

RETHINKING LEGISLATIVE FACTS

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As the factual nature of legal inquiry has become increasingly apparent over the past century, courts and commentators have fallen into the habit of labeling the facts behind the law “legislative facts.” Loosely, legislative facts are general facts courts rely upon to formulate law or policy, but that definition is as contested as it is vague. Most agree that legislative facts exist in some form or another, but few agree on what that form is, on who should find them, and how.

This Article seeks to account for and resolve that confusion. Theories of legislative fact focus on the role facts play in purported lawmaking by the courts—hence the name “legislative.” This Article proposes a different approach that situates facts within the adjudicatory process. The facts captured by the label “legislative fact” play two different roles in resolving parties’ disputes: sometimes, as facts of law, they provide a premise for the rule of decision the court uses to resolve the dispute, and sometimes they assist the court in relating that rule of decision to the circumstances of the parties. Courts should distinguish between these roles when determining who should find the facts, and how. This approach results in sounder dispute resolution and sounder developments in the law, and it is more administrable than the current, undisciplined approach.

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INTRODUCTION

Sound decisionmaking depends on wise choices about who decides, and how. In judicial proceedings, the choices depend in turn on whether the matter to be decided is a question of law or a question of fact. Sometimes it can be difficult to tell the difference between the two.

This Article is about one type of matter that has proven uncommonly difficult to classify: questions of “legislative fact.” Legislative facts, the theory goes, are general facts that courts may use to formulate a legal rule.¹ Examples abound. Do visible religious observances by a public-school employee coerce students to participate in worship?² Are butterfly knives commonly possessed for lawful purposes?³ To what extent does a search of an arrestee’s cell phone further the government’s interest in preventing the destruction of evidence?⁴ What are the causes of the opioid epidemic in Ohio?⁵

Courts answer these questions with facts, in the sense that the answers are descriptive propositions about the world. But these facts differ from the usual factual matter of adjudication in that they are not unique to the parties and may give shape to legal rules that bind the world. Questions of legislative fact thus resemble both questions of fact and questions of law, and instincts about how to classify them shift as their expression changes.

Judges, litigants, legislators, and scholars have grappled with legislative facts for nigh on a century,⁶ yet repeated invocations of the

1 Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

2 See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2430–31 (2022).

3 See *Teter v. Lopez*, 76 F.4th 938, 950 (9th Cir. 2023).

4 See *Riley v. California*, 573 U.S. 373, 388–91 (2014).

5 See *In re Nat’l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 809–10 (N.D. Ohio 2022).

6 The problem presented by this type of fact emerged more than a century ago, see *infra* Part I, but the category did not earn its name until 1942. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) [hereinafter Davis, *Problems of Evidence*] (coining the term “legislative fact”); see also 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5103.2 (2d ed. 2005 & Supp. 2023). For a sample of the extensive literature on the concept since 1942, see, for example, Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637 (1966); Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1203–04 (1975); Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980) [hereinafter Davis, *Facts in Lawmaking*]; Peggy C. Davis, “*There Is a Book Out . . .*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) [hereinafter Davis, *Judicial Absorption*]; Laurens Walker & John Monahan, *Social*

concept have yet to mature into administrable rules about what they are and who should find them.⁷ This Article argues that answers remain elusive for a simple reason: the “legislative fact” label turns on the role that the fact ostensibly plays in judicial lawmaking. The legal conventions that determine whether a question is one of fact or law, by contrast, turn on the role that the inquiry plays in adjudicating the case or controversy before the court.

To adjudicate a case or controversy, a court declares the law and applies the law to the circumstances of the parties before it.⁸ Facts play roles in both declaring law and applying it. In order to find facts that provide a premise for law declaration—for ease, “premise facts”⁹—courts usually follow one set of rules: the rules that govern questions of law. Thus, a judge does not submit to the jury the historical question whether the legislature has repealed the aggravated homicide statute under which the state charged the defendant.¹⁰ And in order to find the facts to which they apply the law—for contrast, “non-premise

Frameworks: A New Use of Social Science in Law, 73 VA. L. REV. 559 (1987); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988); Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1 (1988); John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1 (1993); Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269 (1999); DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 43–62 (2008); Bryan Adamson, *Critical Error: Courts’ Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL’Y REV. 1, 14–16 (2009); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013); Eric Berger, *Gross Error*, 91 WASH. L. REV. 929 (2016); Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251 (2016); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018); and Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 40–44 (2020).

7 See *infra* Section I.C.

8 Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 374–75 (1958) (unpublished tent. ed.) (on file with Kresge Law Library, University of Notre Dame); see also Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235–36 (1985).

9 For this term, I am indebted to Judge Robert E. Keeton and his article, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*. Keeton, *supra* note 6, at 8. Judge Keeton defines “premise facts” as “facts that explicitly or implicitly serve as premises used to decide issues of law.” *Id.* My definition is narrower than his because his definition encompasses facts other than those that serve as premises for law declaration. See, e.g., *id.* at 11 (“[Premise facts include facts that serve] as a premise for a reasoned decision applying settled law . . .”); *id.* (“[Premise facts] influence other decisions such as the admissibility of expert opinion testimony . . .”).

10 See *United States v. Callender*, 25 F. Cas. 239, 257 (C.C.D. Va. 1800) (No. 14,709); see also, e.g., *United States v. Sixty-Seven Packages of Dry Goods*, 58 U.S. (17 How.) 85, 91 (1855); *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363–66 (1842).

facts”—courts follow a different set of rules: the rules that govern questions of fact. Thus, a judge must submit to a jury the historical question whether the defendant pulled the trigger.¹¹

The legislative-fact concept obscures the line between law declaration and law application that marks the frontier between law and fact. Many—perhaps all—premise facts are legislative facts. But because the legislative-fact concept focuses on supposed lawmaking by the courts, and because courts may “make law” at the law-application stage, some—but *not* all—non-premise facts are also legislative facts.

Because it straddles the frontier between law and fact, the legislative-fact concept supplies no ready answer to the question “who decides?” This matters because the legislative-fact label has adhered to some of the most divisive political, social, and economic questions of modern times: efficacy of vaccines,¹² equality of bargaining positions,¹³ economic impact of environmental policies,¹⁴ and so on. The want of clear lines and consistent practices has heightened fears that courts answer these questions without objectivity and has left the public guessing about who is bound by the answers they give.

This Article is not the first to highlight the perils of legislative fact-finding. Over the years, scholars decrying inconsistency and inaccuracy in the enterprise have proposed to reform factfinding with a succession of special rules for legislative facts. This Article proposes an unexamined alternative approach: to jettison the concept of legislative fact and reorient courts to the line between law declaration and law application. Thus, if the court is using a legislative fact to provide a premise for law declaration, then the court should treat the issue as one of law. Otherwise, the court should treat the issue as one of fact.

Part I takes a fresh look at the rise of the legislative-fact concept. At the turn of the twentieth century, the United States Supreme Court began developing constitutional doctrines that increasingly invited fact-intensive inquiries into the effects of laws and policies. Bewildered judges vacillated between treating these matters as questions of law and treating them as questions of fact. Enter the legislative-fact concept, which explained the oddity of these inquiries by tying them to the judiciary’s law-declaring power—not its law-declaring power as an

11 See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

12 See, e.g., *Lukaszczuk v. Cook County*, 47 F.4th 587, 599–603 (7th Cir. 2022), *cert. denied sub nom.* *Troogstad v. City of Chicago*, 143 S. Ct. 734 (2023); see also *Jacobson v. Massachusetts*, 197 U.S. 11, 30–32 (1905).

13 See, e.g., *Mid-Am. Salt, LLC v. D.J.’s Lawn Serv., Inc.*, 396 F. Supp. 3d 797, 809 (N.D. Ind. 2019); see also *Lochner v. New York*, 198 U.S. 45, 57 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 380 (1937).

14 See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2612 (2022); see also *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 517–25 (1941).

incident to its power to resolve cases and controversies, but rather its law-declaring power as an independent and magisterial function.¹⁵ The move wrought revolution, but that revolution subsided in disarray.

Part II accounts for the disarray. Traditionally, courts route a question as one of law or fact based on the question's role in resolving the dispute before the court. Definitions of "legislative fact" capture facts that play different roles in resolving the dispute. This explains why courts struggle with routing questions of legislative fact consistently. By convention, some legislative facts should be found one way, and other legislative facts, another. But typical definitions of "legislative fact" do not differentiate between the two groups.

Part III concludes by asking what courts should do about legislative facts' heterogeneity. It offers a straightforward solution: reject the legislative-fact category. Liberated from the category, the facts may be sorted, and found, according to their role in resolving the dispute. This approach results in sounder dispute resolution and sounder developments in the law, and it is more administrable than the current, undisciplined approach.

A note about scope: this Article focuses on disputes in federal court arising under generally applicable laws, especially the Constitution.

Why federal courts? This Article's proposal is founded, in part, on certain propositions about the power Article III vests in the federal judiciary. States may allocate power differently.¹⁶ Moreover, an important premise of the Article's argument is that the process of law declaration is distinct from the process of law application.¹⁷ The distinction is more difficult to discern in the common-law decisionmaking that is more prominent in state courts, and some would say it is nonexistent.¹⁸ Indeed, one of the impulses that produced the bedeviling concept of legislative fact was the impulse to treat written laws—

15 See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 73 (7th ed. 2015).

16 F. Andrew Hessick, *Saying What the Law Should Be*, 48 *BYU L. REV.* 777, 782 (2022).

17 See *infra* Section III.C.

18 See Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 *VA. L. REV.* 587, 696–97 (2001); see also, e.g., *Reiser v. William Tell Saving Fund Ass'n*, 39 Pa. 137, 144 (1861) ("We speak, of course, only of statute laws; for customary or common law must be in actual operation before it can be authoritatively ascertained and expressed."). But see, e.g., Stephen E. Sachs, *Finding Law*, 107 *CALIF. L. REV.* 527 (2019) (arguing that courts may declare and apply common-law norms just as they do norms derived from written law); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 *U. CHI. L. REV.* 782, 790 (1986) (distinguishing law declaration and law application in the common-law context).

and the Constitution in particular—as merely supplying general principles to be elaborated in a common-law fashion.¹⁹

Why generally applicable laws? Different interpretive rules govern different types of legal instruments.²⁰ The roles that facts play in interpreting written instruments that produce generally applicable rules, such as statutes, are similar for purposes of the problem this Article examines.²¹ Premise facts play a different role when a court interprets the sorts of legal instruments that bind only parties and their beneficiaries, such as contracts and wills.²² It is at least conceivable that courts should approach those facts differently.

Why the Constitution? The legislative-fact concept entered federal court practice by way of constitutional litigation, and that is where the role of legislative facts remains most widely acknowledged. But legislative facts are everywhere.²³ Despite its focus, this Article offers lessons for a range of fields beyond constitutional law: administrative law,²⁴ criminal law,²⁵ antitrust,²⁶ bankruptcy,²⁷ intellectual property,²⁸

19 See, e.g., Karst, *supra* note 6, at 76; Walker & Monahan, *supra* note 6, at 585–87. See generally Hessick, *supra* note 16, at 793–99 (describing ways in which courts “make law” even when dealing with written law); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 9–14 (Amy Guttmann ed., new ed. 2018) (discussing the importation of a common-law “attitude” to adjudication under written laws, *id.* at 13 (emphasis omitted)).

20 See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1093–96 (2017); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 480 (2013).

21 See *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 341 (2015) (Thomas, J., dissenting).

22 See THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 264–65 (New York, John S. Voorhies 1857); Holmes, *supra* note 20, at 418; Monaghan, *supra* note 8, at 232 & n.21; cf. Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 16–17 (2020) (differentiating private acts from public acts on the ground that the former were considered to be like contracts rather than laws and were thus subject to strict rules of interpretation).

23 See Davis, *Problems of Evidence*, *supra* note 6, at 403–04.

24 The distinction between legislative and adjudicative fact originated in administrative law. See *infra* notes 97–102 and accompanying text.

25 See, e.g., *infra* text accompanying notes 313–27.

26 See, e.g., Charles E. Wyzanski, Jr., *A Trial Judge’s Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1294–95 (1952); *infra* note 298.

27 See, e.g., Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 414–22 (2002).

28 See, e.g., *infra* note 212.

taxation,²⁹ and others.³⁰ Clarifying the role a fact plays in dispute resolution in any case may aid the court in finding it.

I. THE RISE OF LEGISLATIVE FACTS

Beginning in the late nineteenth century, a wave of Progressive Era legislation swamped the courts with constitutional challenges by regulated parties, leaving in its wake very little of the nineteenth-century judicial habit of presuming a law's constitutionality.³¹ Courts became more willing to decline to enforce, and to enjoin officers from enforcing, statutes and regulations.³² These decisions opened a broad frontier for judicial inquiry into a new type of fact.³³

Most of the factual matter of Article III adjudication consists of what are commonly known as adjudicative facts: the elements of the factual basis of the particular litigant's claim for some particular form of relief. The new type of fact confronting judges concerned not the particular litigant before the court but the world at large. Facts that were once the concern of legislators and other policymakers became the business of courts now tasked with scrutinizing laws and policies for reasonableness, rationality, tailoring, proportionality, and the like.³⁴

In the second edition of his famous treatise on evidence, John Henry Wigmore took for granted that, “[w]here a legislative act is argued to be unconstitutional, and this is to depend upon the unreasonableness” of the law's effect, “the external facts furnishing . . . the possible actual effect must be considered” by the judge rather than the

29 See, e.g., James S. Halpern, *Some Preliminary Thoughts on a Judge's Look Beyond the Record for Evidence of Legislative Facts*, 57 TAX LAW. 861 (2004).

30 See, e.g., *In re Asbestos Litig.*, 829 F.2d 1233, 1249 (3d Cir. 1987) (tort liability); *Bragdon v. Bayshore Prop. Owners Ass'n*, 251 A.3d 661, 691 & n.20 (Del. Ch. 2021) (business organizations).

31 See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing for the presumption). Thayer did not believe that federal courts should apply as strong a presumption to state legislation, but this distinction was not uniformly observed. *Id.* at 153–55; Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2350 (2017).

32 See Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1002–03 (1924).

33 See, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 307–09 (1927); Frankfurter, *supra* note 32, at 1002–03; Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 18–19 (1928); Karst, *supra* note 6, at 75–76.

34 See Borgmann, *supra* note 6, at 1197; Larsen, *supra* note 6, at 179 & nn.14–15.

jury.³⁵ “But by what theory or method shall the Court receive information of the alleged facts?”³⁶ “This is an interesting inquiry,” Wigmore allowed, “hitherto not carefully worked out by the Courts.”³⁷

Courts were in uncharted waters. The United States’ system of written law generally orients courts backwards: it tasks them with ascertaining legal rules that were created in the past and applying them to facts that occurred in the past.³⁸ The new breed of factual inquiry, however, was generally forward-looking, centered on the *future* consequences of yesterday’s legal rules.³⁹

These forward-looking inquiries compose just one subset of what came to be known as legislative-fact questions, but an influential one nonetheless: they are the inquiries that gave rise to the legislative-fact concept and shaped federal courts’ unusual and uncertain approach to finding legislative facts.

As courts worked their approach out, procedural mechanisms designed for historical inquiry increasingly appeared ill-suited to guide intelligent predictions about the future. Turning the ship of adjudication about to face the future has been a slow and confused process. This Part traces it.

A. Taking Notice

Courts began by treating facts about the effects of laws and policies, ambivalently, as objects of judicial notice.⁴⁰ Courts could remain ambivalent about whether these were questions of law or fact because answers to questions of law and fact both could be judicially noticed.⁴¹ Courts took judicial notice of statutes (specifically, public laws), and in doing so had to “inform themselves of facts which may affect a statute; for example, the precise time when it was approved, to determine its

35 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2555(d) (2d ed. 1923) (emphasis omitted).

36 *Id.*

37 *Id.*

38 See William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 811 (2019); Amanda L. Tyler, Frank H. Easterbrook, Brett M. Kavanaugh, Charles F. Lettow, Reena Raggi, Jeffrey S. Sutton & Diane P. Wood, *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1896–97 (2012) (statement of Sutton, J.); Woolhandler, *supra* note 6, at 113.

39 See Karst, *supra* note 6, at 77; Woolhandler, *supra* note 6, at 114.

40 See 5 WIGMORE, *supra* note 35, § 2555(d); see also, e.g., *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 80 (1920).

41 See 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2567(b), 2569(b) (1st ed. 1905); see also, e.g., *Brown v. Piper*, 91 U.S. 37, 42 (1875).

existence, commencement or any other fact for like purpose.”⁴² Courts could notice these facts—what Wigmore called “facts of ‘law’”⁴³—even if the parties disputed them because they were “matters which the judicial function supposes the judge to be acquainted with.”⁴⁴ By contrast, courts could notice other types of facts—say, whether a party’s railroad is part of a particular rail system⁴⁵—only if the facts were “notorious” or capable of “instant and unquestionable demonstration.”⁴⁶

So long as the substantive law demanded no more than a reasonable basis for legislation, facts concerning that legislation’s effect did not strain the bounds of judicial notice under either rubric. Courts could treat them as “facts of law” subject to judicial notice on the theory that they were adjunct to noticing the statute itself. Or courts could treat the facts as noticeable on the theory that they were ordinary facts that were notorious, or at least capable of unquestionable demonstration. For while the wisdom of a given policy choice may have been obscure or controversial, the mere existence of a basis for the policy could be thought notorious or unquestionable.⁴⁷

Such was the case in *Jacobson v. Massachusetts*.⁴⁸ In *Jacobson*, a man convicted under a compulsory vaccination law for refusing a smallpox vaccine sought to introduce evidence “relat[ing] to alleged injurious or dangerous effects of vaccination” to support his defense that the law was unconstitutional under the Fourteenth Amendment’s Due Process Clause.⁴⁹ Resolving his challenge required the Court to determine whether the statute had any “real or substantial relation” to the “objects” of “protect[ing] the public health, the public morals or the

42 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 182, 181–82 (Chicago, Callaghan & Co. 1891); accord 4 WIGMORE, *supra* note 41, § 2572; see also, e.g., Fourth Nat’l Bank of N.Y. v. Francklyn, 120 U.S. 747, 751–52 (1887).

43 4 WIGMORE, *supra* note 41, § 2569(b).

44 *Id.* § 2565; accord Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 271 (1944); see also, e.g., Hoyt v. Russell, 117 U.S. 401, 404–05 (1886); Gardner v. Collector, 73 U.S. (6 Wall.) 499, 508 (1868); Fremont v. United States, 58 U.S. (17 How.) 542, 557 (1855); cf. 21B WRIGHT & GRAHAM, *supra* note 6, § 5102.1 (“Historically . . . judges were presumed omniscient in matters of law . . .”).

45 *Miller v. Tex. & N.O.R. Co.*, 18 S.W. 954, 954–55 (Tex. 1892).

