (6th Cir. Sept. 14, 2018) (citing *Payton*, 754 F.3d at 377).

¹¹⁷ *See, e.g.*, Amelia Maxfield & Nilam A. Sanghvi, *Junk Statute: How Post-Conviction Statutes Fail Petitioners Convicted Based on False or Misleading Forensic Evidence*, 75 RUTGERS U. L. REV. 1343, 1352–57 (2023) (discussing Pennsylvania law and post-conviction relief measures more broadly); Robert Harry Saylor III, Note, *All Bark, No Bite: How the Lone Star “Junk Science Writ” Could Reinvigorate Federal Habeas Review*, 52 HOFSTRA L. REV. 515, 517–21 (2024) (discussing the post-conviction relief law in Texas).

¹¹⁸ *See McCrory v. Alabama*, 144 S. Ct. 2483, 2483 (2024) (statement of Sotomayor, J., respecting the denial of certiorari) (denying certiorari in a forty-year-old conviction “resting on science that has now been wholly discredited”).

¹¹⁹ *See, e.g.*, *Ex parte Hightower*, 622 S.W.3d 371, 373–76 (Tex. Crim. App. 2021) (addressing changes that affect witnesses’ confidence in the cause of death); *Ex parte Roark*, 707 S.W.3d 157, 185–87 (Tex. Crim. App. 2024) (addressing changes to scientific understanding about shaken baby syndrome).

¹²⁰ *Ex parte Chaney*, 563 S.W.3d 239, 255–57 (Tex. Crim. App. 2018) (finding, in hindsight, that individuation based on a bite mark in an open population is unreliable).

¹²¹ *See, e.g.*, Order Granting Extraordinary Motion for New Trial, *State v. Denton*, 2020 WL 7232303, at *7 (Ga. Super. Ct. Feb. 7, 2020); Order Denying Petition for Writ of

Next, consider public health law. During the COVID-19 pandemic, courts relied extensively on other courts to establish general facts about epidemiology. Many courts cited one case from the Southern District of New York for the general fact that COVID-19 “causes severe medical conditions and has increased lethality” for older people and for those with underlying health problems.¹²² Courts also relied on their predecessors’ factual conclusions about the number of COVID-19 related deaths in the state¹²³ and about the danger the disease poses for particular communities in jails and detention centers.¹²⁴ Similarly, in the immigration context, courts assessing claims of irreparable harm caused by detention have determined general facts about the risk of COVID-19 in detention centers by relying on prior cases.¹²⁵

There are many more miscellaneous examples. Courts have relied on previous cases to determine general facts about whisky’s alcohol content,¹²⁶ about the length of time it usually takes for alcohol to dissipate from the bloodstream,¹²⁷ and about the goals of the Communist Party.¹²⁸ Courts have also relied on prior decisions

Habeas Corpus, *Ex parte* Chanthakoummane, 2020 WL 5927442, at *3 (Tex. Crim. App. Oct. 7, 2020).

¹²² *Basank v. Decker*, 449 F. Supp. 3d 205, 211 (S.D.N.Y. 2020); *see also, e.g.*, *United States v. McGlory*, 2020 WL 1905719, at *2 (E.D. Mich. Apr. 17, 2020) (citing *Basank*, 449 F. Supp. 3d at 211); *Jones v. Wolf*, 467 F. Supp. 3d 74, 87 (W.D.N.Y. 2020) (citing *Basank*, 449 F. Supp. 3d at 211); *United States v. Saad*, 2020 WL 2251808, at *4 (E.D. Mich., May 5, 2020) (citing *Basank*, 449 F. Supp. 3d at 211).

¹²³ *E.g.*, *Taylor v. Milford Reg’l Med. Ctr., Inc.*, 733 F. Supp. 3d 8, 11 (D. Mass. 2024) (noting the COVID-19 death rates in Massachusetts and worldwide (citing *Desrosiers v. Governor*, 158 N.E.3d 827, 833 (Mass. 2020))).

¹²⁴ *E.g.*, *Basank*, 449 F. Supp. 3d at 212 (citing state and federal courts); *Valenzuela Arias v. Decker*, 612 F. Supp. 3d 307, 313 (S.D.N.Y. 2020) (same).

¹²⁵ *E.g.*, *Jones*, 467 F. Supp. 3d at 87; *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 39 (N.D. Cal. 2020).

¹²⁶ *E.g.*, *Singer v. United States*, 278 F. 415, 418 (3d Cir. 1922) (describing “[w]hisky as a well-known intoxicating liquor of high alcoholic content”); *Albert v. United States*, 281 F. 511, 513 (6th Cir. 1922) (citing *Singer*, 278 F. at 418); *Benson v. United States*, 10 F.2d 309, 310 (5th Cir. 1925) (citing *Singer*, 278 F. at 418).

¹²⁷ *E.g.*, *Missouri v. McNeely*, 569 U.S. 141, 169 (2013) (Roberts, C.J., concurring in part); *Ramirez v. Dixon*, 2023 WL 4998574, at *8 n.3 (S.D. Fla. Aug. 4, 2023) (citing *McNeely*, 569 U.S. at 169); *State v. Howes*, 893 N.W.2d 812, 824–25 (Wis. 2017) (citing *McNeely*, 569 U.S. at 169); *United States v. Manubolu*, 13 F.4th 57, 76 (1st Cir. 2021) (citing *McNeely*, 569 U.S. at 169).

¹²⁸ *E.g.*, *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 425–33 (1950) (Jackson, J., concurring in part and dissenting in part); *Schwartz v. Bd. of Bar Exam’rs*, 291 P.2d 607, 617 (N.M. 1957) (citing *Douds*, 339 U.S. at 425–33); *Appeal of Albert*, 92 A.2d 663, 666 (Pa. 1952) (citing *Douds*, 339 U.S. at 425, 427, 429, 431).

to determine general facts about climate change,¹²⁹ about the technology underlying BitTorrent file sharing protocols,¹³⁰ and about the prevalence of cellphones.¹³¹ And the list goes on.

B. Existing Scholarship: Limited Attention, Fewer Answers

The survey above shows that prior courts' factual conclusions have a certain appeal. Courts rely on their predecessors' conclusions regarding general facts regularly and frequently. They do so in a wide range of legal fields. Yet, perhaps surprisingly, the scholarly response to this practice has been underwhelming.

One common view simply dismisses the idea. On this approach, facts simply do not gain precedential force.¹³² In the scholarship about precedents, discussions about treating facts as precedents are scarce and often underdeveloped. For instance, in a recent inquiry about the nature of precedent that spans forty chapters, only one discusses facts as precedents.¹³³ That chapter, however, repeatedly objects to judicial decisions about facts being treated as precedents.¹³⁴ The English common law tradition, which drives much of our current understanding of precedents,¹³⁵

¹²⁹ *E.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (explaining general facts about greenhouse gases); *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012) (citing *Massachusetts*, 549 U.S. at 505); *Peekema v. Bay Area Air Quality Mgmt. Dist.*, 2009 WL 10701552, at *1 (N.D. Cal. Oct. 6, 2009) (citing *Massachusetts*, 549 U.S. at 504–05).

¹³⁰ *E.g.*, *Third Degree Films v. Does 1–47*, 286 F.R.D. 188, 192 (D. Mass. 2012) (citing *Liberty Media Holdings, LLC v. Swarm Sharing Hash File*, 821 F. Supp. 2d 444 (D. Mass. 2011)); *Patrick Collins, Inc. v. Does 1–38*, 941 F. Supp. 2d 153, 158 (D. Mass. 2013) (citing *Third Degree Films*, 286 F.R.D. at 192–93).

¹³¹ *E.g.*, *Riley v. California*, 573 U.S. 373, 393–95 (2014); *Jones v. United States*, 168 A.3d 703, 711 n.18 (D.C. Cir. 2017) (citing *Riley*, 573 U.S. at 395); *Butler v. State*, 459 S.W.3d 595, 601 n.3 (Tex. Crim. App. 2015) (citing *Riley*, 573 U.S. at 393–95).

¹³² *See, e.g.*, Jabez Fox, *Law and Fact*, 12 HARV. L. REV. 545, 551–52 (1899) (arguing that factual conclusions are left to the judge's discretion such that judges are “bound by no precedent and [their] decision[s] make[] no precedent for any future judge”); Larry Alexander, *Precedent: The What, the Why, and the How*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 7, at 11, 11 (“[T]he doctrine of precedent deals with determinations of law, not fact.”); Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 174–75, 174 n.199 (1984) (arguing that what the author calls “historical facts” (including both adjudicative and social facts) have no impact on future cases involving different parties).

¹³³ *See* Adam Rigoni, *Precedent and Legal Creep: A Cause for Concern?*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 7, at 62, 62–74.

¹³⁴ *See id.* at 62, 64.

¹³⁵ *See* *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2276–77 (2024) (Gorsuch, J., concurring) (discussing the origins of stare decisis in the common law, referring to English cases).

is no different. There too, sources that address the matter reject the precedential effect of facts.¹³⁶ Closer to home, a recent treatise on *The Law of Judicial Precedents*, coauthored by thirteen jurists including two Supreme Court Justices and ten judges on circuit courts of appeal, states that “[s]tare decisis has no application to findings of fact or to mixed questions of fact and law.”¹³⁷ Other works explicitly reject all factual precedents, declaring that “no case is an authoritative source for establishing facts (outside the narrow confines of issue preclusion).”¹³⁸

Unfortunately, these interventions offer little more than the cited proclamations. The brevity of these discussions leaves room for many questions. For one, it is not clear whether these scholars reject factual precedents analytically or normatively.¹³⁹ Nor is it clear whether their criticism is mounted against all factual precedents, or only against binding factual precedents.¹⁴⁰ Some of them seem to be opposed to factual precedents about specific (adjudicative) facts, without considering the precedential role of general facts.¹⁴¹ Substantive reasons supporting these objections—whatever their aim is—are absent. But a strong vibe against factual precedents is hard to miss.

Another view recognizes the practice of courts relying on their predecessors when determining facts. But these interventions do not move beyond this descriptive insight. Professor Henry Wolf Biclé noted that the Supreme Court has dealt with

¹³⁶ See, e.g., Timothy Endicott, *Questions of Law*, 1144 LAW Q. REV. 292, 294 (1998) (stating that courts can “set the precedent to bind a later court on questions of law, but not on questions of fact”); RUPERT CROSS, PRECEDENT IN ENGLISH LAW 221 (3d ed. 1977) (“[D]ecisions on questions of fact do not constitute a precedent.”); see also *id.* at 39 (explaining that “th[e] status [of precedent] is reserved for [courts’] pronouncements on the law,” not to disputes that are about facts). In the latter, there is no point in searching for a ratio decidendi. The leading case on this proposition is *Qualcast (Wolverhampton) Ltd. v. Haynes*, [1959] AC 743 (Eng.). See *id.* at 757 (holding that questions of fact, which were traditionally resolved by the jury, do “not become part of our law citable as a precedent”); see also *In re Norman* [1886] 16 Q.B.D. 673, 675 (Eng.) (explaining that in courts of equity, judges decide matters of facts and law, but their decisions are “not a conclusive authority, binding [their] successors in the decision of questions of fact”).

¹³⁷ GARNER ET AL., *supra* note 31, at 382 (“Precedents wield authority and power only to the extent that they establish or reinforce a legal rule or principle.”).

¹³⁸ Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1637–38 (2020) [hereinafter Gardner, *Dangerous Citations*].

¹³⁹ Some seem analytical, see, e.g., *id.*, others normative, see, e.g., *supra* note 136. The majority can be interpreted either way.

¹⁴⁰ Some focus explicitly on stare decisis, see, e.g., *supra* note 137, others explicitly argue more broadly, see, e.g., *supra* note 138. The majority can be interpreted either way.

¹⁴¹ See GARNER ET AL., *supra* note 31, at ch. 44 (criticizing factual precedents but using examples of only adjudicative facts, in the chapter dedicated to “[f]indings of [f]act”).

the task of determining facts “just as it deals with the usual question of law, as a matter dependent upon reasoning and precedent.”¹⁴² Professor Kenneth Culp Davis argued that “factual propositions of law that have been laid down in earlier cases” are “one of the principal sources” for judicial decision-making about facts.¹⁴³ And legal scholar Brianne Gorod suggested that “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.”¹⁴⁴ Scholar Gail Perry and Professor Gary Melton surveyed the lingering effects of a Supreme Court factual conclusion in family law.¹⁴⁵ And Professor Hiroshi Motomura showed how courts rely on prior courts’ judgments as evidence in patent, employment discrimination, and antitrust cases, as well as when using prior criminal convictions in later civil cases.¹⁴⁶ These scholars have recognized the gravitational pull of factual precedents, but have not offered analytical or normative accounts to explain it.

A third view recognizes and criticizes a subset of factual precedents. Larsen has developed the most robust account of factual precedents to date. She discussed a series of factual conclusions by the Supreme Court that were adopted by lower courts.¹⁴⁷ Larsen coined the term “factual precedents” to denote “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.”¹⁴⁸ She later used the term to describe “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

¹⁴² Henry Wolf Bicl , *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 12 (1924).

¹⁴³ Davis, *Judicial Notice*, *supra* note 33, at 970–71.

¹⁴⁴ Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 64 (2011).

¹⁴⁵ Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J. FAM. L. 633, 644–45 (1983) (“It seems probable that social facts found in judicial opinions, especially in Supreme Court opinions, have an aura of authenticity that leads to greater judicial acceptance and makes them more presentable in opinions.”). Perry and Melton found that some “social facts” determined by the Supreme Court in *Parham v. J.R.*, 442 U.S. 584 (1979), were adopted by lower courts and some were ignored. Perry & Melton, *supra*, at 644–45.

¹⁴⁶ Motomura, *supra* note 40, at 982–1001. I am hesitant to consider precedents as evidence, but I leave this point for another time.

¹⁴⁷ Larsen, *Factual Precedents*, *supra* note 35, at 81–97.

¹⁴⁸ *Id.* at 62.

indeed true.”¹⁴⁹ Larsen used the term “precedent” to refer to both binding and persuasive authority.¹⁵⁰ Normatively, she was critical of factual precedents. She argued that the default rule “should be to give no authoritative force to Supreme Court statements of fact.”¹⁵¹ Her only exception are cases in which “the Supreme Court is clear that its factual statements are part of a legal rule.”¹⁵² Larsen’s view caught on. Several scholars adopted her terminology, scope, and definition (at least implicitly),¹⁵³ and joined her in normatively criticizing factual precedents.¹⁵⁴

Finally, a handful of scholars voiced more supportive views about factual precedents, though mostly in passing and none since Larsen’s influential article.¹⁵⁵ Notably, in a series of articles, Monahan and Walker (with different co-authors) developed the idea of “social frameworks,” by which “‘general’ social science research . . . can provide a valuable context for deciding case-specific

¹⁴⁹ *Id.* at 73.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 108; see also Larsen, *Factual Precedents*, *supra* note 35, at 66 (“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.”).

¹⁵² *Id.* at 110–11. For a similar view, see Haley N. Proctor, *Rethinking Legislative Facts*, 99 NOTRE DAME L. REV. 955, 1000–02 (2024) (finding it “[u]nfortunate[]” that such “premise facts” have effects on future cases).

¹⁵³ See, e.g., Gardner, *Dangerous Citations*, *supra* note 138, at 1621, 1638–45 (adopting Larsen’s terminology and criticizing the use of factual precedents); Brent Ferguson, *Predictive Facts*, 95 WASH. L. REV. 1621, 1624 (2020); Sheldon Whitehouse, *Knights-Errant: The Roberts Court and Erroneous Fact-Finding*, 84 OHIO ST. L.J. 837, 846–47 (2023); David Schraub, *Doctrinal Sunsets*, 93 S. CAL. L. REV. 431, 458–60 (2020); Alexandra S. Bornstein, Note, *The Facts of Stigma: What’s Missing from the Procedural Due Process of Mental Health Commitment*, 18 YALE J. HEALTH POL’Y L. & ETHICS 127, 160–63 (2018). Most recently, Larsen’s views resurfaced in discussions about historical facts in constitutional interpretation. See, e.g., Blocher & Garrett, *Originalism and Historical Fact-Finding*, *supra* note 18, at 722; Michael L. Smith, *History as Precedent: Common Law Reasoning in Historical Investigation*, 27 U. PA. J. CONST. L. 587, 648–49 (2025).

¹⁵⁴ See, e.g., Gorod, *supra* note 147, at 65–66 (criticizing the idea of factual precedents, noting that facts change and that factual precedents would cause problems for subsequent litigants); Ferguson, *supra* note 156, at 1655–58 (asserting that factual precedents are problematic due to potential inaccuracies, which are worsened when courts use unverified predictive facts); Whitehouse, *supra* note 153, at 883–84 (arguing that lower courts should refrain from adhering to factual precedents set by the Supreme Court); Rigoni, *supra* note 133, at 63 (arguing that factual precedents undermine legitimacy).

¹⁵⁵ For general discussion in this direction, see, for example, Davis, *Judicial Notice*, *supra* note 33, at 970–71; Motomura, *supra* note 40, at 1051–55 (stating that prior judgments should (sometimes) be admissible as evidence and be seen as weak presumptions).

factual issues.”¹⁵⁶ They suggested treating social science, specifically “scientific methodology” or “social facts,” as legal decisions, not as facts. In turn, they suggested deciding about social science using methods often used for legal decisions—briefs, independent research, and precedents.¹⁵⁷ Excavating this series of articles, one may find many useful insights about factual precedents. However, Monahan and Walker’s real focus was different. Against Davis, who conceptualized social science data as legislative facts, they argued such data should be analyzed as legal decisions. As a corollary, they argued that “its admission raises issues analogous to those presented by the creation and use of precedent in the common law.”¹⁵⁸ But they stopped far short of conducting a robust analysis of factual precedents, the relevant considerations for and against them, or the practical implications involved. In short, Monahan and Walker pointed in the right direction. But their articles leave many analytical and normative questions about factual precedents unanswered (indeed, unasked).

* * *

To recap, this is the current state of the art regarding factual precedents. Part I.A shows courts’ tendency to rely on prior cases

¹⁵⁶ See Monahan et al., *Gender Discrimination*, *supra* note 34, at 1718; Walker & Monahan, *Scientific Authority*, *supra* note 78, at 817–23 (explaining a model of “scientific authority,” analogizing the generality of social science to law). *But see* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 757–760 (2007) (criticizing their approach).

¹⁵⁷ See John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488 (1986) [hereinafter Monahan & Walker, *Social Authority*] (suggesting that courts should treat “social science research as they would legal precedent under the common law”); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877, 879 (1988) [hereinafter Walker & Monahan, *Social Facts*] (supporting treating specific methodologies as precedent, but criticizing the court for “granting precedential value to the specific findings of empirical studies that had previously received judicial approval”); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 583–91 (1987) [hereinafter Walker & Monahan, *Social Frameworks*] (arguing for precedential weight for social frameworks, which are general conclusions from social science research, to help determine specific factual issues in a case); Monahan et al., *Gender Discrimination*, *supra* note 34, at 1726–27 (arguing that due to social frameworks’ generality, courts should “evaluate [them] as legal precedent is evaluated”).