46 4 WIGMORE, *supra* note 41, § 2565; accord Wyzanski, *supra* note 26, at 1295.

47 See CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 329 (1954); EDWARD W. CLEARY, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 331 (2d ed. 1972). *But see* *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891) (questioning whether a factual proposition advanced in support of the necessity of a state regulation “could be indulged, consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice”); *Minnesota v. Barber*, 136 U.S. 313, 321 (1890) (similar).

48 197 U.S. 11 (1905).

49 *Id.* at 23.

public safety.”⁵⁰ But the Supreme Court found no error in the trial court’s refusal to admit Jacobson’s evidence.⁵¹ Both courts could take judicial notice of the “common belief . . . maintained by high medical authority” that vaccines are effective public health measures.⁵² The courts having taken judicial notice of a factual basis for the legislature’s policy, Jacobson’s contrary evidence became legally irrelevant.⁵³ Under the Court’s construction of the Fourteenth Amendment, the legislature was free to choose any rational policy, even if the evidence suggested another policy might be better.⁵⁴ The reasonable basis for the vaccine was notorious and unquestionable, even if its efficacy was not. The Court could therefore notice that reasonable basis without weighing in on whether it was an ordinary fact or a “fact of law.”

As constitutional doctrines came to demand closer judicial scrutiny, however, the ambivalence became more difficult to maintain. *Lochner v. New York*,⁵⁵ though decided the same year as *Jacobson*, heralded an era of more searching judicial review of legislative policy judgments. In *Lochner*, as in *Jacobson*, the Court acknowledged—took notice of—“statistics” showing a basis for the legislation: “that the trade of a baker does not appear to be as healthy as some other trades.”⁵⁶ But unlike in *Jacobson*, it found those statistics inadequate to support New York’s maximum-hours law for bakers. The Court took notice of other facts undermining the justification for the law.⁵⁷ Because it is contestable,⁵⁸ the Court’s reasoning is difficult to reconcile with judicial notice’s requirements for questions of ordinary fact. *Lochner* thus appeared to approach the facts as “facts of law.”

Justice Holmes’s famous quip—“[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics”—criticized *Lochner*’s substantive legal doctrine rather than its mode of factual inquiry.⁵⁹ Others responded by insisting that the Court use better social information. Defending a maximum-hours law for women three years

50 *Id.* at 31.

51 *Id.* at 24, 31.

52 *Id.* at 30. The Court canvassed extrarecord sources supporting its judicial notice. *Id.* at 31 n.1.

53 *Id.* at 35.

54 For a more recent expression of this principle, see *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

55 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 380 (1937).

56 *Id.* at 59.

57 *Id.* at 58–59 (appealing to “common knowledge,” *id.* at 58, and “common understanding,” *id.* at 59). Such phrases are the currency of judicial notice. See *Minnesota v. Barber*, 136 U.S. 313, 321 (1890).

58 *Lochner*, 198 U.S. at 69–70 (Harlan, J., dissenting) (appealing to “common experience,” *id.* at 69, of contrary facts).

59 *Id.* at 75, 75–76 (Holmes, J., dissenting).

after *Lochner*, then-attorney Louis Brandeis submitted a brief containing “a very copious collection of” analogous domestic and international legislation, as well as excerpts of reports “to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization.”⁶⁰ The case was *Muller v. Oregon*. Applauding Brandeis’s submission, the Court mused, “when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration.”⁶¹ The *Muller* Court implicitly recognized the lawlike nature of these facts by taking notice of Brandeis’s extrarecord presentation even though it understood that the factual proposition upon which its ruling turned was “debatable.” Notice would have been unavailable had these “debatable” facts not been “facts of law.”

Another important opinion, issued the same year as *Muller*, obliquely confirmed the facts’ essentially lawlike character. In *Prentiss v. Atlantic Coast Line Co.*, railroads brought bills in equity to enjoin members of a state agency from enforcing passenger rates on the ground that the rates were confiscatory in violation of the Fourteenth Amendment.⁶² The agency argued that its rate-setting proceedings were judicial in nature and, thus, that its finding that the rates were reasonable precluded other courts from reconsidering the rates’ reasonableness.⁶³ Writing for the Court, Justice Holmes concluded that the Commission’s proceedings were legislative rather than judicial in nature because, rather than “enforc[ing] liabilities as they stand . . . under laws supposed already to exist,” they “ma[de] a rule for the future.”⁶⁴ Justice Holmes then resorted to analogy: “A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide.”⁶⁵ That is, “matters of fact that are merely premises to a rule of law” take the character of “law” from the inquiry of which they are a part. Similarly, the matters of fact found by the Commission took a legislative character from the inquiry of which they were a part. Being legislative in character, they did not preclude judicial inquiry.⁶⁶

An accident of terminology may make it difficult to perceive *Prentiss*’s significance to the debate over “legislative facts.” The Court’s

60 *Muller v. Oregon*, 208 U.S. 412, 419, 420 n.1 (1908). See generally Jackson, *supra* note 31, at 2354, 2379 (contrasting the approaches of Holmes and Brandeis).

61 *Muller*, 208 U.S. at 420–21.

62 211 U.S. 210, 217 (1908).

63 *Id.* at 224.

64 *Id.* at 226.

65 *Id.* at 227.

66 *Id.* at 226–27.

holding that the Commission's proceedings—and thus its findings of fact—bore a legislative character is not the point (for now). The pertinent observation concerns the classification and treatment of matters of fact found *by courts*. The Court spoke to this point when it observed that “matters of fact that are merely premises to a rule of law” are for the judge rather than the jury. These matters of fact are, at least for purposes of the judge-jury divide, “law.”

Lochner, *Jacobson*, and *Muller* all began as criminal proceedings tried before a jury. *Prentis* confirmed that the findings in those cases were properly made by the courts not because they were uncontestable facts susceptible of judicial notice, but rather because they were “facts of law.”

B. Taking Evidence

As parties increasingly challenged laws' constitutionality in jury-less equitable proceedings, the materiality of the line *Prentis* drew faded.⁶⁷ District court judges decided, and appellate courts reviewed, questions of law *and* fact in these equitable proceedings,⁶⁸ which invited laxity in distinguishing between the questions.⁶⁹ And so *Muller* began to exert an opposing force that pushed the findings concerning the constitutionality of laws and policies in the direction of “fact.” Reflecting on *Muller* a few years later, then-professor Felix Frankfurter observed: “[W]e are dealing, in truth, not with a question of law but the application of an undisputed formula to a constantly changing and growing variety of economic and social facts.”⁷⁰ The perception that “these questions raise, substantially, disputed questions of fact” prompted calls for “the invention of some machinery by which knowledge of the facts . . . may be at the service of the courts as a regular form of the judicial process.”⁷¹ Initially, reformers focused on improving the regularity and quality of factual presentations for judicial notice in so-called “Brandeis briefs.”⁷² But as the complexity of the

67 See generally Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 513 (2022) (noting that without the disciplining presence of the jury, the “distinction between law and fact” may be “lost”).

68 See, e.g., FED. R. CIV. P. 52 advisory committee's note to 1937 adoption (citing as typical *Silver King Coal. Mines Co. of Nev. v. Silver King Consol. Mining Co. of Utah*, 204 F. 166 (8th Cir. 1913)).

69 Hart & Sacks, *supra* note 8, at 380–81.

70 Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 369 (1916).

71 *Id.* at 372; see also, e.g., Note, *The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 HARV. L. REV. 631, 631 (1936).

72 See, e.g., Frankfurter, *supra* note 70, at 365; *Methods of Work in the Appellate Courts of the United States*, 8 J. AM. JUDICATURE SOC'Y 165, 168 (1925).

inquiries grew, judicial notice began to appear, first, inconvenient, and then, unsuitable.⁷³ Evidence became the watchword.

In 1924, in *Chastleton Corp. v. Sinclair*, the Supreme Court considered the constitutionality of a rent control ordinance it had previously upheld on the basis of a public emergency that had since abated.⁷⁴ Citing *Prentis* for the proposition that “the Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law,” the Court concluded that “if the question were only whether the statute is in force today, upon the facts that we *judicially know* we should be compelled to say that the law has ceased to operate.”⁷⁵ As it was, however, the question was not whether the law remained constitutional “today,” but instead whether it was constitutional “at different dates in the past.”⁷⁶ The Court concluded that answering this question called for a factual inquiry that “c[ould] be done more *conveniently* in the [trial court] than here.”⁷⁷

Evidentiary development in lower courts gradually passed from a convenience to an imperative.⁷⁸ In 1930, the Supreme Court promulgated Federal Equity Rule 70½. The rule required the “court of first instance” in equity cases to “find the facts specially and state separately its conclusions of law thereon.”⁷⁹ The rule pointedly extended its requirements to equitable suits “required to be heard before three judges”⁸⁰—that is, suits for an injunction restraining a state officer from acting under an allegedly unconstitutional state statute.⁸¹ The rule thus emphasized the need for lower-court factfinding in the very cases where courts were engaged in fact-intensive constitutional analysis.

73 See, e.g., FRANKFURTER & LANDIS, *supra* note 33, at 313; Henry Wolf Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 14 (1924); William Denman, *Comment on Trials of Fact in Constitutional Cases*, 21 A.B.A.J. 805, 806 (1935); Frankfurter, *supra* note 70, at 370; Note, *supra* note 71, at 633; see also Karst, *supra* note 6, at 100.

74 264 U.S. 543, 544 (1924).

75 *Id.* at 548–49 (emphasis added) (citing *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 227 (1908)).

76 *Id.* at 549.

77 *Id.* (emphasis added).

78 See Frankfurter & Landis, *supra* note 33, at 22; Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1319 (1942); see also *Kress, Dunlap & Lane, Ltd. v. Downing*, 286 F.2d 212, 215 (3d Cir. 1960).

79 FED. R. PRAC. IN EQUITY 70½, 281 U.S. 773 (1930) (repealed 1935); see also *id.*, 296 U.S. 671 (1935) (repealed 1938).

80 281 U.S. at 773.

81 See Mann-Elkins Act, ch. 309, § 17, 36 Stat. 539, 557 (1910); see also Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–1976*, 72 CASE W. RESV. L. REV. 909, 916–17 (2022).

The Supreme Court soon confirmed that the factfinding requirement extended to the facts courts must consider to ascertain the constitutionality of a challenged law or policy. In 1934, in *Borden's Farm Products Co. v. Baldwin*, the plaintiff sued to enjoin the New York Commissioner of Agriculture from enforcing a milk price control law on the ground that it was unconstitutional under the Fourteenth Amendment.⁸² The district court dismissed the complaint without making findings of fact.⁸³ After surveying the asserted justifications for the challenged law, the Supreme Court concluded that “the particular economic facts” upon which the asserted “rational basis” for the law was “predicated” were “outside the sphere of judicial notice.”⁸⁴ They would therefore have to be the subject of factfinding by the lower court after a “final hearing upon pleadings and proofs.”⁸⁵ Citing Federal Equity Rule 70½, the Court stressed that it had become “increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely *with appropriate determinations upon evidence*,” so the Court’s conclusions found “adequate *factual support*.”⁸⁶

Borden's Farm marked a shift in classification. No longer were facts affecting a law’s constitutionality “ground[s] for laying down a rule of law,” subject to judicial notice even if contestable.⁸⁷ Rather, where contested, they were “outside the sphere of judicial notice.”⁸⁸ Reflecting this shift, the American Law Institute’s *Model Code of Evidence* from the 1940s permitted notice only of “specific facts so notorious as not to be the subject of reasonable dispute,” and “specific facts and propositions of generalized knowledge which are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.”⁸⁹ The reporter of the Institute’s Committee on Evidence, Edmund Morgan, acknowledged that facts used to “lay[] down a rule of substantive law” were not subject to the strictures of notoriety or indisputability.⁹⁰ But he left little doubt that the Committee considered facts relevant to the constitutionality of laws and policies to be

82 293 U.S. 194, 201 (1934).

83 *Id.*

84 *Id.* at 210 (emphasis added).

85 *Id.* at 213.

86 *Id.* at 210 (emphasis added); *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

87 *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924).

88 *Borden's Farm*, 293 U.S. at 210; *see also* *Morris*, *supra* note 78, at 1322.

89 MODEL CODE OF EVIDENCE r. 802 (AM. L. INST. 1942).

90 Morgan, *supra* note 44, at 284.

“proposition[s] of generalized knowledge” that could be noticed only if notorious or indisputable.⁹¹ These questions were questions of fact.

C. *Taking Exception*

Despite these fact-oriented innovations, practice remained inconsistent,⁹² and a countertrend soon emerged. New voices proposed to treat the inquiries demanded by modern constitutional doctrines more like questions of law, not so much because they were questions of law, but instead because they were an exceptional form of factual inquiry.

In 1942, Professor Kenneth Culp Davis published an influential article reflecting on the treatment of evidence in administrative proceedings.⁹³ He observed that “[t]hrough adjudication administrative agencies create law and determine policy, as well as make findings which concern only the parties to the specific case.”⁹⁴ “When an agency finds facts concerning immediate parties,” he continued, “the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts.”⁹⁵ But “[w]hen an agency wrestles with a question of law or policy, it is acting legislatively,” and “facts which inform its legislative judgment may conveniently be denominated legislative facts.”⁹⁶ And so the concept of “legislative facts” was born.⁹⁷

91 *Id.* at 276 n.13; *see also* Davis, *supra* note 1, at 952 (criticizing the *Model Code* on this ground).

92 *See, e.g.*, Karst, *supra* note 6, at 97–98.

93 Davis, *Problems of Evidence*, *supra* note 6.

94 *Id.* at 402.

95 *Id.*

96 *Id.*

97 The distinction between these two categories of fact in agency proceedings was not new. *See* *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting) (tracing it to Justice Holmes). Davis’s contributions were the enduring terminology of “legislative fact” and “adjudicative fact” and the assertion that the distinction carried over into judicial proceedings. *See* Karst, *supra* note 6, at 77 n.9. Today, courts also use the term “legislative facts” to refer to the findings of fact legislatures sometimes make to inform their decisions to pass laws. *See, e.g.*, *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993). This Article does not use “legislative fact” in this sense. That said, a fact that is a “legislative fact” in this sense may become a “legislative fact” in the sense used in this Article when a legal challenge makes it an object of judicial factfinding. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). A question closely related to those explored in this Article is to what extent should courts defer to factfinding by legislatures when ascertaining legislative facts. *See, e.g.*, Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 *IND. L.J.* 1 (2009); Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 *NOTRE DAME L. REV.* 337 (1984).

Davis was principally concerned with facts *agencies* found. But he perceived a connection between those facts and the facts courts found when adjudicating constitutional challenges, and beyond.⁹⁸ According to Davis, courts—like their administrative counterparts—used facts to *make* law.⁹⁹ And when it came to legislative facts, courts frequently and properly took account of materials that were neither notorious nor indisputable nor in evidence.¹⁰⁰ Rightly so, said Davis. Invoking a common-law model,¹⁰¹ Davis insisted that “[w]hat the law needs at its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom ‘clearly’ indisputable.”¹⁰²

In an age when legal realism had taken firm hold, Davis’s words fell on receptive ears.¹⁰³ Charles T. McCormick endorsed Davis’s observations wholesale in his contemporary evidence treatise.¹⁰⁴ And Davis’s campaign to exempt “legislative facts” from the strictures of notoriety and indisputability¹⁰⁵ prevailed in 1975, when Congress enacted Federal Rule of Evidence 201.¹⁰⁶ That rule maintained strict limits on the use of judicial notice, but only for “adjudicative facts.”¹⁰⁷ The Advisory Committee notes confirm that the Committee deliberately excluded “legislative facts,” which it characterized as “fundamental[ly] differen[t]” from adjudicative facts.¹⁰⁸ Quoting Morgan, the reporter of the original model code, the notes explain: “In determining the

98 Davis, *Problems of Evidence*, *supra* note 6, at 403–04; *see also* Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 199 (1956).

99 Davis, *Problems of Evidence*, *supra* note 6, at 404; *cf.* Monaghan, *supra* note 8, at 233 n.23 (questioning the usefulness of analogies between courts and agencies because the latter “necessarily possess considerable lawmaking authority”); Larsen, *supra* note 6, at 232 (similar). Whether it is proper for agencies to exercise any greater lawmaking authority than do courts is beyond the scope of this Article. *Compare* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014), *with* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra*). *See generally* *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (noting that the only permissible “lawmaking” authority for courts *or* agencies comes from a common source: the “degree of discretion” that “*inheres* in most executive or judicial action” under laws that *Congress* makes).

100 Davis, *Problems of Evidence*, *supra* note 6, at 405–06.

101 *Id.* at 406; *see also* Karst, *supra* note 6, at 76.

102 Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 69, 83 (Roscoe Pound et al. eds., 1964).

103 *See, e.g.*, Alfange, *supra* note 6, at 639; Karst, *supra* note 6, at 77; Wyzanski, *supra* note 26, at 1295 n.69; Morris, *supra* note 78, at 1324.

104 MCCORMICK, *supra* note 47, § 329.

105 Davis, *supra* note 1, at 946; *see also* 21B WRIGHT & GRAHAM, *supra* note 6, § 5101.

106 Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. *See generally* 21B WRIGHT & GRAHAM, *supra* note 6, § 5101; *supra* text accompanying notes 59–63, 70.

107 FED. R. EVID. 201(a).

108 *Id.* advisory committee’s note.

content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion."¹⁰⁹ The Committee concluded that the principle should "govern judicial access" to facts relevant to the constitutionality of laws,¹¹⁰ even though Morgan himself had excluded such facts from the principle.¹¹¹ Like Davis, the Committee also accepted that legislative facts were essential to cultivating "judge-made law."¹¹²

Rule 201 provided a fulcrum around which the debate about "legislative facts" could pivot, but it did little to stabilize procedural and evidentiary practices. Two broad questions have emerged. First, which facts qualify as "legislative facts"? Facts that determine the constitutionality of a law or policy, yes, but Davis also revealed that this new breed of facts permeated the "growing points" of all law.¹¹³ Across these substantive areas, it is said, "the distinction" between legislative and adjudicative facts "rapidly fades when one tries to apply it."¹¹⁴

Second, to whatever extent courts can distinguish "legislative facts," how should they go about finding them? Rule 201 exempted "legislative facts" from the strictures of judicial notice, but does it follow that courts should disregard their essentially factual nature for other purposes?¹¹⁵ Reclassification does not alter the reality that courts finding legislative facts are conducting complex, empirical inquiries, and the old impulse to discipline that process has not dissipated.¹¹⁶ And so with courts' occasional release from procedural and evidentiary strictures have come calls for alternative procedural "safeguards" to protect parties from errant legislative factfinding.¹¹⁷

109 *Id.* (quoting Morgan, *supra* note 44, at 270).

110 *Id.*

111 *See supra* notes 89–91 and accompanying text.

112 FED. R. EVID. 201(a) advisory committee's note (quoting Davis, *supra* note 102, at 82).

113 Davis, *supra* note 102, at 83.

114 21B WRIGHT & GRAHAM, *supra* note 6, § 5103.2; *see also* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1789 n.130 (2003) (noting the distinction is "not clear"); Benjamin, *supra* note 6, at 357 n.326 (noting the distinction is "murky"); Berger, *supra* note 6, at 945 (noting the distinction is "blurry").

115 *See generally* FAIGMAN, *supra* note 6, at 45; Walker & Monahan, *supra* note 6, at 583–85.

116 *See* United States v. Leon, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring); Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 1015 n.84 (1980) (discussing different kinds of legislative facts and the range of methods that might be appropriate for finding them).

117 MCCORMICK, *supra* note 47, § 329; *accord, e.g., In re Asbestos Litig.*, 829 F.2d 1233, 1249 (3d Cir. 1987) (Becker, J., concurring); United States v. Davis, 353 F.2d 614, 618 n.1 (2d Cir. 1965) (Waterman, J., dissenting); 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 15:9 (2d ed. 1980); Edward R. Becker & Aviva Orenstein, *The Federal Rules of*

The appellate standard of review offers a case in point. Federal Rule of Civil Procedure 52(a)(6) requires appellate courts to accept district court findings of fact in the absence of clear error.¹¹⁸ Unlike Federal Rule of Evidence 201, Rule 52 contains no “adjudicative” qualifier, and the Advisory Committee notes make no exception for “legislative facts”—a term that had not even been coined when the Supreme Court adopted Rule 52 in 1937.¹¹⁹ To the contrary, Rule 52 emerged in the fact-forward era when the Court frequently remanded cases to lower courts to make “findings of fact” going to constitutionality, raising the possibility that the Court understood “fact” to include what would come to be known as legislative facts.¹²⁰

After Davis identified the category, however, the Supreme Court speculated that Rule 52(a)(6) may not extend to “legislative facts.”¹²¹ In *Lockhart v. McCree*, Ardia McCree was serving life without parole for capital felony murder.¹²² At voir dire, the Arkansas trial judge had removed for cause “prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty”—a practice known as “death qualification.”¹²³ McCree sought a federal writ of habeas corpus on the ground that the death qualification process violates the Sixth and Fourteenth Amendments.¹²⁴ The district court granted the writ. It relied on a variety of social-science studies to find that death-qualified juries are more likely to convict.¹²⁵ Because the Supreme Court rejected McCree’s claim on other grounds, it did not have to decide what standard of review to apply to that finding, which it characterized as a legislative fact, but it did express doubt about the propriety of clear-error review, Rule 52(a)(6) notwithstanding.¹²⁶

Thirty years later, the Court felt no such doubt about facts the district court found in *Glossip v. Gross*.¹²⁷ In that case, the plaintiffs sought

Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 GEO. WASH. L. REV. 857, 899–900 (1992); Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023); Karst, *supra* note 6, at 100–07; Miller & Barron, *supra* note 6, at 1233; see also Davis, *Judicial Absorption*, *supra* note 6, at 1541.

118 FED. R. CIV. P. 52(a)(6).

119 See *id.* & advisory committee’s notes.

120 See Note, *The Practice of the United States Supreme Court in Remanding Cases for Further Consideration*, 43 HARV. L. REV. 940, 942–43 (1930); *supra* Section I.A.

121 *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986).

122 *Id.* at 166.

123 *Id.* at 166–67.

124 *Id.* at 165.

125 *Id.* at 167–68.

126 *Id.* at 168 n.3.

127 576 U.S. 863 (2015).

to enjoin the State of Oklahoma from executing them on the ground that Oklahoma's protocol would violate the Eighth and Fourteenth Amendments. The plaintiffs argued that the first drug in Oklahoma's lethal injection protocol, midazolam, would not render them insensate to the pain caused by the second and third drugs, meaning that the protocol was "sure or very likely to cause serious illness and needless suffering."¹²⁸ The district court held an evidentiary hearing, found that midazolam "is highly likely to render the person unconscious and insensate during the remainder of the procedure," and denied a preliminary injunction.¹²⁹ Reviewing the denial of a preliminary injunction, the Supreme Court applied clear-error review to the district court's finding about midazolam.¹³⁰ Even the dissent, which would have rejected the lower court's findings, agreed that the clear-error rule applied.¹³¹

The Court's decision to follow Rule 52 in *Glossip* has been controversial, as critics perceive in it a departure from both *Lockhart*'s dictum and the broader unacknowledged practice of reviewing findings of legislative fact de novo.¹³² Did the Court defer because it did not consider the fact about midazolam's effect to be legislative? Perhaps, but looking only to its intrinsic qualities, the fact is difficult to distinguish from facts the Court and other courts have described as "legislative"—including the fact in *Lockhart*.¹³³ Or has the Court silently decided that, on reflection, Rule 52 *does* apply to legislative facts? Perhaps, but if so, it becomes difficult to account for the Court's post-*Glossip* treatment of other facts that might merit the label "legislative."¹³⁴ And its failure to articulate that conclusion has left lower appellate courts in disarray.¹³⁵

128 *Id.* at 877 (emphasis omitted) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)).

129 1 Joint Appendix at 77, *Glossip*, 576 U.S. 863 (No. 14-7955).

130 *Glossip*, 576 U.S. at 881.

131 *Id.* at 958 (Sotomayor, J., dissenting).

132 See, e.g., Berger, *supra* note 6, at 951–56; Larsen, *supra* note 6, at 230; Steinman, *supra* note 6, at 43; Yoshino, *supra* note 6, at 258–60. Another recent example that appears to depart from this practice is *June Medical Services L.L.C. v. Russo*. See 140 S. Ct. 2103, 2121 (2020) (plurality opinion), *abrogated in part on other grounds* by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); see also *id.* at 2141 (Roberts, C.J., concurring in judgment).

133 Larsen, *supra* note 6, at 230–33.

134 See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2430 (2022) (looking beyond record to determine whether coach's conduct coerced students to participate in religious observance); *id.* at 2442 (Sotomayor, J., dissenting) (same); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2138 (2022) (engaging in a plenary examination of "evidence" of historical firearms regulations).

135 Compare *United States v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994) (not applying clear-error review "when the fact-finding at issue concerns 'legislative,' as opposed to 'historical' facts"), *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (plurality

II. FINDING LEGISLATIVE FACTS

What accounts for the persistent confusion surrounding legislative facts? To answer this question, one must first understand *what* the confusion is all about. This is not easy because there is no single, accepted definition of “legislative fact.” This Part begins by laying out prevailing definitions of the concept. Right away, one source of confusion appears: the definitions distinguish legislative facts based on characteristics or functions that all facts bear or perform to some degree. Thus, there exists no bright line between legislative and adjudicative facts.

Next, this Part examines standard conventions for determining who decides and how. Rules of procedure and evidence route decisionmaking in adjudication. Can the court answer the question on the pleadings, on a summary judgment motion, or only after trial?¹³⁶ Should the question be submitted to the jury or the judge?¹³⁷ Decided on the record?¹³⁸ Should the answer be reviewable on appeal, and if so, with what degree of deference?¹³⁹ Once final, what does it settle? Conclusively, a given issue for all of the parties’ claims arising out of the same transaction or series of transactions?¹⁴⁰ Or presumptively, a rule for cases presenting the same question within the jurisdiction?¹⁴¹ These determinations depend in part upon whether one classifies the question that decision answers as one of fact or one of law.¹⁴² Examining the choices courts make yields the insight that courts generally route a decision based on the role that decision plays in adjudicating the case or controversy. Questions whose answers assist the court in

opinion) (same), *United States v. Miller*, 982 F.3d 412, 430 (6th Cir. 2020) (dictum taking it as given that findings of legislative fact are subject to de novo review), *and Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030, 1036 (7th Cir. 1982) (similar to *Singleterry*), *with Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 910 F.3d 106, 114 n.13 (3d Cir. 2018) (applying clear-error review), *abrogated in part on other grounds by Bruen*, 142 S. Ct. 2111, *and W. Ala. Women’s Ctr. v. Williamson*, 900 F.3d 1310, 1316 (11th Cir. 2018) (limiting “legislative facts” distinction to administrative and criminal cases), *abrogated on other grounds by Dobbs*, 142 S. Ct. 2228.

136 See, e.g., FED. R. CIV. P. 56(a); *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

137 See, e.g., *Sparf v. United States*, 156 U.S. 51, 102 (1895).

138 See, e.g., *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1159 (2017) (Sotomayor, J., concurring in judgment).

139 See, e.g., U.S. CONST. amend. VII; FED. R. CIV. P. 52(a)(6).

140 See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 17 (AM. LAW INST. 1982) (discussing claim preclusion); *id.* § 27 (discussing issue preclusion).

141 See generally Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1552–54 (2020).

142 See, e.g., Allen & Pardo, *supra* note 114, at 1769; Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 862–63 (1992); Morris, *supra* note 78, at 1304; Hart & Sacks, *supra* note 8, at 373.

formulating the rule of decision are questions of law; questions to whose answers the court applies the rule of decision are questions of fact.

Finally, this Part relates the standard conventions to the definitions of legislative fact to reveal that definitions of legislative fact uniformly encompass facts that play *different* roles in adjudicating the case or controversy before the court. The fact about death-qualified juries the Court tentatively exempted from Rule 52 played a different role in *Lockhart* than did the fact about midazolam in *Glossip*. This bundling of facts that play different roles in adjudication makes the legislative-fact concept incompatible with the standard conventions that turn on the role the fact plays in the adjudication. The next Part will consider what to do in light of that incompatibility.

A. Defining “Legislative Fact”

There is no single definition of “legislative fact.” Common definitions distinguish legislative facts from adjudicative facts based on their function or their characteristics.

Function-based definitions generally capture facts a court uses to perform functions like determining the constitutionality of laws or policies, and a process of legal reasoning.¹⁴³ The father of legislative facts, Davis, pointed to a fact’s function when he defined “legislative fact” as a fact that informs a court’s (or agency’s) formulation of law or policy.¹⁴⁴ Although varied, function-based definitions share with Davis’s the foundational assumption that courts make law. Function-based definitions turn on the finding’s role in lawmaking.

There is a question-begging quality to these function-based definitions. They propose to shape a court’s process for finding facts based on how those facts will affect the development of law going forward. But how facts will affect the development of law going forward often

143 See, e.g., *Landell v. Sorrell*, 382 F.3d 91, 202–03 (2d Cir. 2004) (Winter, J., dissenting) (quoting FED. R. EVID. 201(a) advisory committee’s note), *rev’d on other grounds sub nom.* *Randall v. Sorrell*, 548 U.S. 230 (2006); *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) (citing *United States v. Bello*, 194 F.3d 18, 22–23 (1st Cir. 1999)), *abrogated in part on other grounds by* *Roberts ex rel. Johnson v. Galen of Va., Inc.*, 325 F.3d 776 (6th Cir. 2003); GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 201.2 (6th ed. 2009); Borgmann, *supra* note 6, at 1194; Keeton, *supra* note 6, at 11; Woolhandler, *supra* note 6, at 114; see also 21B WRIGHT & GRAHAM, *supra* note 6, § 5103.2, at 120 n.20 (collecting state rules); Steinman, *supra* note 6, at 42 (collecting examples of functional definitions); cf. Davis, *Judicial Absorption*, *supra* note 6, at 1547–48 (describing problems that arise when findings that “function” like adjudicative facts are instead approached as legislative facts, *id.* at 1548); Frankfurter, *supra* note 70, at 372 (describing facts “which are the foundation of the legal judgment”).

144 See, e.g., Davis, *supra* note 1, at 952.

depends upon the process the court uses for finding them.¹⁴⁵ The decision to classify a fact as “legislative” may thus become a self-fulfilling prophecy: a fact contributes to making law because the court uses it to make law.¹⁴⁶

Function-based definitions also present a line-drawing problem. At least under a view that equates precedent with law,¹⁴⁷ every factual input into the adjudication contributes to some degree to developing the law.¹⁴⁸ The most straightforward act of law application contributes to a body of law by showing the legal consequences that follow from applying a settled rule to a particular set of facts.¹⁴⁹ Accepting Davis’s realist premise, then, every fact informs the formulation of law or policy, however invisibly.¹⁵⁰

But not every fact is a “legislative fact.” Especially if one advocates relaxing the rules of evidence and procedure for legislative facts, one must have a way to distinguish them from the adjudicative facts to which the rules apply.¹⁵¹ Function-based definitions supply no clear way to do it. Enter characteristic-based definitions.

Characteristic-based definitions are more common and distinguish legislative from adjudicative facts based on two intrinsic characteristics. First, the fact’s generality: legislative facts are facts about the broader world, while adjudicative facts are facts about the parties and their dispute.¹⁵² Second, the degree of judgment involved in finding

145 See Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 654 (2015). See generally Tyler, *supra* note 141 (describing different theories of precedent).

146 See FAIGMAN, *supra* note 6, at 146; Borgmann, *supra* note 6, at 1193 n.53.

147 E.g., Hessick, *supra* note 16, at 799–801.

148 See Karst, *supra* note 6, at 77; Monaghan, *supra* note 8, at 236; Woolhandler, *supra* note 6, at 114; see also Masur & Ouellette, *supra* note 145, at 654.

149 See Tyler, *supra* note 141, at 1557–58.

150 Karst, *supra* note 6, at 99. But see Davis, *supra* note 1, at 952 (noting that the “legislative element is either absent, unimportant, or interstitial” in the mine-run of cases applying established law and policy).

151 Monaghan, *supra* note 8, at 230 n.16 (noting that the distinction is “of some significance,” given that it can shape a litigant’s procedural rights).

152 The Eighth Circuit adopted a generality-based definition that has been particularly influential. *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976) (“Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case.”); accord, e.g., *United States v. Davis*, 726 F.3d 357, 366 (2d Cir. 2013) (adopting the Eighth Circuit’s formulation); *United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. Unit B Sept. 1981) (same); *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984) (same); see also MCCORMICK, *supra* note 47, § 329; Alfange, *supra* note 6, at 640; Benjamin, *supra* note 6, at 273; Berger, *supra* note 6, at 532; Borgmann, *supra* note 6, at 1187, 1193; Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 924–25 (1992) (noting that “allocation of authority” in factfinding may turn on whether

them: legislative facts call for exercises of conjecture, prediction, or opinion, while adjudicative facts do not.¹⁵³ Thus, for example, the Fifth Circuit has held that “the issue of whether there is a correlation between advertising [of alcohol] and consumption [of alcohol] is a legislative and not an adjudicative fact question” because “[i]t is not a question specifically related to this one case or controversy,” and because it depends upon “social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning.”¹⁵⁴

Although courts and commentators formulated characteristic-based definitions with an eye to capturing the facts that most contribute to lawmaking, the chosen characteristics have come to “wag the dog.” That is, courts and commentators hold that the facts that bear them may be “legislative” irrespective of the scale of judicial lawmaking in the case; the intrinsic character of the facts, rather than the role they play in developing the law, has come to dictate their classification as “legislative.”¹⁵⁵ The result is sometimes counterintuitive and even arbitrary. In *Perry v. Brown*, for example, the court justified treating general facts about the circumstances of a state law’s enactment as “adjudicative facts” based on the purely contingent circumstance that the law’s sponsors had intervened in the action, converting facts about the law that would have been general in any other case into facts about the parties (namely, the intervening proponents).¹⁵⁶

the fact is a “general” one that is “significant across a range of cases,” *id.* at 924; Walker & Monahan, *supra* note 6, at 559. The Third Circuit has adopted a different generality-based definition—one that requires proponents of legislative facts to show that they are “known to the general public.” *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 910 F.3d 106, 114 n.13 (3d Cir. 2018), *abrogated in part on other grounds by* *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022). This definition seems to conflate the definition of “legislative fact” with the requirements for noticing matters of “adjudicative fact.” FED. R. EVID. 201(a).

153 Adamson, *supra* note 6, at 14; Borgmann, *supra* note 6, at 1187; *see also* Woolhandler, *supra* note 6, at 113–14. Courts have not been consistent with respect to this second characteristic. Under some definitions, the speculative nature of the fact would seem to undermine its “legislative” character. *See, e.g., Bowers*, 660 F.2d at 531 (“Legislative facts are *established* truths, facts or pronouncements” (emphasis added) (quoting *Gould*, 536 F.2d at 220)).

154 *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (plurality opinion); *see also* Larsen, *supra* note 6, at 232; Jackson, *supra* note 31, at 2385.

155 *See, e.g., United States v. Cruz*, 172 F. App’x 168, 170 (9th Cir. 2006); Adamson, *supra* note 6, at 14–15; *see also* Borgmann, *supra* note 6, at 1187 (stating that social facts “often” support judicial rulemaking (emphasis added)).

156 671 F.3d 1052, 1075 (9th Cir. 2012), *vacated on other grounds sub nom.* *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

Courts and commentators alike have struggled to regulate and standardize characteristic-based definitions.¹⁵⁷ Particularity and generality exist on a spectrum,¹⁵⁸ and there is no obvious place to draw a line beyond which a fact becomes general enough to be legislative.¹⁵⁹ Moreover, the degree to which “social factors” may “submit to . . . empirical solution”¹⁶⁰ changes by the minute as data accumulate and data-analysis methods evolve.¹⁶¹ Finally, because general, speculative findings may be restated in ways that are both particular and concrete, and vice versa, the characteristic-based definition enables courts to alter procedural limits, or to protect their findings, by reformulating those findings.¹⁶²

Unadorned, the legislative-fact concept offers little to discipline the discretion it vests in the courts. But line-drawing problems are not necessarily fatal in the law. Especially in our common-law-centered system, courts are able to contain and resolve edge cases.¹⁶³ Why has the legislative-fact concept’s fight for purchase proven so feckless? To answer this question, one must examine the terrain.

B. Answering Questions of Fact and Law

Professors Henry Hart and Albert Sacks developed a common-sense framework to understand how a legal system distinguishes and allocates questions of fact and law.¹⁶⁴ In a notoriously muddled field,

157 See, e.g., *Korematsu*, 584 F. Supp. at 1415; *supra* note 114.

158 See FAIGMAN, *supra* note 6, at 49, 56; Allen & Pardo, *supra* note 114, at 1789 n.130, 1803.

159 Larsen, *supra* note 6, at 232–33; Woolhandler, *supra* note 6, at 114; see also, e.g., *Frank v. Walker*, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) (questioning whether facts concerning “voter fraud, voter habits, voter disenfranchisement” are legislative facts “owing to the great variance across and even within states in the administration of elections”).

160 *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (plurality opinion).