¹⁵⁸ Monahan et al., *Gender Discrimination*, *supra* note 34, at 1742. The authors discussed social facts in another paper, but it barely mentions precedents. *See* Gregory Mitchell, Laurens Walker & John Monahan, *Beyond Context: Social Facts as Case-Specific Evidence*, 60 EMORY L.J. 1109, 1117 (2011).

when determining general facts. Some scholars seem to strongly oppose this trend. But it is unclear if we should understand them as rejecting the idea of factual precedents entirely or merely opposing binding factual precedents (i.e., *stare decisis*). Anyhow, they offered no explanation for the existing practice, and little to no normative or analytical argumentation against factual precedents. Another group of scholars has recognized this prevalent practice in passing, stopping short of theorizing it. Larsen has offered a more robust account. But her analytical account is limited by its focus on decisions by the Supreme Court that lower courts adopt. While the Court is important and influential, it is also idiosyncratic in its immense powers and unique (or nonexistent) procedures for determining facts. Moreover, as discussed above, courts regularly rely on prior courts' factual conclusions, not only when such conclusions were reached by the Supreme Court. In addition, Larsen was critical of factual precedents. Monahan and Walker favorably considered factual precedents, but offered a limited normative and analytical account of them.

In sum, the idea of factual precedents has a strong gravitational pull. Courts are drawn to it, and scholars have recognized that it has merit. But a robust theory of factual precedents, one that situates factual precedents as part of our judicial system, is still wanting. Besides, no serious attempt has been made to defend factual precedents or respond to the idea's critics. The rest of this Article develops such a theory and argues for factual precedents.

II. FACTUAL PRECEDENTS: AN ANALYTICAL FRESH START

The previous Part illustrates that courts regularly and recurrently decide about general facts. General facts, as noted, apply to many unrelated cases. Hence, a normative question arises: How should a court decide about a general fact that another court has previously determined? This, recall, is the question of factual precedents. As explained, existing scholarship is mostly opposed to (and sometimes dismissive of) factual precedents. I advocate for them. But first, there is some analytical work to be done. We need to understand what factual precedents are.

This Part analyzes the concept of factual precedents, offering a new (and hopefully improved) definition for it. The main goal is to set the analytical foundations for discussing the desirability of factual precedents, in this Article and beyond.

A. Changing the Status Quo—Analytical

The survey in Part I.A illustrated that courts often rely on past cases to determine general facts. Yet, I've argued that the existing practice is *not* one of factual precedents. A reader may wonder: Why not? To answer, we need to understand the analytical differences between the status quo and factual precedents.

Our starting point is that different courts ought to determine similar general facts in unrelated cases. And the question is how subsequent courts should treat earlier courts' decisions about these general facts. It is helpful to step back and think of the possible approaches that subsequent courts can have toward prior courts' factual conclusions. Each possible approach presents a distinct model of addressing prior decisions about facts—a different answer to the question of factual precedents. To preempt this Section's conclusion, our existing practices best fit a persuasion model, which differs from a factual precedents model. And here lies the analytical change that this Article puts forth. Let us unpack.

One possible approach is that (a) courts may be *prohibited* from using prior courts' decisions about general facts.¹⁵⁹ A second approach is that (b) courts may be *allowed* to use a prior court's factual conclusion in their decision-making, and have wide discretion in doing so. On this second view, courts could use the prior decision (e.g., when they are persuaded by its content), but would also be free to ignore it altogether (e.g., when they disagree with its content). Finally, (c) courts may be *required* to use a prior court's factual conclusion in their decision-making, regardless of what they think about the prior decision's content and simply because a prior court has decided it. This third model is where we find factual precedents. As we'll see, model (c) has important subdivisions. But let us stick to these three models for now.

We can safely discard model (a). This model sees prior courts' factual conclusions as impermissible sources in our legal system.¹⁶⁰ Whether something is a permitted source in our legal system turns on jurisprudential questions about the nature of law and

¹⁵⁹ On this view, prior courts' decisions about general facts are not permitted sources for subsequent courts. See Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1946–47 (2008) [hereinafter Schauer, *Authority and Authorities*].

¹⁶⁰ See *id.* at 1946–47 (stating that permitted sources are ones a court may use in their judgment); FREDERICK F. SCHAUER, *PLAYING BY THE RULES* 86–87 (1991) [hereinafter SCHAUER, *PLAYING BY THE RULES*] (discussing rules that require excluding or including some factor).

the rule of recognition.¹⁶¹ Some may normatively favor the restrictive approach of model (a).¹⁶² But the survey in Part I.A suggests that, in practice, courts see their predecessors' decisions about facts as a permissible source.¹⁶³ And this practice by courts seems sufficient to render prior decisions as permissible sources under the rule of recognition.¹⁶⁴

So, let us focus on the other two models. Consider model (b), that courts are free to use their predecessor's factual conclusions, and do so when they are *persuaded* by their content. Courts often treat various sources in this way. They use prior cases, foreign law, legislative history, restatements of law, and many other sources as "persuasive authority."¹⁶⁵ This model seems to explain the existing practice. It explains why courts sometimes—but not always—cite prior cases when they determine general facts, as the survey above shows. And I assume most readers would have no quarrel with courts relying on prior courts' factual conclusions in the way that this persuasion-based model suggests. I therefore take (b) as the baseline model for explaining courts' practice of citing their predecessors' factual conclusions. That is, we begin with the assumption that courts treat general facts that their predecessors decided as persuasive authority.

Notice the limitations of model (b). A persuasion-based model frees subsequent courts to use prior courts' factual conclusions.¹⁶⁶ But it offers few (if any) positive guidelines about when and how to use them. On this view, a subsequent court is at liberty to adopt

¹⁶¹ See Hafsteinn Dan Kristjánsson, *Elements of Precedent*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 7, at 75, 79–80 (explaining that "[w]hether or not a precedent is a source in a legal system . . . depends on whether there is a norm of recognition that identifies a precedent as a source," which itself invokes the rule of recognition); H.L.A. HART, *THE CONCEPT OF LAW* 94–95, 294 (2d ed. 1994) (discussing the rule of recognition); Schauer, *Authority and Authorities*, *supra* note 159, at 1956–60.

¹⁶² See, e.g., Gardner, *Dangerous Citations*, *supra* note 138, at 1637–38 ("[N]o case is an authoritative source for establishing facts . . ."); Rigoni, *supra* note 133, at 66.

¹⁶³ See *supra* Part I.A; *supra* text accompanying notes 142–46.

¹⁶⁴ See Schauer, *Authority and Authorities*, *supra* note 159, at 1957 ("A citation to a particular source is not only a statement by the citer that this is a good source but also a statement that sources of this type are legitimate." (emphasis omitted)).

¹⁶⁵ See Flanders, *supra* note 7, at 61–68 (explaining that persuasive authority is conventionally understood as not binding and as flowing from the persuasive content of the authority, and listing twelve sources regarded as persuasive authority). I think the term "persuasive authority" is inadequate, following Schauer. See Schauer, *Authority and Authorities*, *supra* note 159, at 1940–44 (arguing that persuasive authority in this sense is a contradiction in terms).

¹⁶⁶ See SCHAUER, *PLAYING BY THE RULES*, *supra* note 160, at 86–87 (discussing rules that require excluding or including some factor).

or disregard the prior decision at its own discretion. The limits of the persuasion-based model are clearest in cases of disagreement. When the subsequent court disagrees with the prior court's factual conclusion, the prior court's decision will often have no effect, for the subsequent court can simply ignore it. In other words, the baseline model sees prior courts' factual conclusions as content-dependent reasons for subsequent courts. In turn, if the prior court's decision only features in a subsequent court's decision when the latter agrees with the former, then the prior court's impact on subsequent courts' discretion is minimal. Professor Maggie Gardner has criticized citing prior cases in these circumstances as harmful and as serving merely rhetorical purposes.¹⁶⁷

Factual precedents offer a different model. They give prior courts' factual conclusions a greater normative force. According to model (c), prior courts' factual conclusions should always guide subsequent courts' decisions about the same general fact.¹⁶⁸ Even if a subsequent court disagrees, it *must* reckon with the prior decision as an authority. Precedents are regularly seen as authorities for subsequent courts.¹⁶⁹ A precedent requires the subsequent court to take the prior court's (factual) conclusion "seriously as a source and thus to treat its guidance and information as worthy of respect."¹⁷⁰ Put differently, on the factual precedent model, a prior court's factual conclusion is a content-independent reason for subsequent courts.¹⁷¹

A fine line separates content-dependent and content-independent reasons. But the distinction is important. It explains the difference between being guided by (factual) precedents (model (c)) and being merely persuaded by a prior case (model (b)).

¹⁶⁷ Gardner, *Dangerous Citations*, *supra* note 138, at 1675–79.

¹⁶⁸ On precedents as guidance for subsequent courts, see *infra* notes 170, 239, 242, 244, and accompanying text.

¹⁶⁹ On factual precedents as authorities, see Larsen, *Factual Precedents*, *supra* note 35, at 73 (discussing factual precedent as a "lower court's reliance . . . as authority to prove that the observation is indeed true."), and see also Gardner, *Dangerous Citations*, *supra* note 138, at 1626–27 (discussing precedents as either binding or non-binding authorities).

¹⁷⁰ Schauer, *Authority and Authorities*, *supra* note 159, at 1956.

¹⁷¹ *Id.* at 1935–40 ("[W]hen a rule is authoritative, its subjects are expected to obey regardless of their own evaluation of the rule or the outcome it has indicated on a particular occasion."); H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY* 243, 254–61 (1982) (discussing authority as a content-independent reason to act, as well as a guide to evaluating others' actions—whether or not they followed the authority).

Factual precedents require subsequent courts to treat a prior court's factual conclusion (the source) as a reason, simply because it was decided by the prior court.¹⁷² When the prior court's decision is seen as an authority—but not when it is seen as persuasion—it constitutes a reason for the subsequent court, regardless of its substantive content.¹⁷³ This matters. For only then will subsequent courts be required to treat the prior court's factual conclusion as guidance,¹⁷⁴ whether or not they agree with it.

So, there are significant distinctions between model (b), persuasive authority, and model (c), factual precedents. Theoretically, model (b) sees a prior court's factual conclusion as a content-dependent reason, while model (c) sees it as a content-independent reason. Practically, while model (b) allows subsequent courts to either follow or ignore prior courts' decisions at their discretion, model (c) requires subsequent courts to treat prior courts' decisions as guidance.

We now understand how my suggestion in this Article—to recognize factual precedents—will change the status quo. Simply put, when we move from model (b) to (c), we require courts to consider something they were previously free to ignore.

It will be helpful for later discussions to further unpack model (c): to distinguish between overriding factual precedents (c₁) and presumptive factual precedents (c₂).¹⁷⁵ Recall, I will normatively argue for the latter.

¹⁷² See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 113 (1977) (explaining that if the prior decision is taken by the court as entirely justified, the court is not following it because of the gravitational force of the precedent); FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 37–40, 60 (2009) [hereinafter SCHAUER, *THINKING LIKE A LAWYER*] (“[A] court should treat a previous decision as binding just because of its existence and not because it is perceived to be correct.”); SCHAUER, *PLAYING BY THE RULES*, *supra* note 160, at 132–34 (explaining that questions of authority only arise when the subject disagrees); Schauer, *Precedent*, *supra* note 6, at 375–76; Schauer, *Authority and Authorities*, *supra* note 160, at 1943–44:

[I]f an agent is genuinely persuaded of some conclusion because she has come to accept the substantive reasons offered for that conclusion by someone else, then authority has nothing to do with it. . . . A judge who is genuinely persuaded by an opinion from another jurisdiction is not taking the other jurisdiction's conclusion as authoritative.

¹⁷³ See Aleksander Peczenik, *The Binding Force of Precedent*, in *INTERPRETING PRECEDENTS* 461, 467 (D. Neil MacCormick & Robert S. Summers eds., 1997) (“The normative force of all precedents, even those which are not binding *de jure*, has to be distinguished from that of so-called ‘substantive reasons’, whose force is dependent merely on their content, not their form or origin (or ‘pedigree’).”).

¹⁷⁴ On precedents as guidance, see *infra* notes 250–51 and accompanying text.

¹⁷⁵ See *infra* notes 236–48 and accompanying text.

As I explained above, factual precedents would require subsequent courts to treat prior courts' factual conclusions as guidance. But what do I mean by "guidance"? What should subsequent courts do with the prior court's factual conclusion? This question points to the nature of precedents. Precedents can be understood as reasons.¹⁷⁶ Namely, as a reason for subsequent courts to include the prior court's factual conclusion in their decision-making.¹⁷⁷ We have seen that precedents are content-independent reasons, in the sense that they *require* subsequent courts to do something with the prior court's decision regardless of the latter's content. Yet the question remains: What exactly do factual precedents require subsequent courts to do about the prior decision?¹⁷⁸

One answer, (c₁), holds that subsequent courts are required to follow the prior court's factual conclusion and decide in accordance with it. This, I think, is what most people have in mind when they talk about *stare decisis*, or binding precedents. On this view, factual precedents are overriding reasons. They are all-things-considered reasons, requiring subsequent courts to decide according to a prior court's factual conclusion.¹⁷⁹

Another answer, (c₂), holds that subsequent courts are not required to follow the prior court's factual conclusion, only to consider and engage with it.¹⁸⁰ This, I think, is the best understanding of nonbinding precedents. On this view, factual precedents are presumptive reasons. While a subsequent court is not bound by the prior court's factual conclusion, the subsequent court has an

¹⁷⁶ See NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 65–66 (2008); see also *id.* at 58–110.

¹⁷⁷ See Charles F. Capps, *The Holistic Theory of Precedent*, 93 U. CHI. L. REV. 549, 568 (2026) (suggesting that precedents have a gravitational force and explaining that respecting precedents means that courts have to update their credence regarding the proposition the precedents stand for).

¹⁷⁸ I thank Professor Alma Diamond and scholar Meir Yarom for helping develop this part of the Section.

¹⁷⁹ In reality, courts may find ways around this strict obligation. Subsequent courts are tasked with applying the precedent when the cases are similar. This leaves the subsequent court discretion to decide that the prior case is not similar to the case at hand—and thus to distinguish the precedent. In addition, some courts would usually be allowed to overrule a binding precedent. Other courts may simply decline to apply the precedent—because they expect it to be overruled by future courts, or for other reasons. See Schauer, *Precedent*, *supra* note 6, at 594; Nina Varsava, *The Gravitational Force of Future Decisions*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT*, *supra* note 7, at 281, 282, 285 [hereinafter Varsava, *Gravitational Force*].

¹⁸⁰ See Schauer, *Precedent*, *supra* note 6, at 591–93 (discussing a presumptive precedent approach, which “gives a precedent necessary weight without making that precedent dispositive” (emphasis omitted)).

obligation to engage with the prior decision, and to explain its reasons if it decides not to follow the prior decision.¹⁸¹ In other words, presumptive factual precedents (c₂) create an obligation on the subsequent court to engage with the prior decision, yet the subsequent court is free to eventually decide against it (and offer an explanation).¹⁸²

I say more about presumptive factual precedents later, in Parts III.B and IV.B. For now, the point to bear is that my suggestion in this Article—to recognize presumptive factual precedents (c₂)—marks a change from the status quo of the persuasive model (b).

B. Defining Factual Precedents

I define a factual precedent as a general factual conclusion that a court determines in one case, which subsequent courts ought to treat as guidance. Recall, the only other definition(s) of factual precedents on offer is Larsen's.¹⁸³ Like hers, my definition aims to capture both overriding and presumptive (i.e., binding and nonbinding) factual precedents. Yet, our definitions differ. Hers includes only facts determined by the Supreme Court and adopted by lower courts, but my definition is not so limited. Additionally, unlike Larsen's, my definition omits the complicated notion of legislative facts and leaves normative evaluation aside. In this Section, I explain and defend each part of my definition.

To begin, my definition of factual precedents refers to judicial decisions—decisions by courts. I recognize that the concept of precedent itself exceeds legal decisions,¹⁸⁴ and that courts often

¹⁸¹ See Marmor, *supra* note 7, at 265; Peczenik, *supra* note 173, at 467, 470–72 (discussing nonbinding precedents as legal reasons that courts should follow unless there are “particularly strong reasons” to deviate); see also Grant Lamond, *Persuasive Authority in the Law*, 17 HARV. REV. PHIL. 16, 25 (2010) (conceptualizing “persuasive authority” as a content-independent authority, providing courts “a reason to defer to another’s . . . view, just because it is that other court’s view” (emphasis in original)); Flanders, *supra* note 7, at 74–82 (developing a similar idea under the heading of “super persuasive authority”).

¹⁸² I use the term “presumptive” here, following Marmor, *supra* note 7. I do not use “persuasive” because the ordinary view on persuasive precedent is much weaker, see Flanders, *supra* note 7, at 61–67, and because the phrase itself is problematic, see *supra* note 165.

¹⁸³ See *supra* text accompanying notes 148–50.

¹⁸⁴ See Schauer, *Precedent*, *supra* note 6, at 572–75 (explaining the concept of precedent generally, and legal use as one application).

refer (and defer) to factual determinations that Congress or administrative agencies make.¹⁸⁵ But the notion of precedent more naturally operates within the judicial system, referring to decisions by, and relationships between, courts.¹⁸⁶ And these decisions and relationships are the most relevant for our purposes.

The terms “conclusions” and “determine” in the definition point to courts’ final decisions about facts. Courts don’t simply “find” facts like a child finding a snack in their bag. Rather, courts have to actively determine factual conclusions out of the available alternatives.¹⁸⁷ And they explicate these determinations in their written judgments.¹⁸⁸ By pointing to factual conclusions, I also intend to be more specific about the part of the judicial decision that is relevant for factual precedents.¹⁸⁹ I set aside several factual claims that regularly appear in written court judgments: references to testimony given in trial,¹⁹⁰ exchanges on the record,¹⁹¹ exhibits presented by a party, etc. Instead, I focus on the factual conclusions that courts draw from these (and other) sources. So, “Mesothelioma can develop after fairly short exposures to asbestos”¹⁹² can be a factual conclusion. But the social science research, expert testimony, or exhibits used during trial or noted in the judgment to support this conclusion are excluded. Additionally,

¹⁸⁵ See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1177–87 (2001); John O. McGinnis & Charles W. Mulaney, *Judging Facts like Law*, 25 CONST. COMMENT. 69, 74–80 (2008).

¹⁸⁶ Kristjánsson, *supra* note 161, at 76–77 (explaining that precedent is a decision by an institution, and that while various institutions can be relevant, the focus is commonly on courts).

¹⁸⁷ Elsewhere, I have explained that courts do not find facts; they make an active decision to determine fact. Rather than idly finding something that is already there, courts favor one factual claim over others as *the* legal truth in the case. See Kenneth, *supra* note 44, at 94–97, 106–10; see also Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605, 606 (1941) (stating that in law, there are no “directly evident facts, facts ‘in themselves,’ but only facts established by the competent authority in a procedure prescribed by the legal order”).

¹⁸⁸ When deciding cases without juries, courts must state the specific findings of fact that support their conclusions. See FED. R. CRIM. P. 23(c); FED. R. CIV. P. 52(a)(1), (2)(a), (2)(c).

¹⁸⁹ Here, I compare to the use of a judgment generally as evidence. See generally Motomura, *supra* note 40 (discussing the use of judgments generally as evidence).

¹⁹⁰ For more on references to testimony given in trial, see generally Mark Lawrence, *The Admissibility of Former Testimony Under Rule 804(b)(1): Defining a Predecessor in Interest*, 42 U. MIAMI L. REV. 975 (1988).

¹⁹¹ See KAYE ET AL., *supra* note 11, § 10.3 (discussing the use of transcripts and other sources from prior trials).