161 See FAIGMAN, *supra* note 6, at 28–41.

162 See *id.* at 44–45; 21B WRIGHT & GRAHAM, *supra* note 6, § 5103.2 (“[I]n practice courts often elide the distinction to reach a desired result.”); Adamson, *supra* note 6, at 15; Yoshino, *supra* note 6, at 273–74; cf. 3 DAVIS, *supra* note 117, § 15:5 (cautioning that “[g]eneral facts that are judicially noticed may help the court determine facts about a party, but the general facts do not for that reason become adjudicative facts”).

163 Even outside the context of legislative facts, the line between law and fact is one courts have sometimes struggled to define. But courts have not abandoned the distinction for want of a bright line. *Dupree v. Younger*, 143 S. Ct 1382, 1390–91 (2023). Though there are “edge cases,” courts “have long found it possible to separate factual from legal matters.” *Id.* at 1391 (quoting *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 328 (2015)).

164 Hart & Sacks, *supra* note 8, at 374. Hart and Sacks discuss the implications of this framework for the problem of legislative facts in the context of this framework. *Id.* at 384–

their clarifying insight was that there are three types of decisions to be allocated, which the law-fact binary obscures.¹⁶⁵ When courts resolve disputes, they (1) declare law, (2) find facts, and then (3) apply the law declared to the facts found.¹⁶⁶ Law declaration answers questions of law; fact identification answers questions of fact.¹⁶⁷ Law application, however, is reputedly a hybrid: a legal conclusion founded on descriptions of the law and facts of the case, mediated by some degree of judgment.¹⁶⁸ Courts sometimes characterize the question that law application answers as a “question of law,”¹⁶⁹ sometimes as a “question of fact,”¹⁷⁰ and sometimes as a “mixed question of law and fact.”¹⁷¹ To avoid confusion with the distinct questions the court answers at the law-declaration and fact-identification stages, this Article uses the phrase “mixed question” to refer to questions a court answers at the law-application stage.

As Hart and Sacks cautioned, “[t]he problems of law and fact with which lawyers are concerned . . . should not be confused with other problems about the difference between law and fact about which philosophers have debated.”¹⁷² The legal conventions “question of fact” and “question of law” do not map onto the philosophical categories of “fact” and “law.”

85. But I am indebted to Henry Monaghan for revealing the framework’s potential for clarifying the role of facts in constitutional cases. See Monaghan, *supra* note 8, at 233–34; see also Blocher & Garrett, *supra* note 117; Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328, 336 & n.43 (1962).

165 Hart & Sacks, *supra* note 8, at 375–76; see also Monaghan, *supra* note 8, at 234.

166 See, e.g., *U.S. Bank Nat’l Ass’n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018). This framework has a deep historical foundation. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–66 (1973); see also, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

167 Hart & Sacks, *supra* note 8, at 376.

168 *Id.* at 376; see also JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 252–53 (Boston, Little, Brown, & Co. 1898).

169 See, e.g., *In re Marco Guldenaar Holding B.V.*, 911 F.3d 1157, 1159 (Fed. Cir. 2018) (patent eligibility); see also George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 17 (1992); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 241 (1955).

170 See, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 287–88 (1982); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 517 (1984) (Rehnquist, J., dissenting); see also *Kyles v. Whitley*, 514 U.S. 419, 458 (1995) (Scalia, J., dissenting) (describing accurate law application as a matter of “factual accuracy”); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899) (noting that law application is often treated as a question of fact).

171 See, e.g., *U.S. Bank Nat’l Ass’n*, 138 S. Ct. at 966; *United States v. Gaudin*, 515 U.S. 506, 512 (1995).

172 See Hart & Sacks, *supra* note 8, at 374.

Philosophically speaking, a fact is a descriptive proposition about the world—a statement about what *is* or *was* or *will be*.¹⁷³ A law, by contrast, is a prescription—a statement about what *shall be*.¹⁷⁴ To answer a “question of fact,” a decisionmaker relies upon facts to produce an answer that is, itself, a fact—that is, an assertion about some aspect of the case or controversy. Intuitive. Less intuitive: to answer a “question of law,” a decisionmaker *also* relies on facts to produce an answer that is, itself, a *fact*—that is, an assertion about the law that governs the case or controversy.¹⁷⁵ Thus, questions of fact and questions of law, alike, call for factual answers.¹⁷⁶

When it applies law to fact, however, a decisionmaker sometimes makes judgments that implicitly include normative judgments—propositions about what *should be*. A finding that a defendant was negligent, for example, combines a description of the defendant’s conduct with a judgment about how he should have acted.¹⁷⁷ These normative judgments become a form of prescription because they are the standard to which the defendant is held. The phrase “mixed question,” then, only inadequately captures the work a court performs at this stage. The answer to mixed questions depends in part on the answers to questions of fact and law, but it is no mere amalgamation: the element of judgment makes the answer different in kind.¹⁷⁸ Judgment also gives the answer a trait—prescriptiveness—that it shares with the philosophical category “law.”

Who answers a question, when, and how, depends upon the question’s classification. Judges answer questions of law;¹⁷⁹ they do so on

173 See, e.g., Jaffe, *supra* note 169, at 241.

174 Borgmann, *supra* note 6, at 1224; Friedman, *supra* note 152, at 917–19; Monaghan, *supra* note 8, at 233; Woolhandler, *supra* note 6, at 115–16; see also Allen & Pardo, *supra* note 114, at 1801; Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 69–70 (2013); Lawson, *supra* note 142, at 864; James B. Thayer, “*Law and Fact*” in *Jury Trials*, 4 HARV. L. REV. 147, 157 (1890). “Shall” does not necessarily carry normative content here. The point is that, even bracketing jurisprudential debates about the nature or moral content of the law, the prescriptions one might classify as “law” differ from the propositions that answer “questions of law” in judicial decisions. See Lawson, *supra* note 142, at 863 (distinguishing between propositions of law and law without taking a position on what law is).

175 See Allen & Pardo, *supra* note 114, at 1792–94; Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 44 (2011); Lawson, *supra* note 142, at 863.

176 Cf. *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1154 (2023) (describing both the rule of decision and the facts to which it is applied as the major and minor premises of a logical syllogism).

177 See Friedman, *supra* note 152, at 920; Monaghan, *supra* note 8, at 232 n.22; Morris, *supra* note 78, at 1311–12. But see Allen & Pardo, *supra* note 114, at 1790–91, 1802 (arguing that this judgment is factual even in the abstract); Holmes, *supra* note 170, at 457 (arguing that the question is one of law).

178 Monaghan, *supra* note 8, at 232 n.22.

179 See Hart & Sacks, *supra* note 8, at 377.

the basis of material from outside the record, including information known to them before the parties brought their case or controversy to court;¹⁸⁰ their decisions are reviewed *de novo* on appeal, where they may produce precedent;¹⁸¹ and so on. Juries decide questions of fact (except in cases where there is no jury);¹⁸² they may rely only on record evidence;¹⁸³ their decisions are unreviewable or reviewed deferentially¹⁸⁴ and bind only the parties;¹⁸⁵ and so on. Mixed questions often follow questions of fact along their conventional route.¹⁸⁶ Sometimes, however, courts route mixed questions along a more question-of-law-like path, in which case the mixed questions may pull some questions of fact behind them.¹⁸⁷

The three-part framework yields several insights that bear on the problem of legislative facts.

1. Facts Are Everywhere

Law declaration and law application both produce conclusions predicated upon findings that are factual in character. This is most obvious in the case of law application, which produces a legal conclusion by applying the rule of decision to facts identified at the fact-identification stage—“identified facts,” for short. A legal conclusion that the defendant obstructed justice, for example, may rest on an antecedent finding that the defendant destroyed hard drives containing evidence of wrongdoing.¹⁸⁸

The role of facts may be less obvious in the case of law declaration.¹⁸⁹ The statement that the Sarbanes-Oxley Act “was prompted by the exposure of Enron’s massive accounting fraud” is a factual

180 See *Dupree v. Younger*, 143 S. Ct. 1382, 1390 (2023) (noting that a court’s decision on a “question [that] is purely legal” turns on “law books, not trial exhibits”); Morgan, *supra* note 44, at 270; Wyzanski, *supra* note 26, at 1295.

181 See *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2206 n.* (2022); Lawson, *supra* note 142, at 903.

182 See Hart & Sacks, *supra* note 8, at 377.

183 See Morgan, *supra* note 44, at 269.

184 FED. R. CIV. P. 52(a)(6); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1199 (2021); Thayer, *supra* note 174, at 167–68.

185 Lawson, *supra* note 142, at 902–03.

186 Hart & Sacks, *supra* note 8, at 377; see also, e.g., *Sparf v. United States*, 156 U.S. 51, 65–67 (1895).

187 See *infra* subsection II.B.3. See generally Christie, *supra* note 169, at 17 (“Of course, judges have always been able to invade the province of the jury by classifying certain issues as questions of law.”); Thayer, *supra* note 174, at 161–166 (discussing procedural mechanisms to depart from the norm by “securing for the court the application of the law to the facts”).

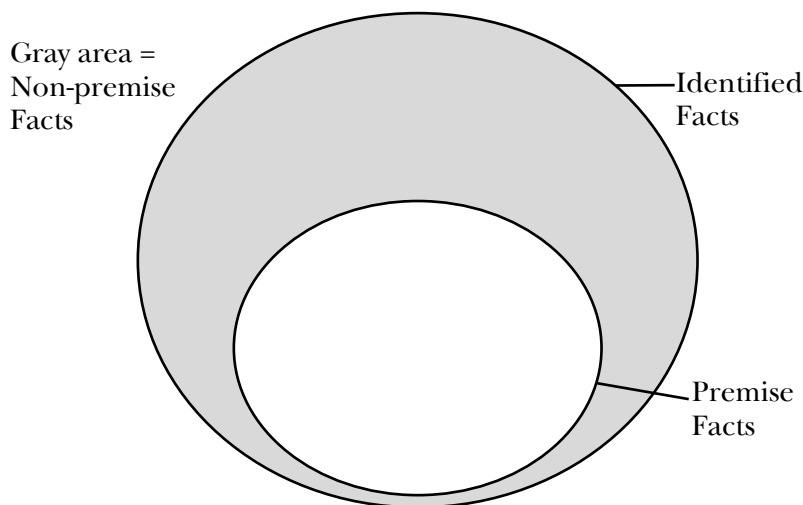
188 See 18 U.S.C. § 1519 (2018).

189 Allen & Pardo, *supra* note 114, at 1792–93.

proposition that informed the rule of decision the Supreme Court derived from the obstruction of justice statute.¹⁹⁰ Facts a court must find to declare a rule of decision form a premise of that rule of decision,¹⁹¹ and so this Article labels them “premise facts.”

The categories of premise fact and identified fact overlap because a fact in a case or controversy may be *both* a premise fact and an identified fact when there is an iterative process of law declaration and application. Indeed, *all* premise facts are arguably identified facts. When a court derives a rule of decision from a written instrument (i.e., engages in law declaration), it relies on rules that tell it which “facts” determine the content of that rule of decision.¹⁹² It is by applying those rules (say, the mischief rule)¹⁹³ to identified facts (say, the historical context of the Sarbanes-Oxley Act) that courts come up with the rule of decision for the dispute.

Because an “identified fact” may also be a “premise fact,” this Article distinguishes “identified facts” that are not premise facts by calling them “non-premise facts.” The following diagram illustrates the relationship among these three concepts:



190 *Yates v. United States*, 574 U.S. 528, 535 (2015) (plurality opinion). See generally Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) (“Interpretation is an empirical inquiry.”).

191 *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 227 (1908).

192 See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082–83 (2017); Eric Berger, *When Facts Don’t Matter*, 2017 BYU L. REV. 525, 528; see also, e.g., 1 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 15:3 (7th ed. 2010 & Supp. 2023–2024) (describing the enrolled bill rule, which prohibits courts from considering facts about legislative proceedings to determine whether a bill that has been enrolled was lawfully enacted).

193 See Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 971 (2021).

The relevant question for routing purposes is whether the fact precedes the ultimate act of law declaration—that is, whether it is a “premise fact.” This leads to an important qualification to the three-part framework introduced at the top of this Section: courts generally treat fact identification and attendant law application as questions of fact *only* when the facts the court is identifying and applying law to are non-premise facts.

When one puts the confounding concept of legislative fact to one side, courts generally route factual inquiries along the premise/non-premise fault line. Questions of premise fact follow paths laid out for questions of law. Questions of non-premise fact follow paths laid out for questions of fact.

Premise Facts. Outside the context of fact-intensive constitutional doctrines like those described in Part I, courts have had little difficulty routing factual inquiries as questions of law when they produce a rule of decision.¹⁹⁴ Whether a law has expired and whether a legislature has repealed it are ultimately questions of law,¹⁹⁵ but they depend on the occurrence or nonoccurrence of certain historical events whose particulars the parties may dispute.¹⁹⁶ A judge may resolve these disputes without submitting them to the jury,¹⁹⁷ and an appellate court may “find” a repeal even if there has been no opportunity to develop a

194 See *Prentis*, 211 U.S. at 227; Frederick J. de Sloovère, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 HARV. L. REV. 1086, 1093–94 (1933). An important qualification is merited here: when they produce a rule of decision under *domestic law*. At common law, questions about the content of foreign law were regarded as questions of fact. Today, they are regarded as questions of law, but courts use different procedures—more fact-like—to answer them. See FED. R. CIV. P. 44.1 (current rule); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2441, 2444–2446 (3d ed. 2008 & Supp. 2023).

195 See Baude & Sachs, *supra* note 192, at 1098–99, 1114.

196 According to a positivist view, all law is an expression of, and thus depends upon, fact. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961).

197 de Sloovère, *supra* note 194, at 1093–94.

record on the question.¹⁹⁸ The same goes for factual questions about whether, and when, a statute was “properly enacted.”¹⁹⁹

Historical inquiries that inform the meaning of a statute or the Constitution also travel paths laid out for questions of law despite their essentially factual nature.²⁰⁰ Different interpretive methods look to different sources to determine the “communicative” and “legal content” of a written instrument,²⁰¹ but they all have factual components.²⁰² The natural meaning of a word at some fixed point in the past is a factual matter.²⁰³ So, too, is the legislature’s intent.²⁰⁴ And though legislative

198 For example, in *Fourth National Bank of New York v. Francklyn*, the plaintiff failed to submit evidence of a statute that had “repeal[ed] and modify[ed] in some respects the statutes agreed and found in the record to be still in force.” 120 U.S. 747, 751 (1887). The Supreme Court nevertheless declined to apply the statute “found” by the court below to the extent that the statute had been modified by the subsequent enactment. *Id.* at 751, 751–52. “[I]t would be unreasonable to apply it when the effect would be to make the rights of the parties depend upon a statute which . . . [we] are judicially bound to know[] is not the statute that governs the case.” *Id.* at 751–52. Modern readers might interpret the references to judicial notice to suggest that repeal remained a “question of fact,” but at the time, judicial notice was more prominently a device for settling questions of law. THAYER, *supra* note 168, at 279–80. Today, judicial notice of law continues but is usually tacit. *City of Aztec v. Gurule*, 228 P.3d 477, 480 (N.M. 2010). See generally Becker & Orenstein, *supra* note 117, at 900 (noting that the Federal Rules of Evidence do not “address[] the question of judicial notice of law”).

199 de Sloovere, *supra* note 194, at 1094; see also, e.g., *Gardner v. Collector*, 73 U.S. (6 Wall.) 499, 504 (1868).

200 See *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 339 (2015) (Thomas, J., dissenting) (collecting cases). Although facts about historical meaning differ from the paradigmatic “legislative fact” described in Part I, scholars and even courts increasingly classify them as legislative in nature. See, e.g., FAIGMAN, *supra* note 6, at 43–44; Blocher & Garret, *supra* note 117, at 62–63. The classification has even led to calls to change the way they are found. *Id.* That courts have traditionally treated these findings as though they answer questions of law, and that questions regarding the advisability of this practice have coincided with these facts’ classification as “legislative” confirms the confounding effect of the legislative-fact classification, discussed in Section II.C.

201 Solum, *supra* note 20, at 480–83.

202 See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22 (1988); Solum, *supra* note 190, at 46.

203 See Aleinikoff, *supra* note 202, at 23; Baude & Sachs, *supra* note 38, at 811; Solum, *supra* note 190, at 12, 17, 47; see also, e.g., Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 465–506 (2018). Even though the legal content of a written instrument is something more than the “[p]urely linguistic” meaning of the words, where “the higher-order legal rules of the era” give some force to that “[p]urely linguistic” meaning, then courts must look to “on-the-ground practice,” Baude & Sachs, *supra* note 192, at 1141—a matter of historical fact. See Thayer, *supra* note 174, at 160. See generally Solum, *supra* note 190, at 33 (“Communicative content is simply the meaning of the text: you need more than meaning to get legal effect.”).

204 See FAIGMAN, *supra* note 6, at 43, 46, 91–92; Aleinikoff, *supra* note 202, at 23–24; Solum, *supra* note 190, at 26–27.

purpose may lose some of its factual nature if it is constructed,²⁰⁵ the question whether one meaning or another furthers that constructed purpose is often empirical and may be answered by resort to facts.²⁰⁶ Yet the court “hash[es] out” all of these questions without the core judicial factfinding apparatus: trial.²⁰⁷

In *Norfolk & Western Railway Co. v. Hiles*, for example, the Supreme Court set out to resolve a disagreement among lower courts about the meaning of a provision of the Safety Appliance Act that required railcars to have “couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles.”²⁰⁸ The Court drew from a variety of extrarecord sources to provide a detailed history of railcar coupler technology.²⁰⁹ The Court then relied on that history to support its construction of the statute.²¹⁰ By declining to confine itself to an evidentiary record, and announcing that its decision would settle the rule of decision in all future cases under the coupler provision,²¹¹ the Court treated these questions of premise fact as questions of law.²¹²

Non-Premise Facts. Courts finding non-premise facts follow paths laid out for questions of fact. These are usually the easy questions to route: “Did the defendant pull the trigger?” goes to the jury. But to underscore that a question’s role in adjudicating the case or controversy—rather than its intrinsic nature—determines the path it follows, consider a counterintuitive example: a question about the law routed

205 See generally Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1898 (2008) (contrasting intentionalism and purposivism).

206 See, e.g., *Potts v. Coe*, 145 F.2d 27, 31–32 (D.C. Cir. 1944). Mischief and purpose are not the same, but the mischief rule calls for a similar factual inquiry. See *Bray*, *supra* note 193, at 969 (“[B]are words are not always enough, for there may be facts an interpreter needs to know to make sense of those words.”).

207 *Dupree v. Younger*, 143 S. Ct. 1382, 1389 (2023); see, e.g., Tyler et al., *supra* note 38, at 1890 (statement of Easterbrook, C.J.) (describing use of extrarecord sources to ascertain historical facts underpinning interpretation).

208 516 U.S. 400, 402 (1996) (quoting 49 U.S.C. § 20302(a)(1)(A) (1994)).

209 *Id.* at 403–09.

210 *Id.* at 414.

211 *Id.* at 403.

212 For another, more recent, example of this approach to statutory interpretation, see *Sackett v. EPA*, 143 S. Ct. 1322, 1337 (2023). Judges also use “evidence in [their] interpretive role” in patent cases, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 387 (1996), though the Court has not consistently treated the premise facts implicated by patent constructions as questions of law. See *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 333 (2015) (stating that courts should “review for clear error those factual findings that underlie a district court’s claim construction”). *But cf. id.* at 341 (Thomas, J., dissenting) (courts should treat patents like statutes for construction purposes).

as a question of fact because the fact of the law was a non-premise fact.²¹³

In *Ritchie Grocer Co. v. Aetna Casualty & Surety Co.*, the plaintiff sought to recover under its employee fidelity policy money an employee had misappropriated.²¹⁴ An exclusion clause in the policy provided that coverage “shall not apply to any Employee” known to the plaintiff to have committed “any fraudulent or dishonest act.”²¹⁵ It was undisputed that the plaintiff was aware when it hired the employee in question that the employee had previously been arrested for breaking into a filling station, taking tires, and selling them.²¹⁶ In granting summary judgment for the insurance company, the district court took “judicial notice that the unlawful entering of a building and the taking of property is burglary and larceny subject to the penalty of the law.”²¹⁷ That is, it routed the question as a question of fact. Although the object of judicial notice was a proposition about the law, that proposition supplied no rule of decision for the case, nor even a premise for one. That proposition of law was instead a non-premise fact to which the court applied the rule of decision it derived from the exclusion clause. Yet the court subjected its finding to the strictures that govern the use of judicial notice to answer questions of fact.²¹⁸

2. A Permeable Boundary

The boundary between premise facts and non-premise facts is permeable because a given fact in a given case or controversy may move from one category to another depending upon how one draws the line between law declaration and law application.²¹⁹ That is, the choice to elaborate the rule of decision as a matter of law may convert a question of fact into a question of law, and thus non-premise facts into premise facts.

Take the age-old question whether a tomato is a fruit or a vegetable. A series of decisions about the proper classification of articles of imported merchandise under tariff statutes shows how courts may route questions concerning the botanical designation and common

213 See 21B WRIGHT & GRAHAM, *supra* note 6, § 5103.1, at 107 n.30 (collecting cases); Allen & Pardo, *supra* note 114, at 1789; see also Jaffe, *supra* note 169, at 242.

214 426 F.2d 499 (8th Cir. 1970).

215 *Id.* at 501.

216 *Id.* at 501–02.

217 *Id.* at 503.

218 *Id.*; see also *supra* notes 105–07 and accompanying text (describing those strictures). In the modern era, express invocations of judicial notice have primarily been for questions of fact. See 21B WRIGHT & GRAHAM, *supra* note 6, § 5102.1.

219 See Thayer, *supra* note 174, at 169–70; Hart & Sacks, *supra* note 8, at 376.

use of different items of produce as questions of fact or as questions of law.

In *Ferry v. Livingston*, the plaintiff sued to recover tariff duties paid on mangel-wurzel, turnip, beet, and cabbage seeds.²²⁰ The question was whether the seeds qualified as “[g]arden seeds” under a statute imposing a duty on “[g]arden seeds.”²²¹ The case was “tried before the [circuit] court without a jury . . . on special findings of fact,” and both parties appealed.²²² Without any apparent deference to the lower court’s construction, the Supreme Court interpreted the words “[g]arden seeds” to refer to seeds planted in a small plot next to a “dwelling-house[,],” primarily for human consumption “before complete maturity,” as opposed to “in the field or farm,” primarily for fodder or for winter food storage.²²³ This was the rule of decision (law declaration). The Court then accepted the lower court’s findings of fact, as follows: mangel-wurzels and turnips were cultivated, wholly or largely, in fields as fodder; beets were cultivated primarily in gardens “for the table”; and cabbages were cultivated in garden and field alike, but primarily for human consumption.²²⁴ These were the identified facts (fact identification). The Court last applied the rule of decision to the identified facts to affirm the lower court’s conclusion that beet and cabbage seeds were garden seeds, while turnip and mangel-wurzel seeds were not.²²⁵ This was law application. Leaving no doubt that the identified facts played no role in law declaration, the Court concluded its decision with the following warning: “As this case rests for decision on the facts found, it is not possible for this court to lay down any general rule which will apply to cases differing in their facts from this case.”²²⁶ The facts found, then, were non-premise facts.

In *Nix v. Hedden*, the Court returned to the tariff statutes to decide whether a tomato should be classified as a fruit or a vegetable.²²⁷ This time, it took a different course. The plaintiff in that action sought to recover duties he paid on tomatoes as vegetables, contending that tomatoes should instead have been classified as fruits, which were duty-free. The plaintiff had offered dictionary definitions of the words “fruit,” “vegetable,” and “tomato,” while the defendant had offered

220 115 U.S. 542, 543 (1885).

221 *Id.* (quoting Morrison Act, ch. 121, § 6, 22 Stat. 488, 513 (1883)).

222 *Id.* at 547.

223 *Id.* at 544–46.

224 *Id.* at 548.

225 *Id.* at 549.

226 *Id.* at 549–50; see also *Robertson v. Salomon*, 130 U.S. 412, 416 (1889) (on question whether beans are seeds or vegetables, finding *Ferry* not to be controlling, and remanding for a new trial that included evidence about the commercial designation of beans).

227 149 U.S. 304, 306 (1893).

definitions of various plant produce that were botanically “fruit,” but commonly known as vegetables.²²⁸ The trial court directed a verdict for the defendant.²²⁹ The Supreme Court affirmed.²³⁰ The question was whether the term “fruit,” as used in the relevant tariff act, necessarily included all produce comprising “that part of plants which contains the seed,” or whether the word “vegetable” could also be understood to include such produce.²³¹ The Court rejected the notion that the proffered definitions were “evidence,” viewing them rather as “aids to the memory and understanding of the court” as it discharged its duty to interpret the statute.²³² The Court also rejected the notion that it must take evidence of the use of different items of produce.²³³ The dictionaries, together with the Court’s knowledge of the use to which various items of produce were commonly put, informed its understanding of the “ordinary meaning” of the words in the statute.²³⁴ That ordinary meaning produced a rule of decision that the word “vegetables” includes tomatoes, while the word “fruits” excludes them.²³⁵ The definitions and uses of various items of produce, then, were premise facts.

The facts in *Ferry* and *Nix* are nearly identical: facts about how people employ different items of produce. The legal questions resembled one another, too: how the government should have classified the items of produce, where classification depends upon their common use. Yet the facts shifted from non-premise facts to premise facts based on the *Nix* Court’s decision to use them to fashion a narrower rule of decision at the law-declaration stage instead of applying a broader rule of decision to them at the law-application stage (as in *Ferry*).²³⁶ The Court’s classification choice, in turn, translated into choices about who decides, and how: accepting the circuit court’s findings and limiting precedential effect in *Ferry*; affirming a directed verdict and rejecting an evidentiary framework in *Nix*.

The choice between law declaration and law application—that is, to what degree a court uses a set of facts to elaborate a rule of decision²³⁷—depends upon the source of the rule of decision, the law of interpretation that governs law declaration, and extrinsic factors like

228 *Id.* at 305 (statement); *id.* at 307 (opinion).

229 *Id.* at 306.

230 *Id.* at 307.

231 *Id.* at 306.

232 *Id.* at 307.

233 *Id.*

234 *Id.* at 306.

235 *Cf.* *Sonn v. Magone*, 159 U.S. 417, 421 (1895) (understanding *Nix* to answer a question of law).

236 Hart & Sacks, *supra* note 8, at 376.

237 *See* Monaghan, *supra* note 8, at 276.

party presentation and procedural posture, which one may group under the shorthand of “law-declaration constraints.”²³⁸ This Article returns to these constraints in Part III.

3. Classifying Judgment

Some amount of judgment inheres in law application.²³⁹ Law application means applying declared law to identified facts to reach a legal conclusion.²⁴⁰ Sometimes, the fit between the rule of decision and the facts is just so, as in *Nix*. But sometimes, it calls for judgment linking the facts found to the rule of decision, especially when that rule of decision takes the form of a standard—like “reasonable”—or is stated at a higher level of generality, as in *Ferry*.²⁴¹ The degree to which the court should elaborate the rule of decision at the law-declaration stage, thus limiting the amount of judgment at the law-application stage, again depends on the law-declaration constraints collected at the end of this Article. Where judgment remains, however, a variety of more or less articulate generalized facts about the world may (at least as a practical matter) inform the law-applier’s judgment, much in the way that similar facts inform legislative decisionmaking.²⁴²

When it connects a rule of decision to non-premise facts,²⁴³ judgment usually follows fact identification along paths laid out for questions of fact.²⁴⁴ This is in part because law application can be difficult to separate from fact identification.²⁴⁵ But even where differentiation is possible, courts often prefer to have the factfinder exercise the judgment law application requires.²⁴⁶

238 Cf. FAIGMAN, *supra* note 6, at 53, 67 (describing constraints as policy choices); Monaghan, *supra* note 8, at 237 (same); Hart & Sacks, *supra* note 8, at 376 (same).

239 Thayer, *supra* note 174, at 154.

240 Monaghan, *supra* note 8, at 236; Hart & Sacks, *supra* note 8, at 375.

241 Monaghan, *supra* note 8, at 236; Hart & Sacks, *supra* note 8, at 375.

242 Hart & Sacks, *supra* note 8, at 384; *see also, e.g.,* McCarthy v. Indus. Comm’n, 215 N.W. 824, 826 (Wis. 1927).

243 When the identified facts are also premise facts, the judgment that links them to the rule of decision moves behind a barrier of law declaration and thus follows paths laid out for questions of law.

244 *See, e.g.,* United States v. Gaudin, 515 U.S. 506, 512 (1995) (“[T]he application-of-legal-standard-to-fact sort of question . . . has typically been resolved by juries.”).

245 *See, e.g.,* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1199 (2021); U.S. Bank Nat’l Ass’n *ex rel.* CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018); Thompson v. Keohane, 516 U.S. 99, 118 (1995) (Thomas, J., dissenting); United States v. Humphrey, 34 F.3d 551, 559 (7th Cir. 1994) (Posner, C.J., concurring); Jaffe, *supra* note 169, at 246.

246 Allen & Pardo, *supra* note 114, at 1775; Monaghan, *supra* note 8, at 232 n.22; *see also, e.g.,* Pierce v. Underwood, 487 U.S. 552, 560 (1988); *Salve Regina Coll. v. Russell*, 499

Railroad Co. v. Stout illustrates this default.²⁴⁷ A six-year-old boy had crushed his foot while playing on a railroad turntable, and he sued the railroad company for negligence.²⁴⁸ No one disputed the circumstances resulting in the injury. The judge charged the jury by reciting considerations that should inform its conclusion about whether the company was “liable for negligence.”²⁴⁹ The jury returned a verdict for the boy, and the company appealed. The company argued that “the facts being undisputed, the question of negligence was one of law, to be passed upon by the court, and should not have been submitted to the jury.”²⁵⁰ The Supreme Court disagreed. It acknowledged that in some cases “where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury” but concluded that this rule did not extend to those cases “where deductions or inferences are to be made from the facts.”²⁵¹ Such cases “the law commits to the decision of a jury” due to the jury’s unique capacity to “draw wise[] and safe[] conclusions from admitted facts.”²⁵²

Stout illustrates how legal conventions route law application as a question of fact in part because our legal system values eliciting the factfinder’s judgment.²⁵³ In the run-of-the-mill case, then, the ultimate act of law application will be done in the same way and by the same person as the resolution of a question of fact unless there is no dispute of fact *and* no room for an exercise of independent judgment by the factfinder.²⁵⁴ Judgment may be foreclosed when the rule of decision fits the facts just so,²⁵⁵ when there is no alternative, reasonable inference to be drawn from the facts,²⁵⁶ or, perhaps, when a binding

U.S. 225, 233 (1991); *cf.* Drew L. Kershen, *Vicinage* (pt. 2), 30 OKLA. L. REV. 1, 79–80 (1977) (“[S]upporters of the jury of the vicinage in 1789 praised these jurors because they would apply the law to the facts in such a way as to reflect the mores of the community in which the crime was committed.”).

247 84 U.S. (17 Wall.) 657, 664 (1874).

248 *Id.* at 657–58.

249 *Id.* at 659.

250 *Id.*

251 *Id.* at 663; *see also* United States v. Gaudin, 515 U.S. 506, 512–14 (collecting cases); Jaffe, *supra* note 169, at 247 (“[A] so-called ‘admitted’ case may not make explicit all the possible or even relevant inferences from the admitted facts.”). The Court has not consistently acknowledged this exception. *See, e.g.,* Dupree v. Younger, 143 S. Ct. 1382, 1389 (2023) (describing “issues that can be resolved without reference to any disputed facts” as “purely legal issues”).

252 *Stout*, 84 U.S. (17 Wall.) at 664.

253 *See, e.g.,* Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1696 (2000).

254 Google LLC v. Oracle Am., Inc., 141 S. Ct 1183, 1199 (2021).

255 *Stout*, 84 U.S. (17 Wall.) at 663; Hart & Sacks, *supra* note 8, at 375.

256 *E.g.,* FED. R. CIV. P. 50(a).

precedent applying the same rule of decision to materially indistinguishable facts has already settled the legal conclusion that must follow.²⁵⁷

But “[m]ixed questions are not all alike.”²⁵⁸ Courts have sometimes decided that law application is better treated as a question of law even when answering it requires judgment.²⁵⁹ Most relevant for present purposes, appellate courts may review law application (and even fact identification) more searchingly when the facts dispose of a constitutional claim.²⁶⁰ This is known as the “constitutional fact doctrine.”²⁶¹ The doctrine is built upon a functional judgment that judges and appellate courts are better situated to exercise the judgment *Stout*

257 Allen & Pardo, *supra* note 114, at 1781–82; Tyler, *supra* note 141, at 1557; *see also, e.g.*, *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1166 (2023) (Sotomayor, J., concurring in part). Summary judgment may create an apparent exception to this rule. One could read the Court's decisions concerning summary judgment to suggest that summary judgment is proper any time facts are undisputed, which in turn would mean that the Court could exercise judgment typically reserved to the factfinder. *See, e.g.*, *Dupree v. Younger*, 143 S. Ct. 1382, 1389 (2023) (discussed *supra* note 251). The questions whether and when a court may take judgment from the factfinder—on a summary judgment motion or otherwise—are beyond the scope of this Article. But a word of warning about a potential optical illusion: When there is no jury, and the judge deciding the summary judgment motion will also be the factfinder at trial, there may also be no reason for him or her to defer exercising his or her judgment in resolving a summary judgment motion where the material facts are otherwise undisputed. It does not follow that a judge could resolve similar questions involving judgment in a jury case.

258 *U.S. Bank Nat'l Ass'n ex rel. CWC Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

259 *Id.*; Allen & Pardo, *supra* note 114, at 1785.

260 *U.S. Bank Nat'l Ass'n*, 138 S. Ct. at 967 n.4; Monaghan, *supra* note 8, at 238.

261 Borgmann, *supra* note 6, at 1206–10. This Article posits that the constitutional fact doctrine is best understood as a doctrine about non-premise facts. But as with legislative facts, the meaning of the term “constitutional fact” is elusive. Some define constitutional facts as “adjudicative facts decisive of constitutional claims.” Monaghan, *supra* note 8, at 230 & n.16; *see also* Blocher & Garrett, *supra* note 117, at 9 & n.47. These definitions, of course, categorically exclude legislative facts. By contrast, Davis uses the terms “constitutional facts” and “legislative facts” interchangeably. Davis, *supra* note 1, at 959 & n.54. In doing so, he appears to refer to a different (if overlapping) set of facts from that captured by the standard constitutional fact doctrine. Faigman defines “constitutional facts” as legislative or adjudicative facts that are relevant to constitutional inquiry. *See* FAIGMAN, *supra* note 6, at 46. Like the legislative-fact concept, the constitutional fact doctrine has its analogue in administrative law. *See* *Crowell v. Benson*, 285 U.S. 22, 58 (1932); Blocher & Garrett, *supra* note 117, at 48; Monaghan, *supra* note 8, at 247. *See generally* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1525 n.194 (2000) (discussing *Crowell*).

reserves to the factfinder when a constitutional right hangs in the balance.²⁶²

4. Classifying Judicial Review

Judicial review—the act of finding a law to be contrary to the Constitution or some other higher law—may occur at the law-declaration stage or at the law-application stage.

a. Judicial Review as Law Declaration

In systems of written law, law declaration means translating the words of a written instrument into an operative rule under which the parties' controversy is to be resolved—a rule of decision. This requires the court to ascertain not only the meaning of the words, but also the legal consequences that flow from that meaning.²⁶³ Judicial review is a feature of law declaration because the legal consequences of a given instrument's words depend, in part, on whether the instrument satisfies conditions established by higher law, including the Constitution.²⁶⁴ A court performing judicial review at the law-declaration stage determines whether the words of a statute (or some other enactment) may afford a rule of decision in the case.²⁶⁵ Consistent with the three-part framework, courts treat judicial review that occurs at the law-declaration stage as a tool to answer a question of law.

James Callender's trial for seditious libel against President John Adams offers an early (and dramatic) illustration.²⁶⁶ Future Attorney

262 Monaghan, *supra* note 8, at 237–38; *see also, e.g.*, Miller v. Fenton, 474 U.S. 104, 114 (1985); Watts v. Indiana, 338 U.S. 49, 51 (1949) (opinion of Frankfurter, J.); A Woman's Choice—E. Side Women's Clinic v. Newman, 305 F.3d 684, 689 (7th Cir. 2002); United States v. Singletery, 29 F.3d 733, 740 (1st Cir. 1994); Borgmann, *supra* note 6, at 1206, 1209, 1220.

263 Baude & Sachs, *supra* note 192, at 1083, 1085–86; Solum, *supra* note 20, at 480, 509–10.

264 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803); Baude & Sachs, *supra* note 192, at 1083, 1102–03, 1109–10. Solum, *supra* note 20, at 508, distinguishes between “communicative content,” “legal content,” and “legal effect.” This Article is ambivalent on the question whether judicial review determines “legal content” or “legal effect”; its focus is on the rule of decision that will govern the dispute.

265 *Marbury*, 5 U.S. (1 Cranch) at 178 (“So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.”); *see also* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 101 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1990) (1835) (“Whenever a law that the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule . . .”).