¹⁹² *Rando*, 16 So. 3d at 1091; see also *McAskill v. Am. Marine Holding Co.*, 9 So. 3d 264, 268 (La. Ct. App. 2009).

since jury decisions very rarely explicate their conclusions about general facts, my definition addresses only bench decisions.¹⁹³

Next, my definition focuses on general facts. Larsen opted for “legislative facts” to capture roughly the same idea.¹⁹⁴ Below, I explain what I mean by general facts, and why I favor this term over legislative facts. Briefly, that is because the latter is ambiguous and harder to pin down compared to the former.

To simplify, legislative facts are general statements about the world that courts use in their judgments.¹⁹⁵ Davis coined this term to capture “social and economic data” that courts rely on to resolve constitutional cases and “create[] the common law through judicial legislation.”¹⁹⁶ His point was to distinguish these legislative facts from adjudicative facts. The latter are facts about “the immediate parties—who did what, where, when, how, and with what motive or intent.”¹⁹⁷ An example of an adjudicative fact is: Joe ran the light on the corner of Sullivan and Third Street on Wednesday night at 8:22 p.m. And an example of a legislative fact is: Violent video games impact teens’ brain development.¹⁹⁸ The

¹⁹³ This still leaves many court decisions. See Henry Zhuhao Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263, 267–72 (2022) (tracing the decline of jury trials and the comparative prominence of bench trials). I write “rarely” because juries may reach specific factual conclusions about general facts. They sometimes do so in civil cases, see, e.g., *Gourdeau v. City of Newton*, 238 F. Supp. 3d 179, 182 (D. Mass. 2017) (suggesting that though general verdicts are the norm, Federal Rule of Civil Procedure 49 gives courts broad discretion to ask juries for specific verdicts), and more rarely do so in criminal cases, see, e.g., *Black v. United States*, 561 U.S. 465, 472 (2010) (advising “caution” when opting for special verdicts in criminal proceedings); *United States v. Concepcion*, 139 F.4th 242, 252 (2d Cir. 2025) (noting a stated preference for general verdicts in criminal cases). This Article does not discuss the precedential force that these decisions may have.

¹⁹⁴ See Larsen, *Factual Precedents*, *supra* note 35, at 71, 73.

¹⁹⁵ See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1265–68 (2012) [hereinafter Larsen, *Confronting Fact Finding*]. But see Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988) (arguing that the distinction between legislative and adjudicative facts is not one of generality, but of manner of proof).

¹⁹⁶ Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–05, 407 (1942); see also Davis, *Judicial Notice*, *supra* note 33, at 952.

¹⁹⁷ Davis, *Judicial Notice*, *supra* note 33, at 952.

¹⁹⁸ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 855 (2011) (Breyer, J., dissenting) (surveying social science literature and concluding that “the video games in question are particularly likely to harm children”).

distinction caught on, and took on legal significance: in the doctrine of judicial notice,¹⁹⁹ in the practice of proving these facts,²⁰⁰ and in appellate discretion.²⁰¹

Despite its prominence and appeal, the meaning of the term “legislative fact” remains elusive. Scholars found it slippery and confusing,²⁰² and courts are baffled about how to address them.²⁰³ A clear distinction between legislative and adjudicative facts is wanting, in both theory and practice.²⁰⁴ Scholars have offered more nuance in developing the term, but these discussions have yielded no clear consensus about its meaning. Some distinguished between legislative facts that serve as premises for declaring a legal rule (premise facts) and those that underpin the application of a legal rule (non-premise facts).²⁰⁵ Others focused on legislative facts in constitutional cases, distinguishing between doctrinal facts (the meaning of the Constitution), reviewable facts (facts about particular rules that transcend particular cases), and case-specific facts (relevant for the application of constitutional rules in particular cases).²⁰⁶ Yet others wanted to replace legislative

¹⁹⁹ E.g., FED. R. EVID. 201 (excluding legislative facts from the rules of judicial notice).

²⁰⁰ E.g., Gorod, *supra* note 144, at 26–37 (arguing that determining legislative facts by relying on amicus briefs or extra-record findings is at odds with the adversarial system); Larsen, *Confronting Fact Finding*, *supra* note 195, at 1264–77 (discussing independent judicial research of legislative facts); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1773–84 (2014) [hereinafter Larsen, *Amicus Facts*] (discussing the reliance on amicus briefs to determine legislative facts).

²⁰¹ E.g., *Hope Clinic v. Ryan*, 195 F.3d 857, 885 (7th Cir. 1999) (Posner, J., dissenting) (arguing that unlike adjudicative facts, legislative facts should not be sheltered under clear error review); *Lockhart v. McCree*, 476 U.S. 162, 170 n.3 (1986) (doubting that the clearly erroneous standard applies to legislative facts); see also Yoshino, *supra* note 39, at 257–58 (discussing inconsistencies in how appellate courts treat legislative facts).

²⁰² See, e.g., Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1193–94 (2013); Yoshino, *supra* note 39, at 255–65 (discussing the Supreme Court’s inconsistent treatment of legislative facts).

²⁰³ See Monahan & Walker, *Social Authority*, *supra* note 157, at 485–88; see also Larsen, *Confronting Fact Finding*, *supra* note 195, at 1268 (“[T]here are simply no rules regulating how the judiciary is to receive or evaluate proof of legislative fact.”).

²⁰⁴ See Woolhandler, *supra* note 195, at 114 (“The line between adjudicative and legislative facts is indistinct.”); Allison Orr Larsen, *The Precarious Art of Classifying Facts*, 73 DUKE L.J. ONLINE 191, 194–95 (2024) (arguing that it is often difficult to distinguish between facts that courts deem adjudicative and legislative); Proctor, *supra* note 152, at 1009 (“The legislative-fact category is [] both over- and underinclusive according to a dispute-resolution-centered theory of judicial power.”).

²⁰⁵ See, e.g., Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 8–11 (1988) (discussing premise facts as “foundation facts,” which “serve as premises for decisions of issues of law”); Proctor, *supra* note 152, at 979–84 (distinguishing premise and non-premise facts based on the distinction between declaring and applying the law).

²⁰⁶ See, e.g., FAIGMAN, *supra* note 92, at 46–49.

facts with terms that refer to their source in social science research, such as “social facts”²⁰⁷ or “social authorities.”²⁰⁸ But there are many legal uses of social science that seem closer to adjudicative facts,²⁰⁹ and legislative facts do not have to rely on social science.²¹⁰ In short, even after decades of attempts to elucidate it, the term “legislative fact” remains vague.

That said, the core intuition seems right. It is helpful to distinguish specific and narrow “whodunit”²¹¹ facts from facts that aim to capture broader phenomena about the world. Factual precedents focus on the latter. That is, I think, why Larsen used the term “legislative facts” in her definition, and also why she immediately explained that it refers to “general factual claim[s].”²¹² In my definition, I take on the distinction between specific and general and recognize the importance of generality. Yet, I refrain from using the term “legislative facts,” mostly because of its lingering ambiguity.

My definition opts for general facts. By that, I mean claims that courts determine about reality and the way things are in the world, which transcend the specific circumstances of the parties in a particular case. These are nonadjudicative facts and are usually regulated as legislative facts. What makes a claim factual is its subject matter, as I discuss below.²¹³ And what makes it general is the scope of the phenomenon it tries to capture.

²⁰⁷ See generally, e.g., Walker & Monahan, *Social Facts*, *supra* note 157.

²⁰⁸ See, e.g., Monahan & Walker, *Social Authority*, *supra* note 157, at 488 (suggesting that “social authority” is a better term for the use of social science research by courts than “legislative facts”). See generally Walker & Monahan, *Social Facts*, *supra* note 157; Walker & Monahan, *Social Frameworks*, *supra* note 157.

²⁰⁹ If one were to focus on the use of social science as a crucial element for legislative facts, they might find examples that are not general. For instance, relying on social science surveys to determine if some trademark is a parody or not does not yield a general fact. See, e.g., *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 143 S. Ct. 1578, 1593 (2023) (Sotomayor, J., concurring) (discussing the use of surveys and warning against overreliance on them).

²¹⁰ For instance, judicial claims about what juries know or do not know are legislative facts that courts almost never rely on social science to establish. More profoundly, it is analytically possible to have legislative facts that rely on sources outside of social science (e.g., on common beliefs or even tarot readings).

²¹¹ Larsen, *Confronting Fact Finding*, *supra* note 195, at 1255 (quotation marks omitted).

²¹² Larsen, *Factual Precedents*, *supra* note 35, at 73.

²¹³ See *infra* notes 219–35 and accompanying text.

Generality is key for factual precedents. It is hard to imagine factual precedents without the said facts being general,²¹⁴ for factual precedents come about only when two courts consider the same fact. It is the generality of these facts that makes them relevant in multiple cases, and thus raises the question of factual precedents. Relatedly, it is no coincidence that terms scholars have used in this context, such as “legislative facts” and similar notions like “social frameworks,”²¹⁵ emphasize generality.

Admittedly, there may be ambiguities about which facts are general. These ambiguities are inevitable given the complications around the concept of generality itself.²¹⁶ As noted, given that legislative facts refer to the notion of generality, that term also faces these ambiguities. But this is not the place to analyze the notion of generality. Similarly, trying to resolve such ambiguities with a typology of facts based on their generality strikes me as futile, for courts (and litigants) have significant leeway in phrasing the facts they determine in various levels of generality. And there will often be different ways of understanding such determinations.²¹⁷ Instead, what we need is a workable way to capture the intuitive distinction between facts that apply only to specific cases and those that apply to many cases. I suggest we simply follow the courts that determined them. So, we deem facts as general for the definition of factual precedent based on how they are articulated by the court that determined them. If they are presented as broad propositions about a phenomenon that transcends the specific

²¹⁴ It is hard, but maybe not impossible. One can imagine adjudicative facts being general in the relevant sense—for instance, when a single event gives rise to separate claims in different jurisdictions.

²¹⁵ Under Walker and Monahan’s definitions, social frameworks and probably most social facts can be seen as general in this sense. Monahan et al., *Gender Discrimination*, *supra* note 34, at 1725–27 (explaining that social frameworks “denote the use of general conclusions from social science research to help determine specific factual issues in a case”); Monahan & Walker, *Social Authority*, *supra* note 157, at 488 (stating that social authority refers to “social science research relevant to creating a rule of law”).

²¹⁶ See *generally*, pun intended, Sarah-Jane Leslie & Adam Lerner, *Generic Generalizations*, STANFORD ENCYCLOPEDIA OF PHIL. (Aug. 4, 2022), <https://perma.cc/VYK5-VBNL>. Here, I largely set aside the distinction between general and particular, which is not what we are after. See, e.g., P.F. Strawson, *Particular and General*, 54 PROC. ARISTOTELIAN SOC’Y 223 (1954).

²¹⁷ See *supra* note 51.

case and parties, they are sufficiently general to count as factual precedents.²¹⁸

Moving on, the term “fact” within my definition of factual precedents deserves some attention. Fact is a tricky concept to pin down.²¹⁹ A proposition may start out as one person’s theory, develop into a hypothesis, and then become accepted and treated as a fact, or even a law. That the Earth is round and rotates around the Sun is one example.²²⁰ Additionally, while the word “fact” usually refers to things that exist in reality,²²¹ there are many factual propositions that are false.²²² Examples include “Elvis is alive” or “the moon is made of cheese.” This complication is well recognized in law.²²³ Furthermore, philosophers have raised doubts about the distinction between facts and values.²²⁴ Relatedly, and more intricately connected to our topic, scholars have tried to explain (and complicate) the distinction between fact and law. Much ink has been spilled looking for clear dividing lines between the two, beyond some pragmatic considerations in particular instances.²²⁵

²¹⁸ I assume here that courts are capable of identifying factual claims as general rather than specific. See, e.g., *Diaz v. United States*, 144 S. Ct. 1727, 1733–35 (2024) (distinguishing between general claims about a group of people, e.g., “most drug couriers know X,” and about the particular defendant, e.g., “Diaz knew X”).

²¹⁹ See generally Kevin Mulligan & Fabrice Correia, *Facts*, STANFORD ENCYCLOPEDIA OF PHIL. (Jan. 13, 2026), <https://perma.cc/DZB9-XCFG>; Ruth Anna Putnam, *Creating Facts and Values*, 60 PHIL. 187 (1985).

²²⁰ See JEROME FRANK, *FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS* 177–79 (1945).

²²¹ See *Fact*, OXFORD ENGLISH DICTIONARY (rev. 2d ed. 2014) (“The actual occurrence of an event; the real existence of a situation or state of affairs.”).

²²² This is well recognized in law, which is why accuracy is not a validity condition for facts in legal decision-making. See, e.g., Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 900 (2010) (“To believe that there are facts is not to believe that all things claimed to be facts are true.”); Kenneth, *supra* note 44, at 52–53 (discussing Professor Hans Kelsen’s view that courts establish facts, and that those are legally valid even if false).

²²³ See, e.g., HANS KELSEN, *GENERAL THEORY OF NORMS* 128–30 (1991) (explaining that a fact determined by a court does not lose its validity even when false); ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 1–2, 10 (2005) (explaining that in legal adjudication, “fact-finding” counts as determining fact—whether the fact is accurate or erroneous).

²²⁴ See generally, e.g., Peter Railton, *Facts and Values*, 14 PHIL. TOPICS 5 (1986); Putnam, *supra* note 219 (arguing that both facts and values are created and constrained in some ways).

²²⁵ See, e.g., Monaghan, *supra* note 17, at 233 (“[L]aw’ and ‘fact’ [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.”); see also JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 189–93 (Boston, Little, Brown & Co. 1898) (discussing the distinction and the difficulty to clearly define both terms). See generally G. Alexander Nunn, *Law, Fact, and Procedural Justice*, 70 EMORY L.J. 1 (2021) (discussing the difficulties in distinguishing the two concepts, demonstrating how courts treat issues like “reasonableness” or “use of force” sometimes as questions of law and sometimes as

For instance, attempts to distinguish questions of law and fact by asking which are decided by judges versus juries were found to be both tautological and misguided, as juries often decide matters of law and judges resolve questions of fact.²²⁶ Professors Ronald Allen and Michael Pardo argued more forcefully that there is no ontological, analytical, or epistemic distinction between law and fact.²²⁷

While it is difficult (if not impossible) to perfectly distinguish facts from law, in many cases this distinction is quite intuitive.²²⁸ Philosophical difficulties notwithstanding, people regularly distinguish between questions and propositions about reality on the one hand, and what to do about reality on the other hand.²²⁹ Courts also regularly distinguish factual propositions from legal ones, among others, when applying the appropriate standard of review.²³⁰ Surely borderline cases exist. But the existence of such borderline cases should not lead us to paralysis.²³¹ And alongside the hard borderline cases there exist clearer instances.

To clarify, the term “facts” in the definition denotes what I (more technically) previously called legal-truths—judicially determined claims about reality and the way things are.²³² We usually have little trouble recognizing these by simply reading the judgment. A strong indication that a claim is factual is that we would normally support or falsify it by referring to sources that

questions of fact, and arguing for a distinction between the two based on institutional considerations).

²²⁶ See THAYER, *supra* note 225, at ch. 5; SCHAUER, THINKING LIKE A LAWYER, *supra* note 172, at 203–06.

²²⁷ See generally Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2002). But see generally Ellika Sevelin, *What About the Non-Legal Facts: Revising Allen and Pardo’s Analytical Distinction Between Law and Fact*, 23 INT’L J. EVIDENCE PROOF 349 (2019).

²²⁸ Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 668 (1949) (noting that while the distinction is never “clear-cut,” we have little trouble distinguishing between factual aspects such as “whether the traffic signal was red or green” and legal ones such as “whether the driver . . . should have blown his horn”).

²²⁹ Facts refer to the former. See, e.g., FREDERICK SCHAUER, THE PROOF: USES OF EVIDENCE IN LAW, POLITICS, AND EVERYTHING ELSE 1–4 (2022) [hereinafter SCHAUER, THE PROOF].

²³⁰ Larsen, *Factual Precedents*, *supra* note 35, at 68–69.

²³¹ See Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 498 (2000) (“And although lawyers, particularly, are likely to be preoccupied with dusk when people ask them about the distinction between night and day, we do not believe that the existence of borderline cases undercuts the existence of a workable distinction between legal and nonlegal authority.”).

²³² See Kenneth, *supra* note 44, at 47, 53–56 (explaining that legal-truths are outcomes of legal decisions that favor one truth-claim over others as *the* legal-truth).

are not predominantly legal.²³³ I recognize that this formulation does not resolve the complexity of distinguishing law and fact. Sometimes this complexity will make it difficult to distinguish factual and legal precedents.²³⁴ But often enough, either thinking about sources or taking a “know it when you see it” approach will suffice. Lastly on this point, recall that this Article explores factual precedents, not the law-fact distinction. If we can agree that some judicial conclusion is factual and identify subsequent courts relying on this conclusion, then we have something to work with, and the law-fact distinction should not bother us too much. This Article already identified many such instances,²³⁵ so we can safely move on.

Finally, a few words about the term “precedent.” Some see precedents as inherently binding. This view suggests that the very meaning of the term is to constrain the subsequent court’s decision to following, overruling, or distinguishing the prior decision’s holding.²³⁶ This view uses the term “precedent” as a shorthand for “the doctrine of precedent” or “stare decisis.” Indeed, under these doctrines, courts must follow²³⁷ earlier judicial decisions about similar issues that were judicially decided by higher

²³³ See Larsen, *Factual Precedents*, *supra* note 35, at 67–70 (defining facts as statements about the world that can be falsified and that are usually followed by evidence); Larsen, *Confronting Fact Finding*, *supra* note 195, at 184–85; Gardner, *Dangerous Citations*, *supra* note 138, at 1640 (adopting Larsen’s definition); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1304 (1942) (“A question of fact usually calls for proof.”). More precisely, factual claims are the kind of claims that our society regularly turns to sources beyond the legal domain (e.g., scientific experts) in order to resolve. The distinction here is between claims that we regularly verify using something like medical scientific consensus versus those we verify using the statute’s text, legal reasoning, etc. My underlying assumption is that the distinction is a matter of practice, but drawing this line is a theoretical question that I do not discuss here. See *supra* text accompanying notes 160–61.

²³⁴ See Rigoni, *supra* note 133 at 66–68 (illustrating the confusion in tort negligence cases); see also, e.g., *Ambrose v. Cyphers*, 148 A.2d 465, 469 (N.J. 1959) (citing RESTATEMENT (FIRST) OF TORTS § 285 (AM. L. INST. 1934)).

²³⁵ See *supra* Part I.A.

²³⁶ See Alexander, *supra* note 132, at 13–14; Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STANFORD ENCYCLOPEDIA OF PHIL. (June 20, 2006), <https://perma.cc/EGC7-Y866> (explaining that precedents are practical authorities, and as a consequence, “later courts are bound to follow the decisions of earlier cases[.]” which “is commonly known as the doctrine of precedent” (emphasis omitted)).

²³⁷ See *supra* note 179.

courts.²³⁸ But this understanding of the term “precedent” is misleading, for not all precedents are binding.²³⁹ Black’s Law Dictionary defines “precedent” as “[a]n action or official decision that can be used as support for later actions or decisions; esp., a decided case that furnishes a basis for determining later cases”²⁴⁰ It distinguishes “binding precedent” (also termed “authoritative precedent” or “binding authority”) that “a court must follow,” from “persuasive precedent,” which is not binding but “entitled to respect and careful consideration.”²⁴¹

Indeed, scholars agree that the concept of precedent is not necessarily binding. In their introduction to a recent book about the philosophical foundations of precedents, Professors Timothy Endicott, Hafsteinn Dan Kristjánsson, and Sebastian Lewis discussed precedent as a prior decision’s “potential use as a guide to action.”²⁴² Legal scholar Bryan Garner and his coauthors used similar language, noting that “a precedent is a former happening that guides later decisions in similar circumstances.”²⁴³ Similarly, Professor Hans Kelsen explained that “when the decision of a case is giving direction to the decision of similar cases,” that decision becomes precedent.²⁴⁴ Kristjánsson argued that precedents are past decisions “that matter” for the legal decision at hand.²⁴⁵ Professors Neil MacCormick and Robert Summers referred to precedents as “models for later decisions.”²⁴⁶ Professor Ronald Dworkin referred to precedents as having “gravitational force,” which provides “some reason for deciding other cases in a similar way in the future.”²⁴⁷ Professor Aleksander Peczenik categorized precedents’ possible force, from formally binding precedents to

²³⁸ *Stare Decisis*, BLACK’S LAW DICTIONARY (12th ed. 2024). *Stare decisis* literally means “to stand by things decided.” *Id.*; see also *Doctrine of Precedent*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining the term as “[t]he rule that precedents not only have persuasive authority but also must be followed when similar circumstances arise”).

²³⁹ See GARNER ET AL., *supra* note 31, at 21–22, 155–232 (viewing precedents, generally and in law, as guides or bases for subsequent decisions).

²⁴⁰ *Precedent*, BLACK’S LAW DICTIONARY (12th ed. 2024).

²⁴¹ *Id.* I avoid the term “persuasive precedents” as problematic. See *supra* note 165.

²⁴² Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis, *Introduction to PHILOSOPHICAL FOUNDATIONS OF PRECEDENT*, *supra* note 7, at 1, 1.

²⁴³ GARNER ET AL., *supra* note 31, at 22 (describing the “common usage” of the term, with which the legal meaning aligns).

²⁴⁴ HANS KELSEN, *PURE THEORY OF LAW* 250 (Max Knight trans., rev. 2d ed. 1967) (1934).

²⁴⁵ Kristjánsson, *supra* note 161, at 76.

²⁴⁶ D. Neil MacCormick & Robert S. Summers, *Introduction to INTERPRETING PRECEDENTS*, *supra* note 173, at 1, 1.

²⁴⁷ DWORKIN, *supra* note 172, at 111–13. See also generally Varsava, *Gravitational Force*, *supra* note 179.

ones that merely provide additional support.²⁴⁸ Many other scholars held similar views.²⁴⁹

My definition uses the term “guidance,”²⁵⁰ to capture both binding and nonbinding factual precedents.²⁵¹ And it uses the term “ought” to denote the nature of precedents as requiring subsequent courts to consider the prior case, thereby distinguishing factual precedents from the persuasion model discussed above.²⁵²

III. THE CASE FOR FACTUAL PRECEDENTS

We now have a better understanding of what factual precedents are all about. We can finally ask: Should we recognize factual precedents? Should we forgo the persuasive model and require courts to engage with prior courts’ decisions about general facts? Should we require courts to treat these factual conclusions as presumptive reasons simply because the prior court decided them, and to explain themselves when they decide not to follow prior decisions?

Yes. Or at least so I argue in the remainder of the Article.

But before we take on the normative argument for factual precedents, it would be wise to get a clearer sense of the practical stakes involved.

A. Changing the Status Quo—Practical Implications

This Section illustrates why (presumptive) factual precedents matter. It teases out the major practical implications that recognizing factual precedents will have for courts, litigants, and the legal system as a whole. The goal is to illustrate the effects that factual precedents will likely have on our legal practice. Naturally, some of these effects are more desirable than others. The next Section normatively evaluates factual precedents in light of these practical implications.

²⁴⁸ Peczenik, *supra* note 173, at 463; *see also Precedent*, BLACK’S LAW DICTIONARY (12th ed. 2024) (distinguishing between binding and persuasive precedent).

²⁴⁹ *See, e.g.*, Gerald J. Postema, *On the Moral Presence of Our Past*, 36 MCGILL L.J. 1153, 1162–64 (1991) (suggesting that the moral force of reasons generated by precedents may be limited, countered, and overridden); Capps, *supra* note 177, at 566–67.

²⁵⁰ This reference to guidance is in accordance with views discussed above. *See supra* notes 168, 242–44 and accompanying text.

²⁵¹ *See* SCHAUER, *PLAYING BY THE RULES*, *supra* note 160, at 112–13 (explaining that “be[ing] guided by” is broader than “follow[ing]”).

²⁵² *See supra* Part II.A.

To begin, recognizing factual precedents will influence *courts*: their discretion and decision-making process about general facts. Factual precedents will require subsequent courts to consider the prior court's factual conclusion as a presumptive reason.²⁵³ Adding a reason supporting one side of a factual dispute matters.²⁵⁴ It makes departing from the prior decision less likely than it would have been otherwise.²⁵⁵ It makes the subsequent court more likely to decide in accordance with the prior court's decision, and demands that the subsequent court comes up with additional reasons to decide against it.²⁵⁶ In addition, factual precedents also impose a burden of explanation. Subsequent courts will have to explain their reasons for not following the prior court's factual conclusions.²⁵⁷ They may rebut the prior decision by providing additional information, or undercut it by undermining the reliability of the evidence or soundness of the analysis that the prior court used.²⁵⁸ So, in a world with factual precedents, courts that disagree with the prior court's factual conclusions need to (1) have good reasons for doing so, and (2) explicitly explain those reasons.

Factual precedents also incentivize courts to determine facts more carefully. Knowing their decisions affect subsequent cases, courts that determine general facts will (*ex ante*) have additional reasons to get them right.²⁵⁹ Similarly, courts will also have a

²⁵³ See *supra* Part II.A.

²⁵⁴ SCHAUER, PLAYING BY THE RULES, *supra* note 160, at 113–14 (arguing that reasons, even weak ones, matter, and should not be written off simply because they can be overcome); see also Marmor, *supra* note 7, at 266–67.

²⁵⁵ See SCHAUER, PLAYING BY THE RULES, *supra* note 160, at 157–58; DUXBURY, *supra* note 176, at x (“[E]ven if a decision-maker feels no obligation to follow a precedent, the precedent might lead him to decide differently from how he would have decided if the precedent did not exist.”).

²⁵⁶ See SCHAUER, PLAYING BY THE RULES, *supra* note 160, at 108–10 (discussing changes to the burden of justification); ROBERT P. MOSTELLER, KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE §§ 342–43 (Robert P. Mosteller ed., 8th ed. 2020) (discussing how presumptions change burdens of production and persuasion). See generally Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920) (same).

²⁵⁷ See Marmor, *supra* note 7, at 265–67 (explaining that horizontal precedents are presumptive reasons, which require courts deciding against them to have reasons for doing so and to provide those in the form of an explanation); Nicholas W. Barber, *Why Precedent Works*, in PHILOSOPHICAL FOUNDATIONS OF PRECEDENT, *supra* note 7, at 49, 58 (suggesting that departing from precedent requires judges to explain themselves).

²⁵⁸ See Marmor, *supra* note 7, at 257–59.

²⁵⁹ See Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK. L. REV. 1095, 1099 (2009) [hereinafter Cheng, *Scientific Evidence as Foreign Law*] (arguing that the legal system has a heightened interest in getting general facts right); Schauer, *Precedent*,

greater aversion to getting them completely wrong. The latter motivation stems from fear of being criticized by colleagues for reaching absurd or unfounded decisions.²⁶⁰ Hence, after introducing factual precedents, courts will be more inclined to articulate good reasons and explanations for their decisions about general facts. I return to this checking function of factual precedents below.²⁶¹

In addition, factual precedents promote more robust engagement between courts about general facts. Like legal precedents, factual precedents encourage courts to build on and interact with prior decisions.²⁶² When the subsequent court disagrees with its predecessor, factual precedents will clearly lead to more engagement, because the subsequent court will have to offer reasons and explanations for not following the prior decision. Engagement likely remains significant in cases of agreement. That is because citing the prior case in agreement lends support to the factual precedent, which is a form of engagement. And it is also because often one of the litigants will argue against the factual precedent, thereby prompting the court to (at least briefly) justify relying on it despite the litigant's counterarguments.²⁶³

Furthermore, factual precedents will probably draw more attention to judicial decisions about general facts, as these would be more likely to affect future cases. It's quite difficult to predict how courts will respond to this change. Some judges may be humbler in determining general facts.²⁶⁴ They will opt for narrower decisions regarding general facts, deciding material issues they are

supra note 6, at 588–91 (discussing how the future effects of precedents influence the court making the first decision *ex ante*). See also generally Varsava, *Gravitational Force*, *supra* note 179.

²⁶⁰ John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 963 (2002); RICHARD A. POSNER, *HOW JUDGES THINK* 140–41 (2008) (discussing judges' disinclination to being reversed, and linking it to their reputation).

²⁶¹ See *infra* Part III.B.2.

²⁶² See Deborah Hellman, *An Epistemic Defense of Precedent*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 63, 74–75 (Christopher J. Peters ed., 2013) (“[T]he precedent is an accumulation of the work of several decisionmakers.”); Barber, *supra* note 257, at 57–58 (explaining that reasoning with precedents “builds upon the past decisions of other judges”).

²⁶³ Binding factual precedents will likely lead to less substantive but more frequent engagement, for subsequent courts would be required to follow their predecessors. This implication is beyond the scope of this Article.

²⁶⁴ See Amalia Amaya, *The Virtue of Judicial Humility*, 9 JURIS. 97, 99–101 (2018) (arguing that judicial epistemic humility encourages courts to learn from other courts and engage with their decisions, recognizing that they might be right); Daniel A. Farber, *The*

certain about while omitting dubious ones that are not essential. These humbler judges may also be less inclined to publish their opinions, hoping to limit the effects of their factual conclusions.²⁶⁵ Conversely, other judges may enjoy the limelight. They may opine on more general facts and opt for broader decisions, hoping to use (and sometimes misuse) their power to affect future cases. Realistically, judges' approaches will likely vary between these alternatives depending on the case, the issue in question, and other idiosyncratic considerations.²⁶⁶

Next, recognizing factual precedents will also affect *litigants*. First, factual precedents will make it easier for litigants to argue for the prior court's decision and harder to argue against it. More technically, they will increase the burden of production of litigants arguing against the factual precedents.²⁶⁷ Second, since factual precedents require subsequent courts to engage with prior cases, they empower litigants to demand subsequent courts to do so. As discussed, litigants already sometimes include prior cases' factual conclusions in their briefs and oral arguments.²⁶⁸ Under the status quo, courts can quickly set aside these arguments. Recognizing factual precedents will increase the importance of such arguments. Hence, it will likely increase litigants' tendency to employ them, as a prior court's factual conclusion will have a greater influence on the subsequent court.

Third, factual precedents accentuate strategic considerations in litigation about general facts. Repeat litigants will be motivated to invest more heavily in establishing or challenging factual

Rule of Law and the Law of Precedents, 90 MINN. L. REV. 1173, 1178 (2006) (discussing humility as a reason for precedents).

²⁶⁵ I thank Professor Erin Murphy for this point. This implication may be problematic, because courts tend to invest less effort in deliberation and reason giving in unpublished opinions, and because if courts do not engage with unpublished opinions, accumulated knowledge about general facts in these opinions may be lost. See Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostidiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORN. L. REV. 1, 18–32, 70–80 (2021).

²⁶⁶ One concern here is that judges may expansively opine on general facts beyond what is necessary for the case. They may do so to advance their worldview or, more cynically, to curry favor with administrations in order to get promoted. It is not clear to me that factual precedents will push judges to adopt these bad practices more than the status quo. See *infra* note 349 and accompanying text. And anyhow, we should criticize judges for doing so. See *infra* text accompanying notes 347–49.

²⁶⁷ See *supra* note 256 and accompanying text; KAYE ET AL., *supra* note 11, § 10.3.

²⁶⁸ See *supra* text accompanying notes 97, 102; see also, e.g., *State v. Torres*, 976 P.2d 20, 32 (N.M. 1999) (discussing litigants citing cases about the general acceptance of HGN testing).

determinations, recognizing their broader implications.²⁶⁹ For similar reasons, factual precedents may lead to forum shopping.²⁷⁰ Once, because litigants may seek judges or courts that (litigants think) would be more likely to side with their factual positions, in order to set a favorable factual precedent and thus influence future litigation. And again, because litigants may seek judges or courts that (they think) would be less inclined to challenge the already established factual precedent (due to lack of diligence, resources, or other reasons).²⁷¹ In addition, litigants may be more inclined to settle lawsuits. Some, to avoid a troubling factual conclusion that may affect future cases. Others, because factual precedents will increase predictability by providing more information about the likely judicial decision, which facilitates more agreements.²⁷²

Lastly, recognizing factual precedents will impact the *legal system* more broadly. Factual precedents often shape a legal norm's application.²⁷³ This happens when a prior court's decision holds that some general fact will serve as a "factual predicate" for future applications of some norm.²⁷⁴ For instance, a general fact about the effects of some drug combination on humans may serve as a factual predicate for all applications of an Eighth Amendment analysis to the drug. Larsen has rightly identified these cases as instances of factual precedents.²⁷⁵ Additionally, factual precedents may also affect a legal norm's interpretation, especially when interpretation turns on some general facts. Prime examples are general facts about history and tradition in constitutional

²⁶⁹ See Murphy, *supra* note 156, at 761–62; see also *id.* at 768 n.205 (citing *United States v. Llera Plaza*, 188 F. Supp. 2d 549, 552–53 (E.D. Pa. 2002) (reconsidering factual findings about fingerprint comparison in light of the government's urging the importance of the issue "both in the case at bar and in other cases in which fingerprint identification could be expected to play a significant role"))).

²⁷⁰ See *id.* at 761–62; Rachel Rebouché, *Facts on Trial: Alliance for Hippocratic Medicine v. FDA and the Battle over Mailed Medication Abortion*, 95 U. COLO. L. REV. 413, 436–37 (2024) (discussing how two federal courts reached contrary conclusions about facts regarding the safety of mifepristone on the same day).

²⁷¹ I thank the editors of the *The University of Chicago Law Review* for this great point.

²⁷² For more on increased predictability, see *infra* text accompanying notes 279–82.

²⁷³ These are often regarded as premise facts. See Keeton, *supra* note 205, at 8–11 (discussing premise facts as foundation facts, which "serve as premises for decisions of issues of law"); Proctor, *supra* note 152, at 979–84 (distinguishing premise and nonpremise facts based on the distinction between declaring and applying the law).

²⁷⁴ SCHAUER, *PLAYING BY THE RULES*, *supra* note 160, at 23–34 (describing factual predicates as "the factual conditions triggering the application of the rule").

²⁷⁵ Larsen, *Factual Precedents*, *supra* note 35, at 108–12.

interpretation cases post-*Bruen*.²⁷⁶ As I discuss below, factual precedents may also shift the balance of power between lower and appellate courts with regard to decisions about general facts.²⁷⁷

* * *

Let us take stock: Surveying legal practice, Part I identified the gravitational pull of prior courts' decisions about facts. Complementing existing scholarship, Part II offered a more robust analytical framework for understanding factual precedents. And Part III.A illustrated the practical implications that recognizing (presumptive) factual precedents will have for courts, litigants, and the legal system more broadly.

Still, a reader may have doubts. Convinced of the analytical and practical implications of recognizing factual precedents, she may question whether this change is desirable. To answer, Part III.B develops my normative case for factual precedents.

B. The Positive Case

This Section argues for factual precedents. More specifically, it claims that recognizing presumptive factual precedents will improve judicial decisions about facts in the way that matters most—by making them more legitimate.

In previous work, I have argued that judicial decisions about facts must be legitimate. Drawing on political theory, I suggested that court decisions, like decisions by other state institutions, must be justified to the parties involved and the general public, especially to those who disagree with the outcome. This need for legitimacy applies to all judicial decisions, including decisions about facts.²⁷⁸ Legitimizing decisions about facts poses a unique challenge because of their dual nature as: (1) legal decisions, and (2) decisions about facts. As such, considerations that ordinarily justify legal decisions (i.e., political considerations like participation and reasoned decisions), as well as those that ordinarily justify decisions about facts (i.e., epistemic considerations like veracity), have a role to play. My positive case for factual precedents follows

²⁷⁶ See, e.g., *supra* text accompanying notes 103–08.

²⁷⁷ See *infra* text accompanying note 313.

²⁷⁸ Kenneth, *supra* note 44, at 96–97, 110–14.

this path. I explain how adopting (presumptive) factual precedents makes decisions about general facts more politically and epistemically justified, and thus more legitimate.

A note on the scope of my argument: The following pages aim to convince you that factual precedents will improve, not perfect, our existing practices for determining facts. I argue that factual precedents will be better than the status quo. This is not an exercise in ideal theory, nor an attempt to reinvent our legal system. I also do not think that factual precedents can solve all the problems with judicial decisions about facts. More narrowly, I argue that our existing legal system that already engages in determining general facts will be better off with factual precedents than without them.

1. Better legal decisions.

First, factual precedents help legitimize judicial decisions about facts as *legal decisions*. Just as legal precedents help justify judicial decisions about legal questions, factual precedents help justify judicial decisions about factual questions.

Factual precedents promote legitimacy by fostering consistency, and thereby predictability and fairness. They do so by making departures from prior decisions more difficult than they would be otherwise.²⁷⁹

Inconsistencies (or “noise”) in judicial decisions about general facts disrupt expectations and coordination, create unfairness, and can make judicial decisions seem arbitrary.²⁸⁰ The more similar two cases are (on relevant dimensions), the more troubling contradictory decisions about general facts appear.²⁸¹ For example,

²⁷⁹ See *supra* text accompanying notes 254–56; Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 76–78 (2018) [hereinafter Varsava, *Value of Stare Decisis*].

²⁸⁰ See Flanders, *supra* note 7, at 83; see also *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (Roberts, C.J., concurring) (“Adherence to precedent is necessary to ‘avoid an arbitrary discretion in the courts.’” (quoting THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (J. Cooke ed., 1961))). See also generally DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, *NOISE: A FLAW IN HUMAN JUDGMENT* (2022) (discussing noise and ways to reduce it in human decision-making systems); Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125 (1972) (arguing that noise leads to redundancy and random errors, and jeopardizes coordination).

²⁸¹ I thank Professor Stephen Rich for this articulation. The intuition against inconsistencies may weaken in cases that are more distinguishable along relevant dimensions. But consistency and coherence are always desirable within a legal system. So, the problems with inconsistency or incoherence may become less pressing, but they never fully dissipate. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 160, at ch. 2.

imagine two federal courts in the same circuit reaching contradictory factual conclusions about the recidivism rates of older drug offenders in two criminal cases, only weeks apart. In this example, the two decisions share important features—jurisdiction, legal field, subject of the fact, and time. These similarities strengthen the expectation that the two decisions will align. As the Second Circuit wrote: “It would be shocking if contrary decisions of two district judges in this circuit on exactly the same facts had to be left standing.”²⁸² Factual precedents are therefore desirable because they reduce factual inconsistencies.²⁸³

Positively, factual precedents are desirable because they increase consistency. In turn, consistency promotes fairness, in the sense of treating like cases alike.²⁸⁴ It also enhances credibility and predictability, and reduces the risk of arbitrary exercises of power,²⁸⁵ which legitimizes judicial decisions about facts.²⁸⁶ At an even deeper level, by promoting consistency, fairness, and predictability, factual precedents help guide human action in a way that respects individuals’ agency and dignity.²⁸⁷ Thus, by serving these values, factual precedents (like legal precedents) also promote the rule of law.²⁸⁸

Next, factual precedents respect prior courts and the legal system as a whole. “The degree of deference a legal system gives to prior findings is an indication of how seriously the legal system

²⁸² *Mamiye Bros. v. Barber S.S. Lines, Inc.*, 360 F.2d 774, 777 (2d Cir. 1966); *see also* *A Woman’s Choice-E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 688–89 (7th Cir. 2002) (finding a similar suggestion “unsound”); *Carhart v. Gonzales*, 413 F.3d 791, 799 (8th Cir. 2005) (finding that a similar suggestion could lead to “absurd” results).