266 United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

General William Wirt, then a young attorney, opened Callender's defense by asking the jury to find the Sedition Act of 1789 unconstitutional:

[J]uries possess the power of considering and deciding the law as well as the fact The federal constitution is the supreme law of the land; and a right to consider the law, is a right to consider the constitution: if the law of congress under which we are indicted, be an infraction of the constitution, it has not the force of a law, and if you were to find the traverser guilty, under such an act, you would violate your oaths.²⁶⁷

Justice Chase, presiding over the trial as circuit justice, corrected Wirt: "it is not competent to the jury to decide on this point."²⁶⁸ He allowed "that juries have the right to decide the law, as well as the fact—and the constitution is the supreme law of the land, which controls all laws which are repugnant to it."²⁶⁹ Wirt understandably believed he had his man: "Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution."²⁷⁰ Justice Chase resisted: "A non sequitur, sir."²⁷¹

Why a non sequitur? The apparent contradiction in Justice Chase's words dissolves when one distinguishes law declaration from law application. As Justice Chase went on to explain, "I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law; and whether they amount to the offence described in the indictment"—that is, "to determine what the law is in the case before them."²⁷² What he describes here is the act of law application.²⁷³ He would not admit, however, that the jury could decide what law to apply to the facts. "It is one thing to decide what the law is, on the facts proved, and another and a very different thing, to determine that the statute produced is no law."²⁷⁴ The latter is a matter of law *declaration* and—according to Justice Chase—the exclusive province of the judge in instructing the jury on what the law is.²⁷⁵

267 *Id.* at 252–53.

268 *Id.* at 253.

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.* at 255.

273 *See id.*

274 *Id.*

275 *See id.* Solum, *supra* note 190, at 20–21, makes a similar and very helpful distinction between "applicative" meaning and "communicative" meaning. Justice Chase was arguing that the jury may determine the "applicative meaning" of a law, but the judge determines its "communicative meaning."

Callender's attorneys parted ways with Justice Chase not because they understood judicial review in that case to be a matter of law application rather than of law declaration, but because they saw the role of the jury differently.²⁷⁶ In the early republic, many believed that federal juries ought to be able to disregard the court's instructions on the rule of decision in order to check the national government.²⁷⁷ Justice Chase's contrary view was controversial, to put it mildly,²⁷⁸ but that is beside the point here. Even if early juries shared in law declaration, law declaration remained a question of law.²⁷⁹

The jury eventually settled into its fact-identification and law-application roles,²⁸⁰ and the Supreme Court concluded that the jury has no right to declare the law. The case was *Sparf v. United States*. Justice Harlan's opinion for the Court divides functions between jury and judge according to the three-part framework: "Upon the court rests the responsibility of declaring the law, upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be."²⁸¹ The Court characterized several early authorities recognizing juries' authority to decide the law—*Callender* among them—as decisions endorsing juries' law-application role.²⁸² In doing so, the Court expressly endorsed Justice Chase's view that the judicial review Callender sought was law declaration, and thus—at least according to the modern judge-jury divide—for the judge.²⁸³

276 See, e.g., *Callender*, 25 F. Cas. at 254.

277 See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 88, 91 (1998). See generally Woolhandler & Collins, *supra* note 18, at 626–29 (discussing early jury practices and their significance).

278 AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840*, at 448 (2021) (noting that Justice Chase was impeached in part for refusing to permit legal argument to a jury).

279 See, e.g., 1 SAMUEL H. SMITH & THOMAS LLOYD, *TRIAL OF SAMUEL CHASE* 34 (Washington, Samuel H. Smith 1805) (acknowledging that "it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries, to decide on the law as well as on the facts"); Woolhandler & Collins, *supra* note 18, at 627–28, 648–49 (noting that departures from jury instructions could be treated as an error "of law" on appeal in certain circumstances).

280 See Kershner, *supra* note 246, at 86.

281 156 U.S. 51, 102 (1895).

282 *Id.* at 64–79.

283 *Id.* at 71–72; see also *United States v. Gaudin*, 515 U.S. 506, 513 (1995) (noting that *Sparf*'s rule applies in civil as well as criminal cases).

b. Judicial Review as Law Application

Law declaration is one context in which courts determine whether an enactment comports with higher law. It is not the only context. Sometimes, judicial review occurs at the law-application stage. This may happen, for example, when a party asks the court to enjoin an officer from enforcing an enactment on the ground that the enactment does not comport with higher law. In that case, the enactment is not put forward to supply a rule of decision in the case or controversy, and the act of judicial review the party asks the court to perform does not (necessarily) become part of law declaration.²⁸⁴ *Borden's Farm* was one such case, which may explain why the Court routed the factual questions in that case as “questions of fact.”²⁸⁵

Judicial review may also occur at the law-application stage when a party merely argues that a particular application of an enactment violates higher law. Consider *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*²⁸⁶ The respondent group sought to participate in Boston's St. Patrick's Day parade and sued the organizers of the parade under the Massachusetts public accommodations law, seeking an injunction compelling the organizers to allow the group to march.²⁸⁷ The state court granted the injunction, but the Supreme Court reversed, holding that the organizers enjoyed a First Amendment right to exclude the group from the parade. The key question in the case was whether the parade amounted to expressive conduct.²⁸⁸

The organizers did not argue that the Massachusetts public accommodations law was facially unconstitutional. Thus, although the statute was put forward by the group to supply a rule of decision for their claim to equitable relief, the Court did not have to decide whether the statute was constitutional in order to derive a rule of

284 Jonathan Mitchell distinguishes between these scenarios as cases in which the court declines to enforce the challenged enactment and those in which the court directs someone else not to enforce the challenged enactment. See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018). Modern versions of the latter include the controversial nationwide antisuit injunction and the question (now before the Supreme Court) whether the Administrative Procedure Act authorizes courts to vacate agency rules. See *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1176–77 (M.D. Fla. 2022), *vacated as moot*, *Health Freedom Def. Fund v. President of the U.S.*, 71 F.4th 888 (11th Cir. 2023).

285 See *infra* note 299 and accompanying text; see also, e.g., *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1161–63 (2023) (plurality opinion) (confining itself to facts pleaded in the complaint to resolve “dormant Commerce Clause” claim that turned on the effects of a state law); *Cooper v. Harris*, 137 S. Ct. 1455, 1469, 1478 (2017) (applying clear-error review to factual finding that race predominated in redistricting).

286 515 U.S. 557 (1995).

287 *Id.* at 561.

288 *Id.* at 566.

decision from it.²⁸⁹ The First Amendment, instead of regulating the rule of decision to be derived from the statute, supplied its own rule of decision that governed the organizers' defense to the group's claim to equitable relief. The Court therefore resolved the case by *applying* a First Amendment rule of decision that the state cannot compel a private party to engage in expressive conduct to the facts of the parade in question.²⁹⁰ Judicial review, in other words, occurred at the law-application stage.

When judicial review occurs at the law-declaration stage, all of the factual elements of judicial review are necessarily premise facts. When it occurs at the law-application stage, its factual elements may be non-premise facts. In other words, facts concerning the constitutionality of laws may be premise facts or non-premise facts.

C. *Janus-Faced Facts*

Courts and commentators wrestling with the treatment of legislative facts have largely failed to acknowledge, much less to differentiate, the two roles facts play in adjudication. This has exacerbated the challenge of determining who gets to decide them, and how. Inquiries involving premise facts follow paths charted for questions of law. Inquiries involving non-premise facts follow paths charted for questions of fact, unless special rules of law application detour them. Legislative facts stand at the gate, looking down both sets of paths but able to follow only one.

1. The Two Faces of Legislative Facts

The legislative-fact category encompasses most, if not all, premise facts because premise facts are general and shape the law. But it encompasses some non-premise facts, too. When one reformulates the judicial role as legislative, it changes the frame through which one views the role that facts play in the decisionmaking process. The question becomes not whether the fact informs the formulation of a rule of decision used to adjudicate the case or controversy before the court, but instead, whether the fact informs a development in the law, writ large. This opens a definitional gap in the boundary between the law-declaration and law-application stages of the dispute resolution framework.²⁹¹ Even law application develops the law. Indeed, Professor

289 *Id.* at 572.

290 Although the Court treated the question as one of law application, and thus a mixed question, it invoked the constitutional fact doctrine to route the question as one of law. *Id.* at 567–68.

291 *See, e.g.,* Hart & Sacks, *supra* note 8, at 384–85.

Davis cited *Borden's Farm* as a case involving quintessential legislative facts, even though the findings in that case were merely facts to which the court would apply the law.²⁹² A court that determines that a statute is unconstitutional develops the law, even if the statute has not been put forward to supply a rule of decision in the case or controversy. Thus, non-premise facts may be legislative facts, too.

The point is true of all function-based definitions, which shared Davis's legislative premise. As both law declaration and law application involve a process of legal reasoning and may determine the constitutionality of a statute or policy, function-based definitions capture both premise and non-premise facts.²⁹³

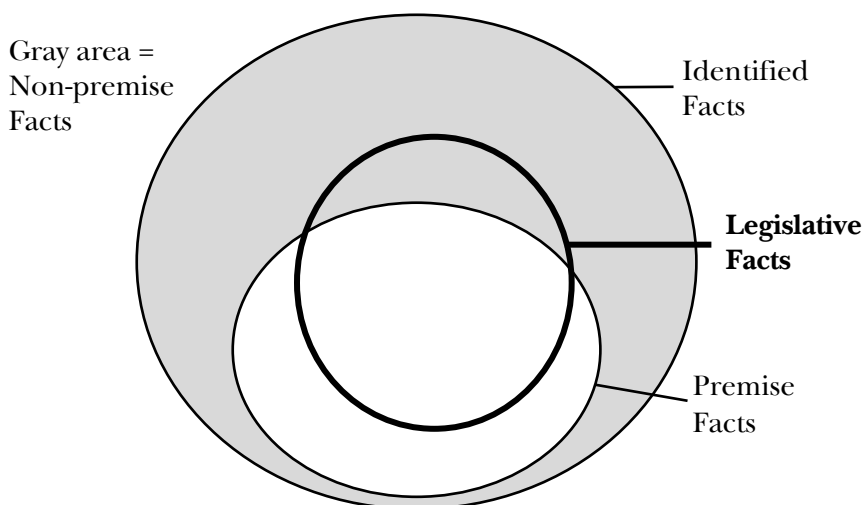
Characteristic-based definitions do the same. General, speculative facts may serve as premise or non-premise facts. Premise facts are more likely than the run-of-the-mill non-premise fact to be general. But non-premise facts that support the judgment function at the law-application stage are likely to be general, too, and they are more likely even than premise facts to have a speculative quality.²⁹⁴ Think of the conditions in the New York milk market about which the *Borden's Farm* Court directed the lower court to find facts. Thus, characteristic-based definitions of "legislative fact" straddle the line between premise and non-premise facts, too.

292 Davis, *Problems of Evidence*, *supra* note 6, at 403–04.

293 See, e.g., *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981); FED. R. EVID. 201 advisory committee's notes; Borgmann, *supra* note 6, at 1194. David Faigman proposes to subdivide the category of legislative facts into doctrinal and reviewable facts. His doctrinal fact category seems to refer only to premise facts, but his reviewable fact category, like most definitions of legislative fact, would encompass both premise and non-premise facts. FAIGMAN, *supra* note 6, at 46–48, 55.

294 Walker & Monahan, *supra* note 6, at 559; Hart & Sacks, *supra* note 8, at 384.

Here is the relationship between the legislative-fact concept and identified, premise, and non-premise facts:



2. Constitutional Chaos

A definition of “legislative fact” that fails to attend to the fact’s role in adjudicating the case or controversy is of course difficult to reconcile with courts’ usual approach to routing decisions. The problem is perhaps most acute in the context of preenforcement challenges. When a party puts a statute forward to supply a rule of decision, and the statute is challenged as void, all facts involved in judicial review are premise facts.²⁹⁵ Even if the facts do not provide premises for the constitutional rule of decision against which the court tests the statute, the facts necessarily provide premises for the *statutory* rule of decision. That is, they are identified and have law applied to them behind the wall of the ultimate act of law declaration. By contrast, in a preenforcement challenge, the court does not have to decide whether to derive a rule of decision from a challenged enactment, and it has a choice to treat a factual inquiry on which the challenge hinges as one of premise fact (contributing to the constitutional rule of decision) or non-premise fact (providing an object to which the court applies the constitutional rule of decision). But the court (or commentators) may not perceive the procedural significance of that choice because the choice did not have the same significance when the court made it behind the wall of law declaration.

295 See *supra* subsection II.B.4.

In both *Jacobson* and *Borden's Farm*, the Court considered whether the state statute violated the Fourteenth Amendment's Due Process Clause because it bore no "real or substantial relation" to a legitimate "object[]" of state regulation.²⁹⁶ But in *Jacobson*, facts bearing on the relationship between vaccines and public health were necessarily premise facts because the court had to find them in order to articulate a rule of decision based on the state statute. In *Borden's Farm*, however, the state statute supplied no rule of decision in the controversy.²⁹⁷ The Court therefore had a choice: treat the facts concerning the relationship between the price controls and the state's objectives as premise facts giving shape to the Due Process Clause—perhaps in the form of a *per se* rule about price controls—or else treat them as non-premise facts to which a more general rule of decision derived from the Due Process Clause would apply.²⁹⁸ The Court chose the latter and accordingly routed questions about "trade conditions" as questions of fact.²⁹⁹

Later decisions and commentaries (perhaps even the *Borden's Farm* Court itself) failed to perceive this choice and therefore understood *Borden's Farm* to create a rule for routing all factual inquiries demanded by the Due Process Clause as questions of fact.³⁰⁰ And even as the pendulum swung in favor of routing these inquiries as questions of law, courts and commentators have not consistently rediscovered the choice.

The choice explains the Court's apparent U-turn between *Lockhart* and *Glossip*.³⁰¹ In both cases, the facts were general and predictive and therefore bore the characteristics of "legislative facts." Yet they did not have to provide a premise for formulating a rule of decision. In *Lockhart*, McCree could have offered his social science studies as components of his proof that *his* Sixth Amendment rights were violated, but he instead relied upon the studies to advance a *per se* rule

296 *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

297 *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 201 (1934).

298 See FAIGMAN, *supra* note 6, at 51. This move, and its consequences for factfinding, are most recognizable in the antitrust context. See *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work . . .").

299 *Borden's Farm*, 293 U.S. at 208.

300 See *supra* Section I.B; see also Davis, *Problems of Evidence*, *supra* note 6, at 403–04.

301 See *supra* Section I.C. Another example of a decision that seems correctly to perceive the choice is *National Pork Producers Council v. Ross*, which ventures outside the record for premise facts—that is, facts used to derive a rule of decision from the Commerce Clause—but restricts itself to the pleadings for non-premise facts—that is, facts concerning the effects of the challenged state law. 143 S. Ct. 1142, 1161–63 (2023) (plurality opinion). The opinion at one point ventures beyond the record to describe non-premise facts submitted by amici, but it finds those facts "unnecessary" to its decision. *Id.* at 1162 n.3.

that death qualification violates the Sixth Amendment.³⁰² For such a ruling, the finding that death-qualified juries are more likely to convict would have served as a premise fact. This explains the Court's reluctance to treat it as a question of fact.³⁰³

In *Glossip*, the Court could have formulated a per se rule about the constitutionality of executing someone using a lethal injection protocol that begins with midazolam, followed by drugs known to cause pain.³⁰⁴ In that case, the facts would likewise have served as premise facts, and clear-error review would have been just as out-of-sync with standard conventions as it would have been in *Lockhart*.³⁰⁵ The Court opted instead to apply a more general rule of decision to the plaintiffs' evidence to decide whether *they* faced an imminent threat of a rights violation under Oklahoma's protocol.³⁰⁶ The Court having opted to treat the finding as one of non-premise fact, the Court's clear-error review comported with the usual rules about who decides, and how.³⁰⁷ Critics have missed this distinction because they focus on the role the fact plays in lawmaking instead of the role it plays in adjudicating the case or controversy.³⁰⁸

302 *Lockhart v. McCree*, 476 U.S. 162, 171 (1986).

303 *Id.* at 168 n.3. While the *Lockhart* Court's observation reflected standard conventions, there is some evidence that the framers of Rule 52 intended to sweep premise facts into its clear-error review prescription. This raises the interesting question whether Rule 52 sanctioned a significant (if unrealized) transfer of power from appellate to lower courts—a question for a future article.

304 *See supra* note 298.

305 This Article takes no position on the rule created by Rule 52. It is possible that Rule 52 uses the word "fact" in a way that departs from standard conventions.

306 *See FAIGMAN, supra* note 6, at 64 (discussing these alternatives in the context of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

307 One may leave to one side the question whether the facts should have been classified as constitutional facts. *See Berger, supra* note 6, at 947–48.

308 *See supra* note 132. Although the modern trend is to criticize as inconsistent decisions that treat questions of legislative fact as questions of fact, the opposite type of error happens. In *Kranson v. Valley Crest Nursing Home*, for example, the Third Circuit considered an appeal from a decision granting summary judgment on a negligence claim under a state statute that foreclosed negligence claims against municipally owned healthcare facilities. 755 F.2d 46, 52 (3d Cir. 1985). The plaintiff argued that the state statute violated the Equal Protection Clause. After taking "judicial notice of the expanding population of the aged and the need for adequate facilities and personnel to care for them" as rational bases for the legislation, the Third Circuit rejected the constitutional challenge. *Id.* at 53. The court properly approached the inquiry as a question of law because the inquiry necessarily preceded the ultimate act of law declaration: namely, declaring a rule of decision under the state tort law. The court could therefore notice the noticed facts even if they were not indisputable. Yet the current edition of *Wright & Miller*, evidently mistaking the question as one of fact, cites the decision as one that misuses judicial notice. *See* 21B WRIGHT & GRAHAM, *supra* note 6, § 5102.1, at 70 & n.51.

The Court's choice in *Glossip* impacts future litigation. The next death row inmate who wishes to challenge the midazolam-based lethal injection protocol may face an uphill climb, but the climb would have been steeper still if the Court had reached the same conclusion after treating the facts as premise facts. Had the Court treated the facts as premise facts, the facts would have become part of a rule of decision that all future courts would have to apply until some litigant persuades the Supreme Court to overturn *Glossip* by declaring a new rule of decision.³⁰⁹ As it is, a party proffering *different* non-premise facts—better evidence that midazolam abets inhumane suffering, for example—has a hope of distinguishing it.³¹⁰ Unfortunately, courts often convert a legal conclusion premised on deference to a lower court's finding of non-premise fact into a precedent that governs cases with different non-premise facts.³¹¹ Characterizing facts about midazolam as legislative facts contributes to this confusion and obscures future claimants' opportunities to distinguish unfavorable precedent.³¹²

The Court got it “right” according to the standard conventions in *Lockhart* and *Glossip*, notwithstanding the confounding legislative-fact concept. But the concept has led courts to depart from the standard conventions in other cases.