²⁸³ *See* Shapiro, *supra* note 280, at 133; *see also* GARNER ET AL., *supra* note 31, at 386 (noting that the “prevailing federal approach” is that precedents promote “judicial unity”).

²⁸⁴ *See* GARNER ET AL., *supra* note 31, at 21–22; CROSS, *supra* note 136, at 4.

²⁸⁵ *See supra* text accompanying note 280.

²⁸⁶ *See* Schauer, *Precedent*, *supra* note 6, at 600 (suggesting that because internal consistency strengthens external credibility, using precedents (or rules) to decrease internal inconsistency will strengthen the decision-making environment of the institution); Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 604–05 (1993) (explaining that the more lawyers learn about judges’ expected decisions, their resistance to their decisions will decrease); Varsava, *Value of Stare Decisis*, *supra* note 279, at 76–78; *see also infra* note 296 and accompanying text (explaining that consistent procedures improve public perception of legitimacy).

²⁸⁷ *See* Jeremy Waldron, *Vagueness and the Guidance of Action*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 58 (Andrei Marmor & Scott Soames eds., 2011) (explaining how law respects human dignity by guiding action, rather than by using manipulation).

²⁸⁸ *See* Sebastian Lewis, *Precedent and the Rule of Law*, 41 OXFORD J. LEGAL STUD. 873, 885–87 (2021) (arguing that precedents serve the rule of law by promoting consistency, predictability, and fairness).

regards those findings. It also reflects how seriously the legal system views itself.”²⁸⁹ Respecting the prior court is a reason for the subsequent court to act, to express its respect.²⁹⁰ And, arguably, being a legal official entails a commitment to show such respect as well.²⁹¹ Factual precedents cash out this commitment. By requiring courts to engage with their predecessors’ decisions, they manifest an attitude of respect toward prior courts’ inputs, reasoning, and methodology. Put negatively, disregarding a prior court’s factual conclusion is a sign of disrespect toward that court.²⁹² In addition, factual precedents cultivate this attitude of respect across the legal system as a whole. For they require a court to engage with any courts’ judicial decision (within the jurisdiction), not just with those that the present court happens to favor.

Relatedly, factual precedents also ground judicial decisions about facts within a broader legal endeavor. By relying on and engaging with prior courts’ decisions, a subsequent court ties its own decision to a broader legal discussion about a particular general fact. This, in turn, promotes legitimacy in two ways. It promotes deliberation between courts, which increases the legitimacy of each decision.²⁹³ And it also embeds each judicial decision about facts within the broader fabric of legal decision-making. It thus renders the court’s decision about facts “a product of the legal community as a whole,” not a single judge’s whim.²⁹⁴

²⁸⁹ Motomura, *supra* note 40, at 1005–06.

²⁹⁰ See JOSEPH RAZ, *THE AUTHORITY OF LAW* 259 (1979). Respect might have only a “limited practical impact” on the subsequent court, especially if the subsequent court thinks the prior court’s factual conclusion was mistaken. See Felipe Jiménez, *Legality and Commitment*, 29 J. ETHICS SOC. PHIL. 394, 405–06 (2025). But even on this account, a subsequent court that respects a prior court would have a reason, albeit a limited one, to engage.

²⁹¹ See Jiménez, *supra* note 290, at 405–06 (stating that individuals, and especially legal officials, may have commitments to the rule of law).

²⁹² See GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 24 (James Sedgwick ed., Philadelphia, Joseph Cruikshank 7th ed. 1805); Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 345 (1948).

²⁹³ Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 23–28 (2023) (describing precedents as promoting deliberation and hence democratic legitimacy); see also Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1032 (2018); Allison Orr Larsen & Neal Devins, *The Judicial Voice on the Courts of Appeals*, 111 IOWA L. REV. 655, 665 (2026) (developing a deliberation model that promotes legitimacy, under which “decisions are better when deliberated and [] deliberation is better when collegial”).

²⁹⁴ Barber, *supra* note 257, at 57–58; see also Hellman, *supra* note 262, at 74–75. Deliberating with peers is therefore a judicial norm, which judges value in their peers. See generally Larsen & Devins, *supra* note 293.

So, by increasing respect for prior judicial decisions and grounding each decision within a broader legal endeavor, factual precedents promote legitimacy inherently. In addition, these same features also promote legitimacy instrumentally. Specifically, factual precedents signal procedural fairness. By requiring courts to engage with prior decisions, factual precedents explicitly indicate that judicial decisions about facts are not arbitrary. They mark these decisions as grounded in structured procedures, which are shared by many courts.²⁹⁵ As a result, litigants and the public are more likely to view these decisions as fair and legitimate.²⁹⁶ Here, again, factual precedents' legitimizing effects mirror those of legal precedents.

Lastly on this point, perhaps factual precedents are desirable simply because we are talking about legal decisions. As explained, judicial decisions about general facts are, well, judicial decisions. Precedents are a crucial part of judicial decision-making in the common law. It therefore seems reasonable to expect that precedents will play a role in judicial decisions about general facts. If this simple syllogism holds, then those who wish to exclude precedents from judicial decisions about general facts should be required to justify their position.²⁹⁷ One may respond by invoking a longstanding practice of courts not relying on precedents when deciding about facts.²⁹⁸ But this practice is best understood as referring to specific (adjudicative) facts, not general facts. And there is a tendency among courts to rely on their predecessors' decisions

²⁹⁵ See Varsava, *Value of Stare Decisis*, *supra* note 279, at 78–79.

²⁹⁶ See Barber, *supra* note 257, at 57–58 (explaining that parties will be more inclined to accept judgments based on precedents). See generally Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (connecting legitimacy to perceived procedural fairness). For empirical support, see Tom R. Tyler, *Whither Legitimacy? Legal Authority in the Twenty-First Century*, 19 ANN. REV. L. & SOC. SCI. 1, 5–7 (2023) (surveying more recent studies); Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCH. 597, 605 (2006) (finding that following legal procedures increases perceived fairness); Taraleigh Davis, *In the Light: Procedural Legitimacy, the Shadow Docket, and Support for the U.S. Supreme Court*, 53 AM. POL. RSCH. 193, 194 (2024) (surveying literature finding a connection between “procedural regularity” and public support of courts).

²⁹⁷ Cf. Frederick Schauer, *The Role of Rules in the Law of Evidence*, in PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 69, 77–79 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021) [hereinafter Schauer, *The Role of Rules*] (explaining that since rule-based decisions are the norm in law generally, those who argue against them in evidence law have the burden of justification).

²⁹⁸ See *supra* text accompanying notes 135–37.

about general facts, as explained.²⁹⁹ So, the original point stands: Given precedents' prominence in judicial decision-making, we should expect to see them in judicial decisions about general facts. And thus, the burden should be on those opposing factual precedents to state their case, and not the other way around.

2. Better decisions about facts.

Moving on, factual precedents also make judicial decisions about facts more legitimate as *decisions about facts*. That is, there are epistemic justifications for factual precedents. Note, I do not argue that factual precedents will always lead to accurate decisions.³⁰⁰ Rather, I argue that there are reasons to think that factual precedents will lead to epistemically better decisions in the aggregate, despite sometimes yielding worse outcomes in particular cases.³⁰¹

To begin, factual precedents will institutionalize a checking function on judicial decisions about facts. Currently, courts rarely and sporadically check one another's decisions about general facts. Recognizing factual precedents will require subsequent courts to engage with prior decisions about general facts. If the prior decision is sound in the subsequent court's view, that court will adopt and apply it. If that court finds the decision flawed, it will identify and explain its shortcomings.³⁰² Thus, factual precedents make subsequent courts provide feedback and check on prior courts' decisions. Less intuitively, a prior court's decision also serves as a check on subsequent courts' decisions, providing a (counter)argument for subsequent courts to engage with. This is easiest to see when a third court criticizes a second court's factual conclusion by referring to arguments made by the first court.

The checking function that factual precedents promote improves judicial decisions about facts in two ways. One way is by enriching the debate. The ongoing engagement between courts about these facts cultivates an exchange of valuable knowledge

²⁹⁹ See *supra* Part I.A.

³⁰⁰ This would be a mistake. See Schauer, *Precedent*, *supra* note 6, at 575–76 (explaining that arguing from precedents means valuing the prior decision even when it was mistaken); SCHAUER, *PLAYING BY THE RULES*, *supra* note 160, at 100–02, 152–53 (arguing that rule-based systems will always be suboptimal compared to ideal particularistic decision-making).

³⁰¹ See Hellman, *supra* note 262, at 65–69 (discussing a system with precedents as epistemically justified in this way).

³⁰² See *supra* Part I.A.

and mutual feedback. It cultivates judicial deliberations about general facts, and thus epistemically improves decisions about them.³⁰³ Another way is by promoting judicial self-check. Knowing that future courts will scrutinize their decisions about general facts, courts will be incentivized to reach better decisions *ex ante*.³⁰⁴ The mere threat of review is a motivation for courts to better ground and explain their decisions, and thus avoid unnecessary holdings they are less certain about. Put differently, by increasing the likelihood of *ex post* scrutiny by peer courts, factual precedents will incentivize courts to determine epistemically better facts *ex ante*.³⁰⁵

Second, factual precedents can help cultivate cooperation and the creation of a shared knowledge base. Nowadays, courts determine general facts independently. Each court generates valuable insights based on investigation by that court, those parties, and the particular circumstances of the case at hand. But the system is highly fragmented. It is thus up to each court to proactively take the initiative if it wants to learn from other courts' experiences. There is currently no mechanism at play to aggregate and utilize the vast pool of knowledge about general facts that is being created across many cases. Scholars have recognized the epistemic treasure trove hidden in our legal system. And they have discussed ways to turn it into a public good that courts, litigants, and society can use.³⁰⁶

There are compelling epistemic reasons for cultivating and utilizing a shared judicial knowledge base about general facts. Namely, once such a system is in place, each court and litigant can benefit from it. Yet, it is unlikely (and inefficient) that any court (or litigant) could create and sustain this vast knowledge

³⁰³ See Shapiro, *supra* note 280, at 132–34 (explaining precedents as exchanges of knowledge between courts that provide feedback about the contents of decisions); Hellman, *supra* note 262, at 70–74.

³⁰⁴ See *supra* notes 259–60 and accompanying text.

³⁰⁵ One can imagine courts determining facts less diligently *ex ante*, knowing that factual precedents will make subsequent courts follow their decisions regardless of the content. While I doubt that courts would act this way in practice (at least knowingly), the mere risk of future criticism by some future court would still serve as a counterbalance to this undesirable judicial practice. I thank Professor Alon Harel for this point.

³⁰⁶ See Zachary D. Clopton & Aziz Z. Huq, *The Necessary and Proper Stewardship of Judicial Data*, 76 STAN. L. REV. 893, 906–15 (2024) (explaining that valuable “judicial data” is created in the legal system, but that it is not being effectively captured); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2107–08 (2016) (explaining that judicial decisions about “systemic facts” can create “a public good” that other judges and litigants can use).

base on its own.³⁰⁷ Hence, to reap the benefits of a shared knowledge base about general facts, we need to treat it as a public good—to get the relevant actors to participate in building and cultivating it.

Factual precedents are an overlooked way to create this public good, to build and cultivate a shared knowledge base about general facts. By requiring courts to engage with each other’s factual conclusions, factual precedents make courts cooperate and contribute to a growing knowledge base about general facts. Such discussions happen openly using a mechanism that legal actors are very familiar with—developing a body of case law dedicated to these general facts. It is through the creation of such dedicated case law that our legal system can create and cultivate this knowledge base. The ongoing discussions between courts, endorsing and criticizing prior decisions about general facts, hone the legal system’s shared understanding of these general facts, thereby improving the knowledge base over time.³⁰⁸ In short, factual precedents use a familiar legal tool to empower courts to cooperate in creating and cultivating a shared knowledge base about general facts.

Third, factual precedents also have an equalizing epistemic effect. Ideally, every litigant should have equal access to the best evidence. Alas, in reality, obtaining evidence—calling witnesses, hiring experts, or conducting research—is costly. This is especially true for general facts, which require specialized knowledge not readily available to the parties (unlike most adjudicative facts). As a result, litigants with fewer resources will often have comparatively limited access to the best evidence about general facts.³⁰⁹ This state of affairs puts these litigants at a disadvantage, particularly when facing opponents with greater financial means.³¹⁰

³⁰⁷ See Hellman, *supra* note 262, at 74–75.

³⁰⁸ See, e.g., Ryan C. Williams, *Historical Fact*, 99 NOTRE DAME L. REV. 1585, 1615–16 (2024) (suggesting that as questions of history repeatedly resurface in different courts, courts will become more confident in the historical record developed in prior cases).

³⁰⁹ See, e.g., Jasmine B. Gonzales Rose, Asees Bhasin & Spencer Piston, *Antiracist Expert Evidence*, 134 YALE L.J. 2362, 2399–2412 (2025) (discussing criminal defenders reporting difficulties in accessing evidence about race that they deem valuable).

³¹⁰ Walker & Monahan, *Social Frameworks*, *supra* note 157, at 583–85 (“[T]he current method of introducing empirical frameworks is expensive. . . . Access to expert testimony on empirical research is effectively precluded in a large number of cases in which the introduction of a framework would seem justified.”).

Factual precedents can help. As just explained, factual precedents promote information sharing across cases, courts, and litigants. Litigants who lack capacity for sophisticated scientific research could learn about general facts by using a source their lawyers know well—reading cases. Accordingly, in their briefs and oral arguments, litigants could invoke the factual precedents, which courts would then be required to consider. This access allows litigants to benefit from the factual conclusions of prior cases and thus helps alleviate (to some extent) the unavoidable inequality of resources between parties.

Note, recognizing factual precedents is key for unlocking this equalizing effect. It is key because it cultivates the knowledge base, as discussed, and also because it makes it worthwhile for litigants to rely on this source. Recall, a system with factual precedents requires courts to engage with their predecessors' decisions about general facts, unlike a system without factual precedents, which allows courts to ignore these decisions. Hence, only in a system with factual precedents can litigants trust that invoking prior cases' factual conclusions will matter in the case at hand.

Of course, factual precedents will not solve all inequalities between parties. Factual precedents allow litigants to invoke prior courts' factual conclusions, not expert testimony or other underlying sources in the prior case.³¹¹ In addition, as Professor Erin Murphy notes, in criminal cases, prosecutors may use their advantages as organized and well-resourced repeat players to create factual precedents. And defense attorneys' diffusion may make it harder for defendants (as a whole) to respond in kind.³¹² However, this imbalance is exactly why factual precedents are so desirable. Factual precedents grant all litigants access to authoritative factual conclusions they may otherwise lack. And since these conclusions (and often the litigants' arguments about them) are available in the case law for any lawyer to utilize, factual precedents allow all litigants—even those who are not part of a tight-knit community—to work with one another. Put simply, factual precedents make it easier for litigants to cooperate in learning, developing, and arguing for and against general facts. Hence, while

³¹¹ See *supra* text accompanying notes 189–93.

³¹² See Murphy, *supra* note 156, at 762–64; see also Gonzales Rose et al., *supra* note 309, at 2422 (arguing that defense attorneys scramble to find suitable experts, disadvantaging defendants compared to prosecutors). Note that diffusion may make responding harder for defendants, but not impossible, as illustrated by the additional experts the defense introduced in *United States v. Llera Plaza*, 188 F. Supp. 2d. 549 (E.D. Pa. 2002).

no panacea, factual precedents mark an improvement compared to the status quo, especially for underresourced and less well-organized litigants.

Finally, factual precedents may also help limit appellate courts' broad discretion in decisions about general facts.³¹³ Currently, appellate courts use shifting standards to review general facts,³¹⁴ liberally rely on in-house research and amicus briefs,³¹⁵ and disagree on procedures.³¹⁶ In doing so, they ignore, and arguably undermine, lower courts' institutional advantages in deciding about facts.³¹⁷ Recognizing factual precedents may help change that. If lower courts engage with one another's decisions about general facts, over time they will likely converge on certain conclusions. Appellate courts will then find it harder to disregard this growing consensus. In this sense, a system in which lower courts internalize the practices of factual precedents can encourage appellate courts to give greater weight to lower courts' factual conclusions, at least those conclusions that were endorsed by many lower courts. Note, I do not suggest that appellate courts should be bound by lower courts' decisions. And I'm unsure whether it's wise to require lower courts to develop and follow horizontal factual precedents. Less rigidly, I think that a system in which lower courts engage with one another, in accordance with the notion of factual precedents promoted in this Article, can change the subtle relationships between lower and appellate courts. By doing so, they may help tame appellate discretion about general facts, and help utilize the epistemic advantages baked into our common law system.³¹⁸

* * *

We find that factual precedents are desirable. They make judicial decisions about facts more justified, as legal decisions and as decisions about facts.

³¹³ I thank Dean Franita Tolson for this point.

³¹⁴ See, e.g., Yoshino, *supra* note 39, at 257–58.

³¹⁵ See Larsen, *Amicus Facts*, *supra* note 200, at 1802–05; Gorod, *supra* note 144, at 40–47.

³¹⁶ See Kenneth, *supra* note 44, at 125–27.

³¹⁷ See Yoshino, *supra* note 39, at 280 (discussing an amicus brief's argument in favor of a lower court's factfinding); see also *United States v. McElhiney*, 2007 WL 9676746, at *3 (C.D. Cal. Mar. 12, 2007) (explaining that litigants need not establish a record about legislative facts in lower courts, because they may do so in the appellate court briefing); Gorod, *supra* note 144, at 48–50.

³¹⁸ Gorod, *supra* note 144, at 26–37 (supporting appellate courts relying more on lower courts' factfinding).

Finally, notice what I do not argue. I do not argue, nor do I think, that judicial repetition of a fact affects the truth of the matter.³¹⁹ The facts that courts determine are true (or false) regardless of what subsequent courts (or anyone else) think about them. As I explained elsewhere, when courts determine a fact, they do not argue that it is *the* truth. They simply determine the legal point of view about it.³²⁰ Hence, recognizing the practice of factual precedents will not affect the truth of some factual claim, only the legitimacy of a judicial decision about it. I also do not argue, nor do I think, that repetition of a fact by many courts should affect judges' beliefs about general facts. Anyhow, judges' beliefs are beside the point. What matters in judicial decision-making about facts is not what an individual judge believes, but how courts should decide about these facts.³²¹

C. Objections and Responses

In the previous Section, I argued for factual precedents. There are counterarguments. Let's explore some of them.

First, consider accuracy. Judicial decisions are better when the facts that underpin them are more accurate.³²² And accuracy is particularly important in judicial decisions about general facts.³²³ Yet courts often determine facts inaccurately.³²⁴ Some may argue that factual precedents can accentuate this problem, for at least two related reasons. One reason is that factual precedents give subsequent courts a justification for reiterating a mistaken prior decision. The other reason is that factual precedents might entrench facts that appeared accurate when decided but turned out to be wrong in hindsight. In short, some may argue that factual precedents should be avoided because they reproduce

³¹⁹ Gardner, *Dangerous Citations*, *supra* note 138, at 1675 ("[T]he quantity of citations is not necessarily indicative of correctness.").

³²⁰ See Kenneth, *supra* note 44, at 53–56 (discussing legal-truths as perspectival truth-claims).

³²¹ Cf. L. Jonathan Cohen, *Should a Jury Say What It Believes or What It Accepts?*, 13 CARDOZO L. REV. 465, 473–75 (1991) (arguing that triers of fact should base verdicts on reasoned acceptance of the evidence rather than on subjective belief).

³²² Kenneth, *supra* note 44, at 55–56.

³²³ See *supra* note 259.

³²⁴ Inaccuracies may arise due to honest mistakes, or they may arise because one of the parties has an interest in such inaccuracies. A sophisticated litigant may "shop" for a favorable case, opponent, and judge to mount their best arguments, hoping to set favorable factual precedents that will affect future cases. See *supra* text accompanying notes 270–71. For present purposes, the problem is the same regardless of how the inaccuracy comes about.

mistakes, and because they embolden some facts that will eventually become inaccurate.³²⁵

There is some truth to this objection. Factual precedents amplify the strength of prior decisions about facts. When the facts are inaccurate, this amplification creates adverse effects. When they are accurate, the effect is desirable—for exactly the same reasons. Put differently, rather than directly affecting accuracy, factual precedents reduce noise in judicial decisions about facts, making subsequent decisions more likely to cohere with prior ones. Unfortunately, it is impossible to set up a system of factual precedents in which subsequent courts will be required to adhere only to accurate decisions. It is impossible because courts (and others) will disagree about which decisions are accurate, and because such a system requires content-based discretion about the prior decision, which takes us back from a factual precedents model to a persuasion model.³²⁶ So, we have to take the good with the bad. Either we use factual precedents to reduce noise—and risk reiterating mistakes—or we let go of factual precedents and opt for more inconsistencies.

In other words, the concern seems really to be about the desirability of consistency and noise reduction in judicial decisions about facts. As I argued above, reducing noise helps make legal decisions more politically justified.³²⁷ Is reducing noise also epistemically desirable? I think so. It is likely that inconsistency will lead to less accurate decisions in the aggregate. Analytically, assuming there is a correct answer to some factual question, inconsistency by definition leads to inaccuracies. Practically, because judges are imperfect and litigants are both imperfect and motivated, variance between cases (i.e., inconsistency) will often lead to inaccuracies.³²⁸ Factual precedents promote consistency across cases, which pushes to reduce the inaccuracies that arise from the variance between cases. Put simply, if there is one right answer

³²⁵ See Gardner, *Dangerous Citations*, *supra* note 138, at 1638–39; POSNER, *supra* note 260, at 177 (suggesting that precedents gain certainty by favoring the state of knowledge at the time they were set over the knowledge available at the time they are applied).

³²⁶ See *supra* Part II.A.

³²⁷ See *supra* text accompanying notes 283–88.

³²⁸ This is a common concern in evidence scholarship. See William Twining, *Freedom of Proof and the Reform of Criminal Evidence*, 31 *ISR. L. REV.* 439, 443 (1997) (finding “a growing recognition that problems of proof, information handling, and ‘evidence’ arise at all stages of legal processes”). See also generally Schauer, *The Role of Rules*, *supra* note 297.

about some general fact, factual precedents nudge the legal system toward this answer in all cases. Additionally, when inaccuracies do inevitably arise, correcting them is easier in a less noisy system. That is because the mistakes are more likely to be identified, and because the correction will spread more quickly throughout the system.³²⁹

A related objection is the problem of stickiness. Factual precedents mean that court₁'s factual conclusion is itself a reason for court₂ to reach the same factual conclusion. Following, court₂'s factual conclusion provides a further reason for court₃ to do the same. After all, the same factual conclusion has now been argued and adopted by two different courts. This solid footing makes it even easier for a fourth court to join in. And so on for the fifth, . . . , nth.³³⁰

Stickiness may be objectionable for two reasons. One is that stickiness can entrench inaccuracies. The previous paragraphs discussed this concern. Another is that the factual conclusion gains support simply because prior judicial decisions have endorsed it, and arguably regardless of the conclusion's epistemic merits.³³¹ But this latter concern rests on misguided assumptions. Namely, it assumes that (1) prior judicial decisions should not matter for subsequent courts' factual conclusions, or (2) there is no epistemic merit to reliance on factual precedents. Contrarily, as I explained in Part III.B, there are good legal and epistemic reasons for relying on prior cases in judicial decisions about facts.

The previous paragraphs tried to take the sting out of the problems of accuracy and stickiness. They argued that accuracy might be enhanced in the aggregate if we opt for consistency, which factual precedents support. And that stickiness has features that make it desirable in our legal system. But it would be

³²⁹ As Professor Edward Cheng explained, there are whole communities of experts beyond the legal field that "stand ready to challenge" judicial mistakes about general facts. Cheng, *Scientific Evidence as Foreign Law*, *supra* note 259, at 1099. These experts often focus on the major cases (e.g., by filing amicus briefs in the Supreme Court), and seldom bother responding to each and every lower court case. Experts may be more inclined to opine earlier in the process to correct mistakes if their interventions will have effects on more cases—that is, under a system of factual precedents.

³³⁰ See Gardner, *Dangerous Citations*, *supra* note 138, at 1639–40 (discussing the ossification of factual precedents).

³³¹ See *People v. Williams*, 147 N.E.3d 1131, 1140 (N.Y. 2020) ("The repetition of a single, questionable judicial determination does not strengthen or add validity to such ruling, and it defies logic that an error, because it is oft-repeated, somehow is made right.").

foolish to completely ignore these objections. Inaccurate judicial decisions about general facts should not be celebrated. Nor should we be happy about courts sheepishly following a prior decision about general facts. These are the possible negative side effects of introducing factual precedents. If they do arise, factual precedents have mechanisms to counter them.³³² Namely, by underscoring engagement between courts and introducing the checking function, as this Article discussed.³³³

A third objection is that factual precedents will exacerbate judicial decisions' tendency to lag behind the newest scientific developments. Our society's best understanding about facts—about reality and the way things are—is dynamic. It changes as new information and better understandings become available. Our legal system can never fully keep up with scientific developments. Worse yet, legal decisions tend to stabilize facts that, in other contexts, are ever-changing. And factual precedents seem to push these legal facts to become even more static, for the reasons explained in the objections above.³³⁴ This is a serious concern. By empowering prior decisions about facts, factual precedents admittedly make it more cumbersome for courts to update their views. To illustrate, factual conclusions about the unreliability of lie detectors continue to affect subsequent cases over fifty years after they were first determined,³³⁵ despite significant changes to the underlying technology.³³⁶ Such lag can have serious implications, as wrongful convictions based on unreliable evidence make clear.³³⁷ I offer a few responses to this problem.

³³² See *infra* text accompanying notes 347–54.

³³³ See *supra* text accompanying notes 301–05; *infra* notes 367–69; see also *infra* Part IV.A.

³³⁴ I thank Professor Ariel Jurow Kleiman for this point.

³³⁵ E.g., *State v. Kolander*, 52 N.W.2d 458, 464–65 (Minn. 1952) (“[U]p to the present time the almost unanimous holding of all courts . . . is that the results of such [lie detector] tests are inadmissible . . . based on the reasoning that the tests have not yet gained such standing and scientific recognition.”); *State v. Goblirsch*, 246 N.W.2d 12, 15 (Minn. 1976) (citing *Kolander*, 52 N.W.2d at 465); *State v. Michaeloff*, 324 N.W.2d 926, 927 (Minn. 1982) (citing *Goblirsch*, 246 N.W.2d at 15); *State v. Eckman*, 2013 WL 2460138, at *4–5 (Minn. Ct. App. June 10, 2013) (citing *State v. Dressel*, 765 N.W.2d 419, 424–25 (Minn. Ct. App. 2009) (quoting *Kolander*, 52 N.W.2d at 465)).

³³⁶ See SCHAUER, *THE PROOF*, *supra* note 229, at 119–25 (discussing the benefits of lie detection, especially compared to the alternatives).

³³⁷ See, e.g., Daniele Selby, *Why Bite Mark Evidence Should Never Be Used in Criminal Trials*, INNOCENCE PROJECT (Apr. 26, 2020), <https://perma.cc/Z6Y6-6A78> (noting that twenty-six individuals “have been wrongfully convicted based on bite mark evidence”); Erica Beecher-Monas, *Reality Bites: The Illusion of Science in Bite-Mark Evidence*, 30 CARDOZO L. REV. 1369, 1373–75 (2009).

It is hard to argue against courts being quicker to adopt novel and accurate factual methods. But novel does not always mean accurate. It is the nature of novel developments that they have not yet been scrutinized and applied in many practical instances. Hence, mistakes will occur if courts quickly adopt infant scientific or technological developments.³³⁸ Put differently, courts lagging novel developments is not (necessarily) a bug. It is a feature of the legal system's aversion to false positives and to adopting novel methods too early. From this perspective, some lag is desirable, and people may reasonably disagree about how long it should be.

Additionally, our best understanding of general facts is, in many cases, quite stable. Legal cases in which science or technology has completely changed are much rarer than those in which it has stayed the same. To illustrate, consider general facts about the risk of asbestos exposure, or the general acceptance of the technology underlying DNA PCR comparison. These general facts have not changed considerably in many years. Courts may safely rely on these (and many other) stable general facts in thousands of cases each year, without worrying about any significant changes to the underlying science. In the vast majority of cases in which no significant change has occurred in the underlying facts, factual precedents are very desirable.³³⁹

That said, the dynamic nature of facts is undeniable. Our theory of factual precedents should explain how factual precedents can change in light of changes to the best understanding of the facts. It can be helpful to distinguish between gradual and paradigmatic changes, both of which should be accounted for. Examples of desirable gradual change include when the underlying technology evolves (e.g., when a new version of a well-known technology is released) or when new research is provided about a social-scientific question, which refines but does not uproot existing understanding (e.g., when new insights emerge about the symptoms of some syndrome). My argument accounts for this evolution. The ongoing engagement between courts about factual precedents will gradually develop and hone judicial understanding of these facts.³⁴⁰ Therefore, factual precedents will evolve and

³³⁸ See Eli Siems, Katherine J. Strandburg & Nicholas Vincent, *Trade Secrecy and Innovation in Forensic Technology*, 73 HASTINGS L.J. 773, 780–90 (2022) (discussing the problems with novel DNA evidence).

³³⁹ See, e.g., *infra* text accompanying notes 407–10.

³⁴⁰ See *supra* text accompanying notes 301–08.

improve over time, as new evidence comes to light in more cases.³⁴¹ Indeed, this flexibility is part of what makes presumptive factual precedents so appealing. Paradigmatic changes in scientific or historical understandings of some general facts call for a different solution. One example of paradigmatic change is when society's best understanding of the facts has flipped.³⁴² These scenarios call for paradigmatic changes in legal decisions—overruling factual precedents. I agree that our legal system should allow overruling of factual precedents. But this is a complicated topic that merits a separate discussion.

A fourth objection holds that factual precedents may facilitate bad judging. There are a few scenarios to consider. One is that of the lazy judge. He may use factual precedents as an excuse for mindlessly agreeing with a prior decision's factual conclusion without giving it much thought.³⁴³ Another scenario is motivated reasoning. Lacking information about some general fact, a judge may “make[] guesses” about the facts,³⁴⁴ and later seek factual precedents to support these guesses.³⁴⁵ Confirmation bias may lead judges to cherry pick favorable decisions, overgeneralize, or ignore nuances in the prior decisions, in order to support their guesses.³⁴⁶ Relatedly, a judge might echo prior decisions due to

³⁴¹ Admittedly, litigants (and courts) must be diligent for such changes to come about. They will need to understand how some research, method, or process compares to the status quo ante. This may seem like a lot to ask. But in fact, I do not think this level of proficiency is very different from what litigants and courts need nowadays, without factual precedents. Indeed, for those sophisticated litigants and judges who will strive for cutting-edge research, factual precedents can save them time by allowing them to rely on prior cases for the well-known parts (e.g., the science underlying DNA extraction) and focus instead on the novel parts (e.g., new ways to analyze the extracted DNA). I thank *The University of Chicago Law Review* Articles Editors for this great point.

³⁴² See, e.g., *supra* notes 335–36 and accompanying text (demonstrating a change in factual conclusions about the reliability of lie detectors); Beecher-Monas, *supra* note 337, at 1371–72 (noting that “[t]he science behind bite-mark testimony is murky at best” but is often admitted); see also Williams, *supra* note 308, at 1617–18 (arguing that historical facts’ precedential force should be vulnerable to changes in our understanding of history).

³⁴³ I thank Professor Erin Murphy for this point.

³⁴⁴ Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 15 (1986) (observing that the Court often “makes guesses” when lacking information on general facts); see also Gorod, *supra* note 144, at 53–56 (suggesting that judges are likely to have preconceived views about legislative facts that they have to determine). Allen, *supra* note 286, at 631 (noting that much of the evidence is “imported” by the fact finder based on experience).

³⁴⁵ See Larsen, *Factual Precedents*, *supra* note 35, at 76 (“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.”).

³⁴⁶ See Gardner, *Dangerous Citations*, *supra* note 138, at 1639–40, 1655–56 (discussing the pitfalls of judges’ misuse of factual precedents). In addition, some argue that legal

their availability and prominence, rather than engaging thoughtfully with those decisions.³⁴⁷

Note, however, that the problems the previous paragraph identifies (and to some extent also stickiness) are bad judicial practices. We should always oppose judges who cherry pick information or lazily follow heuristics over better-informed available sources. Similarly, judges should not misuse prior cases—or any other source—to vindicate their own assumptions and ignore opposing views. Nor should they, under the guise of the factual precedents I argue for, mindlessly follow prior decisions automatically. One might argue that factual precedents tempt judges to engage in such bad practices. But I do not see how factual precedents make judges more prone to bad judging. Judges can rely on prior cases in adverse ways even now, under the persuasion-based status quo. And we do not usually think that legal precedents make judges more prone to bad judging. If anything, factual precedents may help confront these concerns. For factual precedents explicitly require judges to seriously engage with prior cases.³⁴⁸ And the checking function creates mechanisms to counter and criticize such attitudes. Hence, in a system with factual precedents, a judge who mindlessly adopts (rather than engages with) a (mistaken) prior court's factual conclusion is not only underperforming as a judge. He also risks being criticized and overruled by future courts.

The bad-judging objection has a more sinister version. Judges sometimes misuse their power to promote the ideological, political, or religious views they favor. In our context, judges may go out of their way to establish general facts about controversial issues.³⁴⁹ Some may argue that factual precedents exacerbate this problem, by luring judges with the possibility of affecting future cases.³⁵⁰ Surely, judicial misuse of power is probably unavoidable

search engines make judicial research less accurate. See, e.g., Larsen, *Factual Precedents*, *supra* note 35, at 74–76; Rigoni, *supra* note 133, at 69.

³⁴⁷ See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 720–23 (1999) (discussing information cascades generally); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 32–33 (2009) (applying the idea of information cascades to sequential precedents).

³⁴⁸ See *infra* Part IV.A.

³⁴⁹ See, e.g., *supra* note 270; Food & Water Watch, Inc. v. EPA, 2024 WL 4291497, at *18 (N.D. Cal. Sept. 24, 2024) (concluding “by a preponderance of the evidence that fluoride is associated with reduced IQ in children—at least at ‘higher’ concentration levels”).

³⁵⁰ I thank Professor Nomi Stolzenberg for this point. See *supra* text accompanying notes 265–66.

in a vast legal system like ours. These vices are blameworthy and should be criticized. But it is not clear to me that factual precedents will make such misuses of power more common.³⁵¹ Importantly, when these misuses of power come about, factual precedents have an answer. Recall that the system of factual precedents fosters an ongoing engagement between courts about general facts.³⁵² It therefore includes a mechanism for responding to such bad decisions. If we assume that some judges will be tempted to determine broad general facts, it seems fair to assume that other judges will be tempted to respond in kind—criticizing their peers and correcting them in future cases.³⁵³ Hence, factual precedents disincentivize misuse of power *ex ante*, and provide a mechanism for correcting such indiscretions *ex post*.³⁵⁴

Lastly, a fifth objection is based on litigants' interests in arguing their own case. The problem here is that relying on factual precedents may limit litigants' ability to argue about some facts, unduly limiting their opportunity to make certain arguments. This is a common concern in these contexts.³⁵⁵ It arises, for instance, in the party presentation principle.³⁵⁶ The latter basically holds that "courts should resolve cases on the basis of the issues and reasons presented by the parties to the dispute."³⁵⁷ While significant, these interests should not be overstated. Litigants' freedom to argue their own case is regularly balanced against other interests, such as finality, respect for prior decisions, fairness, and efficiency.³⁵⁸ To illustrate, if the interest protected in arguing

³⁵¹ See *supra* notes 264–65 and accompanying text.

³⁵² See *supra* text accompanying notes 262–63.

³⁵³ See *infra* text accompanying notes 367–68.

³⁵⁴ See *supra* text accompanying note 305.

³⁵⁵ See Gorod, *supra* note 144, at 65–66; Ferguson, *supra* note 153, at 1659; see also Monahan et al., *supra* note 34, at 1730 n.46 (citing empirical evidence supporting the claim that juries are more attentive to expert testimony than to jury instructions).

³⁵⁶ See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation."); *Clark v. Sweeney*, 146 S. Ct. 410, 412 (2025) ("The parties 'frame the issues for decision,' while the court serves as 'neutral arbiter of matters the parties present.'" (quoting *Sineneng-Smith*, 140 S. Ct. at 1579)). See also generally Owen B. Smitherman, *Grounding the Party Presentation Principle*, 101 NOTRE DAME L. REV. (forthcoming 2026) (discussing the principle's origins and impact on appellate courts).

³⁵⁷ Randy E. Barnett & Lawrence B. Solum, *Making the Party Presentation Principle Safe for Originalism*, 174 U. PA. L. REV. 947, 949 (2026). But many ambiguities remain about what exactly the principle stands for. See *id.* at 961–93.

³⁵⁸ This is a well-known tension in *res judicata*. See, e.g., 18 MOORE'S FEDERAL PRACTICE, §§ 131.10, 132 (3d ed. 2026). Professors Randy Barnett and Lawrence Solum have argued that litigants who chose not to raise originalist arguments, despite their

one's own case is about putting forth the best possible arguments, it is not clear that litigants should always be at the helm. As Professors Randy Barnett and Lawrence Solum recently explained, litigants may be ill-equipped to make some arguments due to incompetence, lack of expertise and resources, or strategic reasons.³⁵⁹ These scenarios seem quite probable for general facts.³⁶⁰ In these cases, it seems reasonable for courts to rely on factual precedents, to engage with and consider arguments that would lead to better judicial decisions about general facts, even if the parties did not present these arguments themselves.³⁶¹ There are also reasons to favor factual precedents over the party presentation principle in pro se litigation.³⁶² Anyhow, my normative argument in this Article is for presumptive factual precedents, which allow litigants to challenge the prior decision. Hence, this concern seems even less problematic in our context.