In *United States v. Gould*,³¹³ for example, the Eighth Circuit reviewed a conviction under the Controlled Substances Import and Export Act, which at the time prohibited importing substances produced

309 In *Baze v. Rees*, for example, the plurality understood its decision to settle the constitutionality of all lethal injection protocols that were “substantially similar” to the one the Court upheld in that case. 553 U.S. 35, 61 (2008) (plurality opinion). But see Tyler, *supra* note 141, at 1557–59 (describing different theories of precedent, only some of which would make the rule of decision binding in future cases).

310 See Monaghan, *supra* note 8, at 236; Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1163 (2023) (plurality opinion) (observing that “[f]urther experience may yield further facts[, b]ut the facts pleaded in this complaint merely allege harm” that falls sort of the legal standard). Some courts acknowledge that *Glossip*'s holding is limited, while others understand it to foreclose facial challenges to materially identical lethal injection protocols. Compare *In re Ohio Execution Protocol*, 860 F.3d 881, 885–86 (6th Cir. 2017) (en banc) (“reject[ing] the State’s argument that the Supreme Court’s holding in *Glossip* categorically bar[red]” a challenge to a materially identical protocol because the Court had applied a clear-error standard of review, *id.* at 886), with *Arthur v. Comm’r, Ala. Dep’t of Corr.*, 840 F.3d 1268, 1315 (11th Cir. 2016) (treating the Court’s holding as dispositive of a facial challenge to Alabama’s similar lethal injection protocol), *abrogated in part on other grounds by Buckle v. Precythe*, 139 S. Ct. 1112 (2019).

311 This is an example of what Jonathan Masur and Lisa Larrimore Ouellette call “deference mistakes.” Masur & Ouellette, *supra* note 145, at 654. These deference mistakes may well implicate due process concerns. See generally Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003). This Article leaves for another day questions about due process limits on courts’ treatment of legislative facts.

312 See, e.g., FAIGMAN, *supra* note 6, at 50, 65; Berger, *supra* note 6, at 947.

313 536 F.2d 216 (8th Cir. 1976).

“by extraction from . . . [c]oca leaves.”³¹⁴ At trial, the government presented evidence that the defendant had imported cocaine hydrochloride, and the court instructed the jury that cocaine hydrochloride was a controlled substance within the meaning of the statute.³¹⁵ Because the statute did not list “cocaine hydrochloride” by name, however, the instruction required an inferential step: that cocaine hydrochloride is a substance produced “by extraction from . . . [c]oca leaves.” The trial court therefore implicitly took judicial notice of the fact that cocaine hydrochloride is a derivative of coca leaves.³¹⁶

The propriety of the court’s instruction, and the implicit finding on which it rested, turned on whether cocaine hydrochloride’s status as a derivative of coca leaves is an adjudicative fact or a legislative fact. If it is an adjudicative fact, then Federal Rule of Evidence 201(g) (now Rule 201(f)) required the court to instruct the jury that the jury had no obligation to accept the court’s instruction as conclusive.³¹⁷ If it is a legislative fact, then the court was not bound by Rule 201.³¹⁸ The Eighth Circuit found that the fact was legislative because it was a fact that “do[es] not change from case to case but appl[ies] universally.”³¹⁹

The fact of cocaine hydrochloride’s provenance played no part in distilling a rule of decision for the case.³²⁰ Rather, the jury was invited to apply the statute to that fact (as well as other facts about the defendant’s conduct) to reach a conclusion about whether the government had proven an element of the crime. Thus, the question was one of non-premise fact that would have gone to the jury under standard conventions. Yet the Eighth Circuit blessed a trial judge’s taking it from

314 21 U.S.C. § 812(c) sched. II (1970).

315 *Gould*, 536 F.2d at 218.

316 *Id.* at 219.

317 *Id.* (quoting FED. R. EVID. 201(g) (1975) (relettered 2011)).

318 *See* FED. R. EVID. 201(a).

319 *Gould*, 536 F.2d at 220. *But cf.* *Commonwealth v. Peckham*, 68 Mass. (2 Gray) 514, 515 (1854) (approving instruction *allowing* jury to take notice of the fact that gin is an “intoxicating liquor” because “everybody, who knows what gin is, knows not only that it is a liquor, but also that it is intoxicating”).

320 The Eighth Circuit reasoned further that the district court was merely construing the Controlled Substances Import and Export Act and instructing “the jury as to the law to be applied in a case.” *Gould*, 536 F.2d at 220. This would have been consistent with treating the question as one of premise fact and therefore keeping it from the jury. The court does not, however, appear to have been engaged in statutory construction. Although it referred to dictionary definitions, the definitions were not of the words in the statute—“coca leaves,” for example—but of cocaine hydrochloride. *Id.* at 219. Thus, the court appears to have consulted the dictionary to confirm the *scientific* fact that cocaine hydrochloride derives from coca leaves, rather than any linguistic fact. In any event, courts following *Gould*’s precedent have not confined it to cases of statutory construction. *See infra* note 322.

the jury, which the Sixth Amendment guaranteed the defendant,³²¹ solely because it was “general.”

Courts have followed *Gould* in reviewing similar factual instructions in criminal cases.³²² For example, they have allowed trial courts to take from juries the question whether the federal government has proven the jurisdictional element of a crime³²³ on the ground that the existence of federal control over a given piece of property “does not change from case to case but, instead, remains fixed.”³²⁴ But standard conventions would give such questions to the jury because they involve fact identification and law application, not law declaration.³²⁵

If these moves strike the reader as uncontroversial, that may be because cocaine hydrochloride’s status as a derivative of coca leaves is uncontroversial. So, too, is the existence of federal authority over, say, Fort Benning.³²⁶ Both facts would presumably be subject to judicial notice even as adjudicative facts.³²⁷ But the decision to classify the facts as “legislative” means the courts could have taken them from the jury even had they been controversial.³²⁸ That courts do not take controversial general facts from criminal juries more often reveals a pervasive (if unacknowledged) doubt about the soundness of the legislative-fact

321 *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

322 *See, e.g.*, *United States v. Turner*, 47 F.4th 509, 525 (7th Cir. 2022); *United States v. Love*, 20 F.4th 407, 411–12 (8th Cir. 2021); *United States v. Hernandez-Fundora*, 58 F.3d 802, 810–12 (2d Cir. 1995); *United States v. Bowers*, 660 F.2d 527, 530–31 (5th Cir. Unit B Sept. 1981); *Redmond v. United States*, No. 2:20-cv-5170-SVW, 2021 WL 1156845, at *5–6 (C.D. Cal. Feb. 16, 2021), *aff’d*, No. 21-55142, 2022 WL 4461379 (9th Cir. Sept. 26, 2022), *cert. denied*, 143 S. Ct. 1098 (2023) (mem.); *see also* *United States v. Iverson*, 818 F.3d 1015, 1030–32, 1032 n.7 (10th Cir. 2016) (O’Brien, J., concurring) (discussing additional authority). Surprisingly, and perhaps perniciously, the Eleventh Circuit has restricted the legislative-fact designation to criminal (and administrative) cases. *See* *W. Ala. Women’s Ctr. v. Williamson*, 900 F.3d 1310, 1316 (11th Cir. 2018), *abrogated on other grounds by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

323 *E.g.*, *Love*, 20 F.4th at 410–12. The question whether the court has subject-matter jurisdiction over a prosecution is distinct from the question whether the government has satisfied a “jurisdictional element” of a crime. *See, e.g.*, *United States v. González*, 311 F.3d 440, 443 (1st Cir. 2002) (explaining the difference and its implications under the Sixth Amendment). The former question need not go to a jury, but the latter ordinarily would. *See* *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016).

324 *Bowers*, 660 F.2d at 531.

325 *See, e.g.*, *United States v. Jackalow*, 66 U.S. (1 Black) 484, 487 (1862).

326 *See* *Bowers*, 660 F.2d at 531.

327 *See* *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976). The *Gould* court may have noted that the fact met Rule 201’s requirements of incontrovertibility and notoriety, but its classification of the fact as a legislative fact freed the fact from these requirements. *See also* *Bowers*, 660 F.2d at 531 (“The fact that Fort Benning is under federal jurisdiction is a well established fact appropriate for judicial notice.”).

328 FED. R. EVID. 201 advisory committee’s notes.

classification.³²⁹ That doubt, in turn, means that courts apply the doctrine unevenly.³³⁰

The concept of legislative facts produces uncertainty and inconsistency in cases where constitutional rights and limitations hang in the balance. This is because conventional definitions of “legislative fact” are incompatible with standard conventions for determining who decides, and how. What should courts do about it?

III. JUDICIALIZING LEGISLATIVE FACTS

One solution to the incompatibility between definitions of legislative fact and standard conventions is to discard those standard conventions, at least when it comes to legislative facts. One way or another, this is the course most scholars propose.³³¹

Alternatively, courts might discard (or at least recast) the legislative-fact category and resolve questions of legislative fact as they resolve any other question that arises in a case or controversy. That is the course this Article proposes.

The legislative-fact concept implicates an important theoretical divide in the concept of judicial power. The more traditional theory of judicial power holds that courts’ core function is to resolve disputes, and that the law-declaration function is merely “incidental to its responsibility to resolve concrete disputes.”³³² The other theory holds that courts have a “special function” of developing—even making—

329 3 DAVIS, *supra* note 117, § 15:5 (criticizing courts for not more regularly treating general non-premise facts as legislative).

330 For example, the Eighth Circuit has also held that trial courts may *not* instruct juries on legislative facts because Rule 201 does not *permit* them to do so. See *Qualley v. Clo-Tex Int’l, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000). Evincing the utter confusion surrounding the legislative-fact concept, the *Qualley* panel relied on *Gould* to support its decision. *Id.* For another example of inconsistent treatment of “legislative facts,” see *supra* note 135.

331 See, e.g., Borgmann, *supra* note 6, at 1244–47; Gorod, *supra* note 6, at 69; Walker & Monahan, *supra* note 6, at 583–98; Yoshino, *supra* note 6, at 251; see also Woolhandler, *supra* note 6, at 126 (criticizing tendency to solve the problem of legislative facts by adopting procedures “that make[] the judicial process more like administrative and legislative processes”). Allison Orr Larsen is a partial exception. She would discard a characteristic-based legislative-fact definition in favor of a similarly functional inquiry: “Is this the type of question that would benefit from adversarial testing and expert testimony?” Larsen, *supra* note 6, at 234. This definition would likewise encompass both premise facts and non-premise facts, but her proposal is more compatible with standard conventions in this way: once a trial court makes the initial decision to route the question as one of fact or law, she would have appellate courts make a corresponding routing choice on appeal. *Id.* at 234–40.

332 FALLON ET AL., *supra* note 15, at 73.

the law.³³³ The legislative-fact concept is a product of the latter theory.³³⁴

This Part considers the viability of the legislative-fact concept from the perspectives of both theories. Discarding or recasting the legislative-fact concept is consistent with a traditional model of judicial power. This is not especially surprising, given the concept's provenance. But even if one subscribes to a law-development theory of judicial power, the standard conventions better achieve the goals of sound law development than do the legislative-fact-oriented alternatives.

This Part concludes by considering an important objection law-development theorists may make to the standard conventions: there is no bright line between law declaration and law application, so the standard conventions do not succeed in disciplining courts' findings of facts-that-would-be-legislative. It is not clear that this objection suffices to salvage the legislative-fact concept, for that concept, too, lacks bright lines. But taking the criticism seriously, this Article identifies exemplary "law declaration constraints" that will discipline the choice between law declaration and law application, and thus the choice of who decides, and how.

A. *Judging as Dispute Resolution*

According to the dispute-resolution theory of judicial power, the role of federal courts is to resolve cases and controversies according to preordained legal rules. To invoke Chief Justice Marshall for the proposition that "[i]t is emphatically the province and duty of the judicial department to say what the law is," is not to refer to a lawmaking power, nor even to a power to opine abstractly on the content of the law.³³⁵

333 *Id.* at 74. Scholars most often refer to the "special function" as "law declaration," and this vision of judicial power as the "law declaration model." *Id.* Somewhat confoundingly, the law-declaration model of judicial power deemphasizes the law-declaration stage of adjudication. This is not because proponents of the law-declaration model view law declaration as unimportant (quite the contrary), but instead because they would not limit the court's law-declaration power to the law-declaration stage in the same way that proponents of the dispute-resolution model would. To avoid the confusion this paradox has the potential to create, this Article refers to the "special function" as "law development."

334 One's choice of model may change from one court to another. Professor Monaghan, for example, argues that law development is the Supreme Court's primary model, even if dispute resolution remains the dominant model for inferior courts. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012). And indeed, commentary about legislative facts has focused on the Supreme Court's reception of facts and treatment of lower-court findings. But the concept also shapes factfinding in district courts. *See, e.g.*, FED. R. EVID. 201 (exempting legislative facts from rules for judicial notice by trial courts).

335 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Rather, when courts “say what the law is,” they merely derive from some independent source of law a rule of decision to govern the dispute before them.³³⁶ Courts then exercise judgment to resolve the dispute according to that rule of decision.³³⁷

The legislative-fact concept exists in tension with this theory of judicial power. It presumes that courts exercise legislative will, as well as judicial will, and distinguishes facts that provide a premise for legislative judgment.³³⁸ The line between these factual premises and what this Article calls “premise facts” is subtle but important. In *Prentis*, the Court had distinguished “matters of fact that are merely premises to a rule of law” from other facts because premise facts were adjunct to the *judicial* function of ascertaining “laws supposed already to exist.”³³⁹ Their character set them apart not only from non-premise facts, but also from the findings of fact the agency had made when acting legislatively by formulating “a rule for the future.”³⁴⁰ According to *Prentis*, a judicial finding at the law-declaration stage differed from a legislative one precisely because the former was made in service of determining what the law is, not what it should be.³⁴¹ By contrast, the legislative-fact concept allows for no difference between the function of the court and the function of the legislature (or agency).³⁴² A court finding legislative facts is not saying what the law *is* but rather, like a legislature (or agency), what it *should be*.³⁴³

According to the traditional view of judicial power, law declaration and law application are intrinsically different.³⁴⁴ At the law-declaration stage, the court concludes with a descriptive statement, albeit one that legal conventions route as one of law: “the law is (or was) X.”³⁴⁵ At the ultimate law-application stage, by contrast, the court concludes with a prescriptive statement: “the defendant shall (not) be liable” or “the defendant shall (not) be enjoined.” That legal conclusion may flow mechanically from applying the rule of decision to the

336 See *id.* (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”); see also FALLON ET AL., *supra* note 15, at 74; Hessick, *supra* note 16, at 784–85, 788 (describing the “declaratory theory of the law,” *id.* at 784).

337 THE FEDERALIST NO. 78 (Alexander Hamilton).

338 Davis, *supra* note 1, at 952.

339 *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226–27 (1908).

340 *Id.* at 226.

341 *Id.*; see also Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (book review) (describing a “vision of the federal judge in our constitutional system” as one who “say[s] what the law is, not what the law should be.”).

342 See Davis, *supra* note 1, at 961.

343 See *id.* at 952–53.

344 *Contra* Jaffe, *supra* note 169, at 246–47.

345 See Monaghan, *supra* note 8, at 235.

identified facts, or it may require judgment.³⁴⁶ But that judgment occurs at the law-application stage, not at the law-declaration stage. And it is an act of judgment, not of will.³⁴⁷

A fact that precedes law declaration resembles the conclusion to which it leads in that both are descriptive. One cannot distinguish the premise from the conclusion, which legal conventions treat as one of “law,” so courts must treat the premise as one of law, too. Moreover, there is no formal distinction among the premise facts to which courts apply a rule of decision: all inform the judgment involved in law application, none contributes to “making” law.³⁴⁸

It may be that many of the routing choices Congress and the courts have made for questions of fact and law are discretionary.³⁴⁹ The Constitution limits appellate review of jury findings of fact,³⁵⁰ but it may not require judges and appellate courts to control law declaration,³⁵¹ judges to take judicial notice of law and uncontested facts, or appellate courts to defer to nonjury findings of fact. This Article leaves for another day important questions about how premise facts should, and perhaps must, be found.³⁵² But insofar as courts choose to route decisions based on the law-fact distinction, there exists in standard legal

346 The judgment with which this Article is most concerned is the judgment a decisionmaker exercises in connecting the facts found to the rule of decision. See *supra* subsection II.B.3. A court may also exercise judgment in articulating a rule of decision when the legal source from which it draws that rule is indeterminate or underdeterminate. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10 (2001). See generally Solum, *supra* note 190, at 41 (distinguishing indeterminacy from underdeterminacy). Unlike the judgment that bridges facts to law, the judgment a court exercises when it declares a rule of decision does not—according to the formalist account given here—have a prescriptive component. By contrast, one premise of the legislative-fact concept is that the judgment the court exercises when it declares a rule of decision does have a normative or prescriptive component. See *infra* Section III.C.

347 Finding a fact—whether legal conventions treat the question it answers as a question of fact or of law—likewise requires no exercise of will. Walter Wheeler Cook, *Facts and Statements of Fact*, 4 U. CHI. L. REV. 233, 237 (1937).

348 *Contra* Jaffe, *supra* note 169, at 247 (distinguishing ordinary factfinding from the process of “select[ing] from among [one’s] experiences” a standard of conduct and concluding that “this authoritative choice from among known or possible modes of conduct is law making”).

349 See, e.g., Monaghan, *supra* note 8, at 238–39.

350 U.S. CONST. amend. VII.

351 Compare Monaghan, *supra* note 8, at 239 (asserting that law declaration is the appellate courts’ “constitutionally mandated duty”), with John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 519–20 (2000) (arguing that the rule of vertical precedent is not grounded in the Constitution). If Professor Monaghan is correct that law declaration is a constitutional duty, plenary review of premise facts likewise becomes a constitutional imperative.

352 For an interesting take on this question, see Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. (forthcoming 2024) (manuscript at 4–7), <https://ssrn.com/abstract=4538260> [<https://perma.cc/H8XK-BG89>].

conventions no formal basis to distinguish questions of premise fact from questions routed as questions of law, nor is there any formal basis to distinguish one question of non-premise fact from another. All premise facts and only premise facts should follow the law-declaration path. All non-premise facts and only non-premise facts should follow the fact-identification path. The legislative-fact category is, consequently, both over- and underinclusive according to a dispute-resolution-centered theory of judicial power.