IV. FACTUAL PRECEDENTS IN ACTION

By now, we have developed a pretty good understanding of the nature of factual precedents, and the core case for them. The heavy lifting is behind us. If my reader is convinced that we should adopt factual precedents into our legal practice, she likely has questions about operationalizing them. This Part answers some of these questions.

To begin, the change this Article advocates for can come about by judicial fiat, without any changes to legislation. Like their kin legal precedents, factual precedents would simply be a

prominence nowadays, cannot claim it is unfair to use these arguments against them. *See* Barnett & Solum, *supra* note 357, at 980. Arguably, it is similarly fair to rely on general facts, especially if they were used in a prior case.

³⁵⁹ Barnett & Solum, *supra* note 357, at 970–76 (discussing originalist argumentation in constitutional cases); *see* Gorod, *supra* note 144, at 10–11; *see also, e.g.*, Gonzales Rose et al., *supra* note 309, at 2420–26 (explaining that defense lawyers do not raise claims about racism because they fail to realize how it can affect their case or do not have the resources to make such claims); *id.* at 2429–31 (explaining that attorneys refrain from raising arguments about race for strategic reasons, fearing that it will antagonize the jury).

³⁶⁰ *See supra* text accompanying notes 309–10.

³⁶¹ The party presentation principle may be particularly weak if we recognize factual precedents. For a court can assume that the litigants knew about the relevant general facts by reading the case law and hence had an opportunity to respond. *See supra* text accompanying notes 356–57. Of course, giving litigants notice about using factual precedents on a topic they never addressed is probably always good practice.

³⁶² *See* G. Alexander Nunn, *Judicial Enforcement of Evidence Law*, 78 VAND. L. REV. 1459, 1484–87 (2025) (discussing an active role for judges in decision-making about facts).

norm of judging, rather than an application of a specific law.³⁶³ Precedents, legal and factual, are a mode of judicial decision-making that common law courts subscribe to. It is up to judges to establish, sustain, and develop this practice, and to make it robust and meaningful.³⁶⁴

A. Engaging with Factual Precedents

I argue for presumptive factual precedents. On this view, when a court is about to determine a general fact that a prior court has already determined, the subsequent court must engage with the prior decision. It ought to regard the prior decision as a reason, and explain itself if it decides not to follow that prior decision.³⁶⁵

For litigants and judges, engaging with factual precedents will be no more difficult than with legal precedents. When a general fact is relevant in a case, litigants and judges will research prior cases, seeking ones that have previously determined that fact. When a litigant invokes such a case (and it is found relevant³⁶⁶), the court would have an obligation to engage with it—to take it into account when deciding about the general fact.

For courts, engagement will often look like a simple reference—a citation and possibly a brief discussion—to a prior case. This will be the usual practice when courts decide to follow the prior decision. As we have seen, courts have no problem doing so.³⁶⁷ If a court decides not to follow a factual precedent, engaging with it would mean discussing the prior decision and explaining the reasons not to follow it.³⁶⁸ When prior cases reached conflicting

³⁶³ See Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 791 (2017) (stating that deference to precedent is “an implicit constitutional principle”).

³⁶⁴ My argument—that courts themselves can decide to constitute factual precedents—does not mean that the transition will be easy. Questions will arise about this transition. For instance, how should courts treat prior courts’ factual conclusions that were made before the recognition of factual precedents? Adopting this Article’s suggestions requires addressing these transition periods, and I trust that most of these questions can be quite easily resolved. But this Article does not elaborate on this issue further.

³⁶⁵ See *supra* text accompanying notes 181–82, 253–58.

³⁶⁶ What makes a precedent in a prior case relevant to the case at hand turns, to a large extent, on what makes the two cases similar. This, in turn, is a complicated evaluation. See *supra* text accompanying notes 281–82. However, it is one that courts regularly take on.

³⁶⁷ See *supra* Part I.A.

³⁶⁸ See, e.g., *People v. Burrus*, 200 N.Y.S.3d 655, 715, 728–31 (N.Y. Sup. Ct. 2023) (engaging with prior cases analyzing a novel DNA method and stating reasons not to follow it); *People v. Williams*, 147 N.E.3d 1131, 1142 (N.Y. 2020) (holding that the prior decision “did not adequately account for either the proprietary nature of the [forensic statistical

conclusions about the fact at hand, the court should engage with these as conflicting reasons, eventually favoring what it regards as the better argument, and explaining its choice.³⁶⁹

In practice, courts' engagement with factual precedents can vary further. In addition to the options just mentioned, courts may thoroughly discuss a factual precedent in obiter, signaling to future courts (and litigants) that the issue should be revisited.³⁷⁰ They may also briefly acknowledge the factual precedent and leave probing it for another day.³⁷¹ These practices generally serve the purposes of engagement with factual precedents. They are therefore generally desirable, and it is no wonder they are mostly valued by judges.³⁷² Conversely, sometimes judges treat prior decisions dismissively or disrespectfully.³⁷³ And sometimes their decisions are aimed not at engaging with the prior conclusions, but at capturing media or affinity groups' attention, promoting the judge's own brand, or auditioning for prestigious positions.³⁷⁴ These aren't desirable. This is not what we have in mind when we think about courts engaging with one another, exchanging ideas, and promoting respect for judicial decisions about facts through deliberation.

Failing to engage with a relevant factual precedent is a flaw in a court's reasoning. When judges fail to engage, they deserve criticism. In this sense, again, factual precedents resemble legal precedents.³⁷⁵

But let us not overstate the claim. Judicial reasoning is complicated, and courts have other obligations that may conflict with robust engagement with factual precedents. These include generally applicable considerations (e.g., the party presentation principle) as well as considerations that are specific to a particular domain (e.g., the heightened importance of a defendant's right to

tool] or the relatively narrow subsection of the relevant scientific community able to examine and endorse that tool").

³⁶⁹ See, e.g., *State v. Rochat*, 269 A.3d 1177, 1203–06 (N.J. Super. App. Div. 2022) (engaging with two conflicting prior decisions about a novel DNA technology).

³⁷⁰ See generally Brian M. Hoffstadt, *Doing the Splits*, DAILY J. (Sept. 17, 2024), <https://www.dailyjournal.com/article/380958-doing-the-splits>.

³⁷¹ See *id.*

³⁷² Larsen & Devins, *supra* note 293, at 677–81 (interviewing judges that look favorably on such practices).

³⁷³ *Id.* at 682–84.

³⁷⁴ *Id.* at 684–86.

³⁷⁵ See *Andrew v. White*, 145 S. Ct. 75, 82 (2025) (criticizing a lower court for failing to recognize a precedent).

argue their case in criminal law). Hence, legal decisions about facts might fall short of ideally engaging with factual precedents, but still be justified (all things considered) given courts' other obligations. Relatedly, not every flaw in legal reasoning is detrimental to judicial decisions. Courts regularly enjoy broad discretion when deciding about facts. While courts' errors are often criticized on appeal, these errors are not always corrected, nor do they always change the outcome of the case. This is true even for constitutional violations, as the Supreme Court recently clarified.³⁷⁶ This Article argues only that failing to engage with factual precedents is a flaw in judicial reasoning. The adequate remedies for such a flaw are a separate matter that we leave for another day.

Lastly, one may wonder: Should courts ever refrain from engaging with factual precedents?³⁷⁷ One may want courts to refrain from engaging with a prior decision that is normatively objectionable, for instance if it promotes racial stereotypes. Or, one may want courts not to engage if the prior decision is deeply epistemically objectionable, for instance if it adopts junk science or misinformation. I think we should reject both suggestions.

There are two core concerns here. The first concern is that engagement with the prior decision will elevate its importance, and hence ignoring it is better. I doubt this rationale. Many objectionable judicial decisions about general facts gain prominence even without subsequent courts' engagement.³⁷⁸ Moreover, engaging with objectionable ideas and explaining their faults is better than wishing them away. Engagement cultivates reasoned deliberation and helps us, as a society and a legal community, hone our understanding of the general facts at hand.

The second concern is the "backfire effect." Crudely, it suggests that reiterating a claim, even in the context of refuting it, might increase the claim's prominence.³⁷⁹ If this is true, then critically engaging with objectionable factual precedents will often lead judges (and the public) who read the subsequent case to support the prior case's objectionable view, even if the subsequent

³⁷⁶ *Pitts v. Mississippi*, 146 S. Ct. 413, 417 (2025) ("Even constitutional errors are sometimes subject to a 'harmless-error' rule and do not require a new trial if the prosecution can show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (quoting *Chapman v. California*, 386 U.S. 18, 23–24 (1967))).

³⁷⁷ I thank Professor Aya Gruber for this point.

³⁷⁸ See, e.g., *supra* note 349 and accompanying text.

³⁷⁹ See Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307–08 (2010).

court has criticized and rejected it. This, in turn, would be a reason not to engage with objectionable factual precedents. However, this concern is overblown. The backfire effect has failed to replicate in follow-up studies, and more recent works have found that corrections are actually very effective in confronting prior mistaken information.³⁸⁰ So, despite these possible concerns, there are significant benefits to engaging with factual precedents.³⁸¹

B. Evaluating the Strength of Factual Precedents

I argue for presumptive factual precedents. On my suggestion, courts would be required to engage with a prior court's decision as a presumptive reason. But reasons vary in strength. Some reasons have significant effects and others are more easily overcome by other reasons. What makes a prior court's decision about some fact a weightier reason for the subsequent court? Put differently, what makes factual precedents stronger?

Before I answer, let me explain why this question matters. In Part IV.A I explained that failing to engage with a (relevant) factual precedent is a flaw in judicial reasoning. The strength of the factual precedent tells us more about this flaw. The more weight a factual precedent has, the more important it is for a subsequent court to engage with this factual precedent—to either follow it, or provide a thorough explanation for not doing so. And, in turn, courts would be more worthy of criticism for failing to adequately engage with stronger factual precedents.

So, how to evaluate the strength of factual precedents? Some of the relevant considerations are familiar from legal precedents.

³⁸⁰ See Brendan Nyhan, *Why the Backfire Effect Does Not Explain the Durability of Political Misperceptions*, 118 PROC. NAT'L ACAD. SCI., no. 15, 2021, at 1, 2 (“[S]ubsequent research suggests that backfire effects are extremely rare in practice. Most notably, an extensive replication and extension study conducted by other researchers found [] no evidence of backfire effects in response to corrective information across numerous experiments.” (citing Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence*, 41 POL. BEHAV. 135 (2019)). See generally Briony Swire-Thompson, Nicholas Miklaucic, John P. Wihbey, David Lazer & Joseph DeGutis, *The Backfire Effect After Correcting Misinformation Is Strongly Associated with Reliability*, 151 J. EXPERIMENTAL PSYCH. GEN. 1655 (2022) (discussing the growing consensus against the backfire effect and adding to it).

These studies suggest that the backfire effect is most prominent in cases of motivated reasoning. But this is a vice of judicial (and other) reasoning, which judges should always avoid. See *supra* text accompanying notes 347–48.

³⁸¹ I reiterate that this Article focuses on factual precedents in bench trials. Complicated questions about the relationship between factual precedents and decisions by jurors are beyond my scope.

The procedural posture of the deciding court is one such consideration. An en banc decision should carry greater weight as a factual precedent, compared to decisions by smaller panels.³⁸² Similarly, factual precedents that emerge from the full adversarial process should be favored,³⁸³ especially over those that rely on judicial shortcuts like stipulations or affirmations of judgments without discussion.³⁸⁴ The rationale here is to utilize the institutional advantages of lower courts (e.g., expert testimony, cross-examination) and appellate courts (e.g., amicus briefs, reviewing many cases) in decision-making about facts.³⁸⁵

Another consideration is prominence. Legal precedents gain strength when more courts adopt them.³⁸⁶ One might hesitate to apply this consideration to factual precedents, because judicial repetition does not, in itself, make general facts more (or less) accurate.³⁸⁷ But, as explained, prior courts' decisions matter for factual precedents. Engagement and consistency with other courts help justify judicial decisions, and they thus matter for both legal and factual precedents.³⁸⁸ In addition, engaging with prior decisions also lends epistemic support to a subsequent decision.³⁸⁹ Therefore, echoing legal precedents, the more prevalent a factual precedent is, the stronger it should be. And factual precedents that are questioned or criticized by courts should carry less weight.³⁹⁰

³⁸² GARNER ET AL., *supra* note 31, at 495 (“[E]n banc precedent is especially authoritative.”); Maggie Gardner, *District Court En Bancs*, 90 *FORDHAM L. REV.* 1541, 1570–94 (2022) (discussing the strength of en banc decisions by lower courts).

³⁸³ I thank Professor Mike Pardo for this point. See Yoshino, *supra* note 39, at 281 (“[T]he weight to be afforded to district court findings of legislative fact should vary according to the degree of adversarial testing to which those facts were subjected.”); Gorod, *supra* note 144, at 21–25.

³⁸⁴ See DUXBURY, *supra* note 176, at 3 n.4 (citing English law to find that “[t]he authority of a precedent might be weakened [] because for one reason or another the prior court, in deciding the case, proceeded without a full determination of the facts”).

³⁸⁵ See Yoshino, *supra* note 39, at 281–82 (favoring “case-spanning” adversarial testing).

³⁸⁶ GARNER ET AL., *supra* note 31, at 233–35 (arguing that adoption, citation, and approval of a decision by subsequent courts increase the precedent’s value).

³⁸⁷ See *supra* text accompanying notes 319, 330.

³⁸⁸ See *supra* notes 289–96 and accompanying text.

³⁸⁹ See *supra* text accompanying notes 301–05.

³⁹⁰ See GARNER ET AL., *supra* note 31, at 239–42 (suggesting that doubt and hesitation about a precedent diminish its value). The idea that courts should consider prior cases for both sides of a disputed claim, not only ones in which a proposition was accepted, is common in discussions about offensive collateral estoppel. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979); Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 *STAN. L. REV.* 281, 289–94, 304–08 (1957).

Features of the specific decision should also influence the weight of factual precedents. Decisions that include better arguments, clearer reasoning, more engagement with criticism, and more authoritative sources should be favored.³⁹¹ Similarly, decisions by courts or judges with expertise about the general facts at hand should be favored. Examples include decisions made by bankruptcy courts or those made by the Second Circuit in securities regulation cases.³⁹² And conversely, cases in which a party was limited in presenting evidence or arguments—due to an inconvenient procedural forum, or because the general facts were peripheral or the stakes nominal—should carry less weight.³⁹³

In addition, decisions within the same jurisdiction are typically treated as stronger legal precedents.³⁹⁴ Interestingly, we may be inclined to ignore jurisdictional lines when considering factual precedents.³⁹⁵ This is because general facts seldom change across jurisdictional lines, and because courts can benefit epistemically from engaging with one another's decisions about general facts, even if the courts in different jurisdictions follow different methods. However, in practice this argument raises complications. The legal justification for relying on precedents beyond jurisdictional lines is not as significant as within the same jurisdiction.³⁹⁶ And it is hard to predict how cross-jurisdiction factual precedents will play out, especially because legal precedents aren't as expansive. Hence, mostly for practical reasons, at this point it is better

³⁹¹ See GARNER ET AL., *supra* note 31, at 157–58, 226–29; see also *Rochat*, 269 A.3d at 1205 (giving “due consideration” to a prior court’s discussion about a novel DNA technology, finding that “the scholarly analysis undertaken in [the prior case was] sound, illuminating, and persuasive”). This consideration may also, to an extent, address the forum shopping problem. See *supra* text accompanying notes 269–72. A factual precedent that was established in a case in which a weak litigant was not able to present all the best counterarguments would be less weighty.

³⁹² See GARNER ET AL., *supra* note 31, at 243–47 (explaining that the reputation of the deciding court and judge matter for the weight of precedent).

³⁹³ See *Parklane Hosiery*, 439 U.S. at 330–31, 331 n.15 (holding that estopping a defendant that had limited opportunity to defend in the previous case is unfair, and also that offensive collateral estoppel is unfair when the prior case was nominal). The rationales discussed in *Parklane* are relevant here, but only to an extent. While *Parklane* discussed limiting the ability to discuss a claim in a subsequent case, under the view of factual precedents I defend here, the other party always has an opportunity to respond. Hence, the unfairness considerations carry less weight in our case.

³⁹⁴ GARNER ET AL., *supra* note 31, at 243–44.

³⁹⁵ For a similar view about legal precedents, see Flanders, *supra* note 7, at 83–84 (suggesting that uniformity among cases matters across jurisdictions); Thomas B. Bennett, *There Is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1700–30 (2023).

³⁹⁶ See *supra* text accompanying notes 281–82.

to tread carefully and give more weight to factual precedents within the same jurisdiction.

Other considerations are unique to factual precedents. For one, time impacts legal and factual precedents differently. In legal precedents, older decisions are usually given more precedential weight,³⁹⁷ and novel decisions less.³⁹⁸ Conversely, in factual precedents, we should not favor ancient decisions. Newer decisions benefit from additional information that was not available before.³⁹⁹ This is particularly important because our understanding of facts evolves over time. To account for the dynamic nature of facts, we might consider “doctrinal sunsets” for factual precedents.⁴⁰⁰ But softer principles like ascribing less weight to older factual precedents (thereby favoring more scrutiny when using them) would also work.⁴⁰¹

Additionally, more weight should be given to decisions that follow best practices for determining general facts. First, courts should clearly explicate the general facts that they determine, mindful of their ability to affect the generality of their factual conclusions.⁴⁰² Second, they should articulate the arguments and evidence supporting their factual conclusion. Third, courts should explicitly state their confidence level in their factual conclusions, even if that means acknowledging uncertainty.⁴⁰³ These practices will help subsequent courts to accurately evaluate a prior court’s analysis of the general facts.⁴⁰⁴ Hence, decisions that follow these best practices should be incentivized. Allocating more strength to them (or demoting the force of factual precedents that don’t follow these practices) is a way to incentivize these desirable practices.

³⁹⁷ GARNER ET AL., *supra* note 31, at 176–81 (explaining that decisions that have long been accepted carry greater weight).

³⁹⁸ *Id.* at 159–60 (explaining that infant precedents are usually, but not always, weaker).

³⁹⁹ Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1588 (2020) (“A court that resolves an issue earlier in time will have less information.”).

⁴⁰⁰ *See generally* Schraub, *supra* note 153.

⁴⁰¹ *See* People v. Prante, 180 N.E.3d 875, 900–01 (Ill. App. Ct. 2021) (finding that a changed view in the scientific community regarding the reliability of bite marks made the evidence “no longer generally accepted”).

⁴⁰² *See supra* text accompanying note 218.

⁴⁰³ *See supra* text accompanying note 264; Gorod, *supra* note 144, at 76 n.320 (suggesting that courts should make clear when they think that the evidence was weak). I thank Professor Edith Beerdsen for this point.

⁴⁰⁴ *But see* Morris, *supra* note 233, at 1321 (suggesting that courts might overestimate the prior decision, “haunted by the fear that [the previous court] considered something that they have missed”).

Note, the considerations making a factual precedent stronger are procedural. We ask subsequent courts to evaluate the circumstances undergirding the prior decision, not its outcome. This follows from the nature of factual precedents as content independent.⁴⁰⁵ It also echoes evaluations of prior decisions in similar contexts.⁴⁰⁶

C. Factual Precedents in Evidence Law

This Article discussed many examples of courts engaging with prior decisions about general facts in constitutional, tort, and criminal cases, among others. Recognizing factual precedents, as I propose, encourages much more of this practice. To illustrate how factual precedents will affect legal doctrines, consider some of the ways factual precedents will affect evidence law.

Factual precedents can be useful when considering an expert's testimony. To admit such testimony, courts have to determine various general facts, and they regularly rely on prior cases to do so.⁴⁰⁷ Some courts have gone a step further. Courts in California treat a prior appellate court's decision that some technique has gained general acceptance in the relevant field as a factual precedent.⁴⁰⁸ Courts in Maryland, Illinois, and Nebraska may take judicial notice of general acceptance based on prior cases.⁴⁰⁹ And the Supreme Court of Nebraska held that when a trial court has established some element of a *Daubert* analysis and an appellate court has affirmed it, there is "a prima facie case of reliability by relying on precedent, and the burden shifts to the opponent to show that recent developments raise doubts about the validity of

⁴⁰⁵ See *supra* Part II.A.

⁴⁰⁶ See, e.g., *Parklane Hosiery*, 439 U.S. at 331–33 (deciding a question of nonmutual estoppel based on procedural considerations about the prior case, not the content of the prior decision).

⁴⁰⁷ See *supra* text accompanying notes 50–71.

⁴⁰⁸ E.g., *People v. Venegas*, 954 P.2d 525, 528 (Cal. 1998) (stating that a prior appellate decision upholding the admission of a technique based on general acceptance in the relevant scientific community "becomes precedent for subsequent trials in the absence of evidence that the prevailing scientific opinion has materially changed"); *People v. Turner*, 476 P.3d 676, 688 (Cal. 2020) (adopting *Venegas*); *People v. Nelson*, 185 P.3d 49, 59–60 (Cal. 2008) (same).

⁴⁰⁹ E.g., *Schultz v. State*, 664 A.2d 60, 67–72 (Md. Ct. Spec. App. 1995); *People v. Robinson*, 2 N.E.3d 383, 399 (Ill. App. Ct. 2013) (instructing courts to consider prior courts within and beyond the jurisdiction to decide whether to take judicial notice of a method's general acceptance); *State v. Casillas*, 782 N.W.2d 882, 898 (Neb. 2010) ("[O]ther courts may simply take judicial notice and ride behind.").

previously relied-upon theories or techniques.”⁴¹⁰ Following these examples, it is easy to imagine courts adopting presumptive factual precedents—specifically, to determine general facts undergirding experts’ methods. For instance, courts may rely on factual precedents about a method’s general acceptance in the scientific community, as well as its error rates, underlying technology, or other general facts determined in this analysis.

Relatedly, Professor Edward Cheng recently criticized the *Daubert* standard for asking judges and juries to make decisions beyond their ken.⁴¹¹ Under *Daubert*, when experts offered by the two parties disagree about substantive scientific claims, judges and juries have to decide which expert’s view to trust. But judges and juries do not have the adequate expertise to favor one expert’s view over another. Thus, Cheng suggested the “consensus rule.” Rather than asking judges and juries to decide which expert’s claim is more accurate, we should ask them to identify the consensus in the expert community about this claim, and defer to it.⁴¹² This exciting idea has led to a rich scholarly discussion.⁴¹³ For present purposes, I note only that the scientific consensus regarding some question is itself a general fact. Hence, courts can, and should, rely on their predecessors’ decisions when deciding what the scientific consensus is. Put simply, if we follow Cheng and complement the current *Daubert* standard with the consensus rule, courts should use factual precedents to determine what the scientific consensus is.

Furthermore, we can also use factual precedents negatively. That is, we can imagine factual precedents about the unreliability⁴¹⁴

⁴¹⁰ *Casillas*, 782 N.W.2d at 898. For a similar view in New York, see *Williams*, 147 N.E.3d at 1139 (“Judicial precedent may also support a conclusion with respect to the general reliability of a disputed scientific technique short of a hearing.”).

⁴¹¹ Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 407, 414–19 (2022).

⁴¹² *Id.* at 430–47.

⁴¹³ See generally, e.g., Symposium, *The Consensus Rule: A New Approach to Admissibility of Scientific Evidence*, 67 VILL. L. REV. 837 (2022); David S. Caudill, Harry Collins & Robert Evans, *Judges Should Be Discerning Consensus, Not Evaluating Scientific Expertise*, 92 U. CIN. L. REV. 1031 (2024). These discussions relate to prior scholarly debate about whether jurors should defer to experts or simply be educated by them. See generally, e.g., Ronald J. Allen & Joseph S. Miller, *Common Law Theory of Experts: Deference or Education*, 87 NW. U. L. REV. 1131 (1993) (setting up the dichotomy); Richard Lempert, *Experts, Stories, and Information*, 87 NW. U. L. REV. 1169 (1993) (criticizing the former view).

⁴¹⁴ On the duality of the term “general acceptance,” see *supra* note 51. The same applies to “reliability,” *mutatis mutandis*.

or insufficient general acceptance of some method.⁴¹⁵ Negative factual precedents can be especially valuable in post-conviction relief. As noted, states have enacted laws that grant post-conviction relief when the conviction was based on “false evidence.”⁴¹⁶ (Most statutes have additional requirements, for instance, showing that the false evidence was material to the conviction.⁴¹⁷) Determining that a case relied on false evidence often involves revisiting general facts about methods underlying the false evidence.⁴¹⁸ Courts in these (and later) cases can rely on prior decisions about a method’s unreliability. In other words, they can treat a prior decision about a method’s unreliability (or lack of acceptance) as a factual precedent. Courts have already done so in post-conviction cases involving bite-mark comparison.⁴¹⁹ Similar decisions may be expected about other methods that have come under scrutiny, including lie detectors⁴²⁰ or manner-of-death analysis.⁴²¹

Lastly, consider a hotly debated issue in evidence law: general facts about people’s tendencies. In *Diaz v. United States*,⁴²² the Supreme Court considered the admission of expert testimony about the tendency of drug traffickers to know that they are carrying drugs.⁴²³ This tendency is a general fact. The court held it admissible under Federal Rule of Evidence 704(b).⁴²⁴ In her concurrence, Justice Ketanji Brown Jackson noted that the ruling would allow experts to testify about general facts regarding the tendencies of groups of individuals, such as the common mental

⁴¹⁵ See, e.g., *supra* text accompanying note 24.

⁴¹⁶ See, e.g., *Ex Parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014) (discussing the standard in Texas).

⁴¹⁷ See *id.*; Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUS. L. REV. 483, 524–30 (2020) (surveying post-conviction writs in different states).

⁴¹⁸ See *supra* text accompanying notes 117–19.

⁴¹⁹ See *supra* text accompanying notes 120–21.

⁴²⁰ See *supra* text accompanying notes 335–36.

⁴²¹ For criticism of the method as subjective, see, for example, Jeff Kukucka, “*There Is No ‘Right’ Answer*”: *The Perils of Cognitive Bias in Autopsy Decisions*, 7 FOR DEF., no. 4, Dec. 2022, at 6, 8 (discussing a scientific finding that led forensic pathologists to admit that manner-of-death determination “is not a ‘scientific’ determination’ such that ‘there is no ‘right’ answer’” (quoting Brian L. Peterson et al., *Commentary on Dror et al. ‘Cognitive Bias in Forensic Pathology Decisions’*, 66 J. FORENSIC SCI. 2541 (2021))). See also generally Dan Simon, *Minimizing Error and Bias in Death Investigations*, 49 SETON HALL L. REV. 255 (2019).

⁴²² 144 S. Ct. 1726 (2024).

⁴²³ *Id.* at 1730.

⁴²⁴ *Id.* at 1735; see also Brief for John Monahan et al., as Amici Curiae Supporting Respondent, *Diaz*, 144 S. Ct. 1727 (No. 23-14) (discussing framework evidence).

states of people suffering from schizophrenia or battered woman syndrome.⁴²⁵

Scholarship has also considered general facts about people's tendencies. Monahan and Walker discussed them as "social framework" evidence: general social science conclusions that can provide a "frame of reference or background context for deciding factual issues crucial to the resolution of a specific case."⁴²⁶ Monahan and Walker suggested that expert testimony⁴²⁷ about framework evidence can provide useful general information—for instance, about the reliability of eyewitness testimony, assessments of dangerousness, or ordinary symptoms of battered women and molested children.⁴²⁸ More recently, Professor Hillel Bavli discussed the use of "population propensity" evidence, the general tendency of people to commit certain acts in a certain way.⁴²⁹ Bavli discussed experts testifying about such evidence in cases involving fraud, homicide, drug trafficking, and other crimes.⁴³⁰ He argued that such testimony should be excluded as impermissible character evidence.⁴³¹ In a similar vein, Professors Jasmine Gonzales Rose, Asees Bhasin, and Spencer Piston discussed experts providing "antiracist evidence." Examples include educating the jury about general facts such as the meaning of tattoos and symbols (as racist or harmless), the prevalence of racial stereotypes (e.g., about rap lyrics), implicit racial bias (e.g., in eyewitness identification), and impact of racist policies (e.g., on attitudes toward and interactions with the police).⁴³²

Factual precedents can be very useful for determining general facts about people's tendencies. First, factual precedents can lay the foundation needed for the introduction of expert testimony about people's tendencies. As explained, experts are often introduced to correct jurors' misconceptions or lack of relevant

⁴²⁵ *Diaz*, 144 S. Ct. at 1736–38 (Jackson, J., concurring). Such evidence, she explained, can help jurors better understand these conditions and confront common misconceptions. *Id.*

⁴²⁶ Walker & Monahan, *Social Frameworks*, *supra* note 157, at 559. *See also generally* Monahan et al., *Gender Discrimination*, *supra* note 34.

⁴²⁷ *See* Monahan et al., *Gender Discrimination*, *supra* note 34, at 1732 (supporting communication of framework evidence by expert witnesses, rather than judicial notice).

⁴²⁸ Walker & Monahan, *Social Frameworks*, *supra* note 157, at 563–70.

⁴²⁹ Hillel J. Bavli, *Stereotypes as Character Evidence*, 77 STAN. L. REV. 89, 128–30 (2025).

⁴³⁰ *Id.* at 103–05, 131, 149 n.254.

⁴³¹ *Id.*

⁴³² Gonzales Rose et al., *supra* note 309, at 2374–92.

knowledge.⁴³³ Hence, as a preliminary matter, courts have to establish what juries know or do not know about these tendencies⁴³⁴—for instance, whether or not juries know about eyewitnesses’ implicit racial bias, or the meaning of some tattoos. These, in turn, are general facts. Subsequent courts could rely on decisions in prior cases about what juries know as factual precedents to decide whether expert testimony would be helpful to jurors about the issue at hand.⁴³⁵

Second, expert testimony about people’s tendencies also has to be relevant (and not overly prejudicial).⁴³⁶ This feature also hinges on general facts. For example, consider the relevance of an expert’s testimony about battered child syndrome in a particular case. General facts about the syndrome—e.g., its general acceptance in the relevant expert community and its symptoms—are needed to decide the admissibility of the expert’s testimony.⁴³⁷ (For if the syndrome is considered a hoax, or if the child in the case does not have any of the symptoms, then the introduction of such testimony will not be very relevant, and thus likely excluded under Federal Rule of Evidence 403.⁴³⁸) Subsequent courts could then use decisions about these general facts as factual precedents

⁴³³ *Id.* On misconceptions by juries, see generally Gustavo Ribeiro, *Misinformation and the Jury*, 101 IND. L.J. 287 (2026).

⁴³⁴ See, e.g., *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008) (citing *United States v. Foster*, 939 F.2d 445, 451–52 (7th Cir. 1991)) (finding that jurors are not well-versed in the behavior of drug traffickers); *Linn v. State*, 929 N.W.2d 171, 742 (Iowa 2019) (discussing juries’ misconceptions about the options and appearance of women suffering battered woman syndrome); *Commonwealth v. Anestal*, 978 N.E.2d 37, 41 n.5 (Mass. 2012) (finding that the effects of battered woman syndrome are not common knowledge, relying on prior cases holding the same).

⁴³⁵ See, e.g., *United States v. Winbush*, 580 F.3d 503, 511 (7th Cir. 2009) (citing *Foster*, 939 F.2d at 451–52) (noting that jurors are not knowledgeable about drug dealers’ behavior); *United States v. Brown*, 7 F.3d 648, 652 (7th Cir. 1993) (citing *Foster*, 939 F.2d at 451–52, 451 n.6) (same). *Diaz*, 144 S. Ct. at 1737 (citing *Linn*, 929 N.W.2d at 742) (discussing the misconceptions about battered woman syndrome); *State v. Syperda*, 2019 WL 6893791, at *6 n.7 (Iowa Ct. App. Dec. 18, 2019) (citing *Linn*, 929 N.W.2d at 732) (discussing facts about battered woman syndrome); *López-Correa v. United States*, 537 F. Supp. 3d 169, 187 (D.P.R. 2020) (citing *Linn*, 929 N.W.2d at 735) (same).

⁴³⁶ See FED. R. EVID. 403.

⁴³⁷ See *State v. Holland*, 346 N.W.2d 302, 308 (S.D. 1984) (noting that the syndrome can be present when injuries are inflicted on a child over time and in a nonaccidental manner).

⁴³⁸ Whether the symptoms arise in a case also implicates Federal Rule of Evidence 702(d), which requires that the expert’s opinion reliably applies the method to the facts of the case.

in future cases⁴³⁹—and so on for battered woman syndrome, shaken baby syndrome, or for the infliction of racial trauma.

Third, people's tendency to act in a certain way is itself a general fact. So far, we have imagined establishing this general fact by admitting expert testimony. But courts may also take judicial notice of such a general fact. And they may rely on factual precedents to do so.⁴⁴⁰ Put differently, courts may use prior decisions—e.g., about drug traffickers' tendency to know that they carry drugs, about symptoms of particular conditions, or about implicit racial bias in eyewitness testimony—as factual precedents, and rely on these factual precedents to support their decision to judicially notice such tendencies.

CONCLUSION

This Article explores factual precedents. Our journey began by surveying the legal practice and showing that various courts often encounter the same general facts in unrelated cases. This practice, I explained, raises the question of factual precedents. Namely, when a court has to determine a general fact, how should it address a prior court's decision about that same general fact?

This Article sets the analytical foundation for discussing factual precedents. It distinguished between using prior cases as persuasive sources and using them as factual precedents. Under the former, subsequent courts are free to ignore prior decisions if they want to. Under the latter, courts are required to engage with the prior decisions, to see them as guidance. The Article also articulates and defends a new definition for factual precedents. A

⁴³⁹ See, e.g., *State v. Martinez*, 68 P.3d 606, 616 (Haw. 2003) (citing *Holland*, 346 N.W.2d at 308) (relying on prior cases for facts about battered child syndrome); *State v. Gardner*, 716 S.W.3d 388, 414–15 (Tenn. Crim. App. 2024) (citing *Martinez*, 68 P.3d at 616–17) (same).

⁴⁴⁰ Using factual precedents to support taking judicial notice of general facts is a promising yet underexplored idea that merits a closer look. Some scholars seem at ease with this idea. See, e.g., MOSTELLER ET AL., *supra* note 256, § 329 (noting that courts may take judicial notice of general facts based on other courts' judicial notice of those facts); see also, e.g., Walker & Monahan, *Social Frameworks*, *supra* note 157, at 578–91; Monahan et al., *Gender Discrimination*, *supra* note 34, at 1742.

But complications may arise, specifically at the intersection of judicial notice and hearsay. See ROGER C. PARK, AVIVA A. ORENSTEIN & DALE A. NANCE, *EVIDENCE LAW* 617–20 (5th ed. 2022); MOSTELLER ET AL., *supra* note 256, §§ 298, 330; see also *Herrick v. Garvey*, 298 F.3d 1184, 1188, 1191 (10th Cir. 2002); *Middleton v. Koushall*, 2024 WL 1967816, at *27 (D. Md. May 3, 2024).

factual precedent is a general factual conclusion that a court determines in one case, which subsequent courts ought to treat as guidance.

This Article then argues for presumptive factual precedents. On this view, subsequent courts are required to engage with prior courts' factual conclusions but not necessarily follow them. Courts must treat these prior decisions as reasons and explain themselves if they decide not to follow them. The Article explains how courts should engage with factual precedents and what makes factual precedents stronger. It then illustrates how factual precedents can impact evidence doctrines. Overall, the Article explains how factual precedents will make legal decisions about facts better—more epistemically and legally justified.

Throughout this Article, we reached several broader theoretical conclusions. One is worth reiterating here. Namely, the Article emphasizes the dual nature of legal decisions about facts—as (1) legal decisions, and (2) decisions about facts. This seemingly obvious insight has significant implications. The most general is that fundamental principles of judicial decision-making are important and valuable for judicial decisions about facts. In this sense, precedents are just one example. We can further advance many of our evidence theories and doctrines—and thus improve judicial decisions about facts—by learning from other judicial decisions. Another implication is that this relationship works both ways. Thinking about judicial decisions about facts can cast new light on judicial decisions about law. For instance, factual precedents can offer lessons about the idea of presumptive precedents. This form of precedent is weaker than *stare decisis*, but stronger than ordinary views of persuasive precedents. This Article illustrates the desirability of presumptive factual precedents. Based on the analysis above, there are good reasons to consider presumptive precedents in judicial decisions about legal questions as well.

Finally, if this Article succeeds in defending a case for factual precedents, more remains to be said about the topic. To conclude, I outline two such open questions.

Consider binding factual precedents. Should factual precedents ever have a binding effect? This is a complicated question. As discussed, many seem to normatively oppose this view.⁴⁴¹ Larsen was generally critical of the idea, but she recognized one

⁴⁴¹ See *supra* Part I.B.

exception. Namely, when the Supreme Court explicitly establishes a premise fact—i.e., holds that some general fact serves as the factual predicate for the application of a rule—lower courts should treat it as a binding factual precedent.⁴⁴² This view makes sense, especially in light of the strength of Supreme Court precedents. However, I want to reiterate that factual precedents involve judicial decisions *about facts*. As such, they are necessarily vulnerable to epistemic criticism.⁴⁴³ A strong epistemic criticism might severely undercut a subsequent court's legitimacy in relying on a factual precedent. For that reason, maybe factual precedents should not be binding, at least not in the most stringent way imaginable.⁴⁴⁴

Next, consider changing factual precedents. As explained, a theory of factual precedents needs to include rules of change.⁴⁴⁵ Given the dynamic nature of human knowledge, factual precedents will be very objectionable unless it is possible (and feasible) to change them. We might imagine borrowing again from legal precedents. Thus, a decision by a higher court or a later court of similar stature would be needed to overrule a factual precedent. But questions remain. Which standards and considerations should courts take into account when overruling a factual precedent? Should the doctrines for changing legal precedents apply, or is more nuance needed? What about using doctrinal sunsets on factual precedents, as hinted at above?⁴⁴⁶

There are other open questions about how factual precedents fit within our existing evidence doctrines. Developing a robust theory and practice of factual precedents requires us to address these questions. I hope that this Article illustrates the desirability of this endeavor.

⁴⁴² See Larsen, *Factual Precedents*, *supra* note 35, at 108–14.

⁴⁴³ See *supra* text accompanying note 260; Kenneth, *supra* note 44, at 117.

⁴⁴⁴ We may also wonder: What does it mean for factual precedents to be binding? Arguably, in its most stringent version, a binding factual precedent will (1) require lower courts to follow a prior court's factual conclusion; and thus (2) effectively bar litigants from arguing against it, as doing so would be an irrelevant waste of time. But we can imagine more relaxed versions of binding factual precedents.

⁴⁴⁵ See *supra* text accompanying notes 339–42.

⁴⁴⁶ See *supra* text accompanying notes 400–01.