B. Judging as Law Development

Especially over the past century, many have concluded that federal courts have “a special function of enforcing the rule of law, independent of the task of resolving concrete disputes over individual rights.”³⁵³ This vision of judicial power does not lead inexorably to the conclusion that courts make the law they have a special duty to declare. But those who believe that courts make law are more likely to subscribe to this law-development-centered theory of judicial power. If one believes courts are making law that affects nonparties, then the concrete dispute that provides the setting for that lawmaking takes on secondary importance.³⁵⁴

When priorities are so reordered, it becomes less important what role a fact plays in resolving the dispute as a formal matter. What matters is facts’ role in developing the law. Thus, the arguments that have been advanced for conserving or discarding the usual decisionmaking conventions for legislative facts are functional ones, addressed to imperatives of sound lawmaking.³⁵⁵

The problem is that these functional arguments pull in opposite directions, which saps the prescriptions that accompany the legislative-fact concept of much of their normative strength. The legislative-fact concept responds to two opposing concerns.³⁵⁶ The first is that treating questions of legislative fact as questions of fact will deprive judges and appellate courts of control over the development of the law and will result in variegation in the law. The second is that treating them as questions of law will force courts to resolve complex empirical questions without the usual factfinding apparatus. Any solution that resolves one problem necessarily exacerbates the other. Even

353 FALLON ET AL., *supra* note 15, at 74.

354 Miller & Barron, *supra* note 6, at 1193–99.

355 Monaghan, *supra* note 334, at 668 (“[The law-declaration model] tends to see any restraints on [judicial] authority solely in functional terms.”); *see also, e.g.*, Miller & Barron, *supra* note 6, at 1190–91; Hart & Sacks, *supra* note 8, at 398. For a particularly thorough canvas of these functional arguments, see Yoshino, *supra* note 6, at 266–78.

356 Larsen, *supra* note 6, at 224; Yoshino, *supra* note 6, at 266.

compromise solutions that treat legislative facts like something between fact and law get some of the worst of both worlds without securing any part of the best.

Routing questions according to standard conventions, by contrast, addresses both sets of concerns. It does not eliminate the practical problems created by these facts' two-faced nature, but it does submit them to orderly regulation. Even if one subscribes to a law-development-centered theory of judicial power, then, there are good reasons to dispense with the legislative-fact concept and instead adhere to standard conventions.

1. Controlling Law Development

Many favor routing questions of legislative fact as questions of law (or something similar) because they think legislative facts uniquely contribute to developing the law.³⁵⁷ Legislative facts are true not only of the parties but of other persons not before the court, and the answer to a question of legislative fact may bind future parties.³⁵⁸ Thus, the argument goes, the parties who happen to be before the court should not control the information the court uses to answer it.³⁵⁹ The judge should be free to venture beyond the record—something he or she may do only if he or she retains control over the question as one of law.³⁶⁰ Moreover, appellate courts are better equipped to factor in the views of a range of interest groups and structurally better positioned to promote efficiency and uniformity by resolving recurring factual issues once and for all.³⁶¹ These advantages favor treating the question as one of law.

Standard conventions treat those questions of legislative fact that are also questions of premise fact as questions of law, accruing in the resolution of those questions all the benefits of detachment from party control, uniformity, and efficiency that a legislative-fact-as-law approach strives to achieve. True, those conventions would treat all other questions of legislative fact (i.e., those that are questions of non-premise fact) as questions of fact. This choice divests judges and appellate courts of control over their resolution and increases the risk of

357 See, e.g., Larsen, *supra* note 6, at 224.

358 See Berger, *supra* note 6, at 947.

359 See, e.g., Karst, *supra* note 6, at 109; Morris, *supra* note 78, at 1319; Wyzanski, *supra* note 26, at 1293; cf. Hart & Sacks, *supra* note 8, at 398 (“Should such a free choice [of legal standard] be made without taking into account the opinions and preferences of [non-parties]?”).

360 See Miller & Barron, *supra* note 6, at 1244.

361 See, e.g., *In re Asbestos Litig.*, 829 F.2d 1233, 1249 (3d Cir. 1987) (advocating treating findings of fact from prior cases as binding in part because “members of the asbestos industry had the opportunity to advocate a contrary conclusion”).

inconsistent outcomes from one party to the next. But standard conventions also mitigate these concerns in at least two ways.

First, the precedent set (or the law “made”)³⁶² by the court’s decision is limited to the non-premise facts upon which it is based.³⁶³ If another interested party comes along with a case or controversy in which that party presents materially different non-premise facts, then the court may reach a different legal conclusion (“make” different law). Judges and appellate courts may lose their ability to make law proactively, but little generally applicable law is made without their controlling influence.³⁶⁴

Second, other devices for promoting sound developments in the law remain available. Most importantly, judges and appellate courts retain control over law declaration, and may protect the law so declared through more expansive definitions of a court’s holding.³⁶⁵ In addition, adherents to the law-development model of judicial power may subscribe to more permissive law-declaration constraints that allow courts to convert law application into law declaration.³⁶⁶ Alternatively, appellate courts may assert authority to control law application (and antecedent non-premise factfinding) through exceptions that are compatible with the standard conventions, such as the constitutional fact doctrine.³⁶⁷ These devices allow courts to control the quality of law development much in the way that the legislative-fact designation does.

362 According to the law-declaration model of judicial power, precedent *is* law. See, e.g., *Nor. Plains Co. v. Bos. & Me. R.R.*, 67 Mass. (1 Gray) 263, 267 (1854).

363 See *In re Ohio Execution Protocol*, 860 F.3d 881, 886 (6th Cir. 2017) (en banc); Monaghan, *supra* note 8, at 236; Hart & Sacks, *supra* note 8, at 384.

364 Cf. Tyler, *supra* note 141, at 1588 (describing how expanding the definition of “precedent”—as the legislative-fact concept does—diminishes its quality).

365 See, e.g., *id.* at 1585–87 (describing how an adjudicative model of precedent enables a court to control “the content of its case law,” *id.* at 1585).

366 See *infra* Section III.C.

367 See *supra* subsection II.B.3. As it is, the coexistence of the legislative-fact doctrine and the constitutional fact doctrine has resulted in considerable confusion. See Borgmann, *supra* note 6, at 1188–89. To the extent that one defines “constitutional facts” as adjudicative facts, see Monaghan, *supra* note 8, at 230, the constitutional fact doctrine is nominally distinct from the legislative-fact doctrine. But because no clear line divides adjudicative from legislative facts, the two often overlap. In *Dunagin v. City of Oxford*, for example, the Fifth Circuit mixed reasoning from both doctrines when it declined to defer to district court findings of fact. 718 F.2d 738, 748 n.8 (5th Cir. 1983) (plurality opinion). This led to uncertainty about the scope of its “exception” to Rule 52(a)(6) for findings of legislative fact. Compare *Don’s Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (following *Dunagin*), with *W. Ala. Women’s Ctr. v. Williamson*, 900 F.3d 1310, 1316 (11th Cir. 2018) (declining to exempt legislative facts from the clear-error standard of review).

2. Finding Facts Reliably

Others favor routing questions of legislative fact as questions of fact (or something similar) because they think legislative facts present unique empirical challenges that demand the best factfinding apparatus courts have to offer.³⁶⁸ It is one thing to attribute to judges knowledge of facts about the common meaning of words or the manner in which a law was enacted.³⁶⁹ But judges are not trained economists or physicists or physicians.³⁷⁰ Judges (or juries) need qualified experts and the discipline of a vetted record to answer questions in those fields, and (at least in nonjury cases) the appellate court needs detailed findings by a judge that has listened to and questioned the experts and scoured the record.³⁷¹ Moreover, questions of legislative fact are often deeply contested. In such situations, the argument runs, adversarial testing is most likely to lead to the truth.³⁷² That requires putting all sources of information in the record to be tested and contested—something that happens effectively only in district court, and only for questions of fact.

Standard conventions achieve the benefits of sound factfinding for a subset of legislative facts by routing questions of non-premise fact as questions of fact. True, courts would answer all other questions of legislative fact (i.e., those that are questions of premise fact) as questions of law, which means diverting them away from the best factfinding tools. This may, in turn, diminish the quality of factfinding, especially when law declaration requires courts to make predictions beyond their core fields of competence.

The standard conventions supply tools to regulate these problems, too. By emphasizing the line between law declaration and law application, they reorient courts to the law-declaration constraints that determine whether a given fact will serve as a premise fact or non-premise fact.³⁷³ When problems of faulty factfinding arise, stricter law-

368 See, e.g., Borgmann, *supra* note 6, at 1212–19; Larsen, *supra* note 6, at 224–27.

369 See *supra* note 44.

370 United States v. Leon, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring) (“Like all courts, we face institutional limitations on our ability to gather information about ‘legislative facts[]’”); Karst, *supra* note 6, at 100 (“[J]udicial competence to evaluate the legislative facts varies inversely with their distance from the facts concerning the parties.”); cf. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 468 (1916) (proposing that lawyers and judges receive training in economics, sociology, and politics to meet the modern challenges of constitutional adjudication).

371 See Karst, *supra* note 6, at 101; Larsen, *supra* note 6, at 225.

372 Larsen, *supra* note 6, at 224. But see Tyler et al., *supra* note 38, at 1891 (statement of Easterbrook, C.J.) (questioning value of adversarial presentation in resolving the types of historical questions that are central to law declaration).

373 See *infra* Section III.C.

declaration constraints will lead courts to treat the plagued factual inquiry as one of non-premise fact and route it accordingly.

3. Compromises

A brief note on proposals to treat legislative facts as something between fact and law: In a way, much of the scholarship on legislative facts matches this description. Some who favor routing questions of legislative fact as questions of law have proposed enhancing factfinding facilities available to law declarers to mitigate the costs of unreliable factfinding.³⁷⁴ Some who favor routing questions of legislative fact as questions of fact have proposed heightened review in appellate courts when there are reasons to mistrust the factfinder's conclusions.³⁷⁵ Others who take no overt position on the law-fact divide propose procedural devices for legislative facts that hover somewhere between those for fact and those for law.³⁷⁶ Whatever their differences, the ultimate objective of all of these proposals is the same: find "legislative facts" in a way that combines the best of rules for questions of fact with the best of rules for questions of law.

These compromises end up with something less than the best, weakening their normative claim: second-rate factfinding producing decisions subject to less-than-complete control by appellate courts, whose precedential status is uncertain.³⁷⁷ Worse still, because these compromises operate outside of standard conventions, they are not (clearly) subject to any of the regulatory devices those conventions provide.

C. An Objection to the Standard Conventions

Functional costs match or exceed the functional benefits achieved by the legislative-fact concept. This alone justifies abandoning a concept that urges a departure from courts' usual way of doing business on functional grounds. But the concept comes with another serious drawback: administrability. Courts' inability over the past half century reliably to distinguish legislative from adjudicative facts has resulted in inconsistent decisions that undermine a value at the heart of all theories of judicial power—rule of law.³⁷⁸

374 See, e.g., Alfange, *supra* note 6, at 667–68; Gorod, *supra* note 6, at 69–70; Davis, *supra* note 1, at 984.

375 See Benjamin, *supra* note 6, at 358 n.326; Borgmann, *supra* note 6, at 1244–47; Larsen, *supra* note 6, at 236.

376 See Yoshino, *supra* note 6, at 279.

377 See Masur & Ouellette, *supra* note 145, at 647.

378 See *supra* subsection II.C.2.

Identifying line-drawing problems is easy enough. Drawing clear lines is another matter. Can courts reliably distinguish premise from non-premise facts? The simple (but incomplete) answer is “yes”: the court relies on premise facts to declare law; the court applies the law to non-premise facts. The real question is whether one can reliably distinguish law declaration from law application.

The question is a serious one, though it may not be enough to resuscitate the legislative-fact concept, which suffers from its own, acknowledged line-drawing problem. The answer to the question is a qualified yes—qualified because the task of distinguishing law declaration from law application will not always be straightforward, and the choice between the two will not always be determinate. Thus, while standard conventions will discipline courts’ procedural choices under this Article’s proposal, courts will retain more or less discretionary control over routing insofar as they may choose between law declaration and law application.

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides a good test of courts’ ability to distinguish the two steps. It forbids federal courts to grant applications for writs of habeas corpus on any claim adjudicated on the merits in state court “unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”³⁷⁹ The statute thus defines the federal standard of review with reference to each of the three parts of the dispute resolution framework: law declaration (“contrary to . . . clearly established Federal law”), law application (“unreasonable application of[] clearly established Federal law”), and fact identification (“unreasonable determination of the facts in light of the evidence presented in the State court proceeding”).

In *Williams v. Taylor*, the Court considered whether the first two limitations—“contrary to” and “unreasonable application of”—constrain the federal court’s review of the state court’s decision in distinct ways.³⁸⁰ According to the Court, the “contrary to . . . clearly established Federal law” prong permits relief whenever the state court answers a question of law incorrectly under Supreme Court precedent.³⁸¹ It therefore permits federal courts to correct errors of law declaration *and* errors of law application that would be treated as errors of law.³⁸²

379 28 U.S.C. § 2254(d) (2018).

380 529 U.S. 362, 404–05 (2000) (O’Connor, J.).

381 *Id.* at 405.

382 A state court makes a decision that is “contrary to . . . clearly established Federal law” when it “arrives at a conclusion opposite to that reached by this Court on a question

By contrast, when the error is one of “run-of-the-mill” law application—the sort typically routed as a question of fact³⁸³—AEDPA limits federal courts to reasonableness review.³⁸⁴ Critically, the Court held that the two limitations have “independent meaning” and thus affirmed that law declaration and law application are distinct and distinguishable.³⁸⁵

Justice Stevens, writing for three other Justices, disagreed. He was “not persuaded that the phrases define two mutually exclusive categories of questions.”³⁸⁶ At least in some circumstances, an “unreasonable application of[] clearly established Federal law” could be said to be “contrary to . . . Federal law” because law application may answer a “question of law” when the court extends an “earlier decision[] . . . to new factual situations.”³⁸⁷

Justice Stevens’s view does not necessarily deny a conceptual difference between law declaration and law application, but it does deny the distinction’s disciplining force. According to the realist premise that gave rise to the legislative-fact concept, the law-declaration step in adjudication consists not only of saying what the law is, but also what it shall be, and so it involves the same prescriptive exercise that is sometimes required by law application.³⁸⁸ Law declaration and law application therefore merge at the point of judgment, where either a generally applicable rule or a case-specific conclusion may fill the analytical

of law” or when it “confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Court’s].” *Id.* The first scenario involves an error of law declaration. The second scenario involves an error at the law-application stage but only in one of the scenarios when courts route law application as a question of law—as when the facts are undisputed and precedent forecloses an independent exercise of judgment. *See supra* note 257 and accompanying text; *see also, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 517 (1995) (“The prosecution’s failure to provide minimal evidence of . . . any . . . element, of course raises a question of ‘law’ that warrants dismissal.”).

383 *See supra* subsection II.B.3.

384 A state court makes a decision that involves “an unreasonable application of[] clearly established Federal law” when it properly “identifies the governing legal rule”—declares the correct rule of decision—“but applies it unreasonably to the facts of a particular prisoner’s case.” *Williams*, 529 U.S. at 407–08.

385 *Id.* at 404; *see also* SUP. CT. R. 10 (distinguishing these concepts); *Kyles v. Whitley*, 514 U.S. 419, 459 (1995) (Scalia, J., dissenting) (criticizing majority for “eliminat[ing] all distinction between mistake in law and mistake in application”).

386 *Williams*, 529 U.S. at 384 (opinion of Stevens, J.).

387 *Id.* at 384–85.

388 Woolhandler, *supra* note 6, at 117 (“But the concept of legislative fact assumes that the legal rules are not formulated in advance, since the evidence is presented to assist the court in its normative function of making up such rules.”); *see also* FAIGMAN, *supra* note 6, at 90; Hessick, *supra* note 16, at 786 (describing the realist theory).

niche.³⁸⁹ Even if we may reliably label an act of judgment as one of law declaration or one of law application, does the distinction actually discipline a court's choice about who decides, and how?³⁹⁰

This is where law declaration constraints come in. These are the substantive and procedural rules that guide a court in deciding whether to use a given fact to articulate a more specific rule of decision at the law-declaration stage (making it a premise fact) or as an object to which a court applies a more general rule of decision at the law-application stage (making it a non-premise fact). A comprehensive survey of law declaration constraints is beyond the scope of this Article, but a few examples of constraints illustrate the point:

Substantive Law: The instrument from which the court derives a rule of decision constrains the extent of its law declaration.³⁹¹ If one believes that courts merely find the law, then the constraint the instrument puts on law declaration is easy to perceive: the extent of law declaration is necessarily limited to the content of the law the court is finding. But even if one believes that courts are making law, the choice of what law to make is constrained (to some extent) by whatever principles one believes should guide courts in making the law.³⁹²

Party Presentation: When a party argues that a law or policy is unconstitutional as applied to the party, then there may be no need for the court to engage in law declaration—the court need only consider whether the particular facts of the case reveal a constitutional transgression. This is not to say that facts do not inform law declaration in as-applied challenges, only that courts have more of a choice about how to use them and may have good reason to use them for law application only. For example, the *Jacobson* Court recognized that its decision upholding Massachusetts's vaccine law against a facial challenge—on the force of *premise* facts—would not foreclose an as-applied challenge in the “extreme cases” of a person whose health the vaccine would seriously jeopardize.³⁹³ But “such cases are not safe guides in the administration of the law.”³⁹⁴ Facts from “extreme cases” serve better as non-premise facts, presented by parties for whom the “extreme case” is a reality.³⁹⁵

389 See, e.g., Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1439–40 (2001); Jaffe, *supra* note 169, at 255–56; Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328, 337 n.45 (1962); Hart & Sacks, *supra* note 8, at 384.

390 See, e.g., Thayer, *supra* note 174, at 161–66 (describing ways in which courts have taken control from juries through jury instructions).

391 See FAIGMAN, *supra* note 6, at 78–79.

392 See, e.g., *id.* at 116; Hessick, *supra* note 16, at 794–96.

393 *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 38–39 (1905).

394 *Id.* at 38.

395 See *id.* at 38–39.

External Limits: Other legal rules may also constrain a court's choice between law application and law declaration. AEDPA is one such statutory limit. By limiting habeas relief to situations in which the state court decision departed from "clearly established Federal law," Congress limited federal courts' ability to convert non-premise facts into premise facts by using them to elaborate on existing precedent to announce a more specific rule of decision.³⁹⁶ Congress and the courts may limit factfinding in other ways, and there is no reason that they could not use this power to constrain courts' choice between law declaration and law application.³⁹⁷

Posture: Uncertainty about the correct rule of decision is more tolerable in some procedural postures than in others. For example, a court need only decide whether the party is *likely* to succeed on the merits when that party moves for a preliminary injunction.³⁹⁸ Likelihood of success is most obviously a judgment about whether the party will be able to adduce non-premise facts to support his or her claim. Sometimes, however, uncertainty about what the law is may factor into the equation.³⁹⁹ In such cases, a court presented with a doubtful fact may have a higher tolerance for treating that fact as a premise fact and articulating a *likely* rule of decision based on it. If the uncertainty persists when it comes to final judgment, however, the court may be more reluctant to declare a rule of decision based on the uncertain fact and may therefore opt to treat it as a non-premise fact.

Constitutional Considerations: Appellate courts striving to control the development and enforcement of constitutional law may choose to engage in more elaborate law declaration to diminish the role factfinder judgment plays in vindicating constitutional rights, duties, or limits. As discussed above, appellate courts have sometimes claimed factfinder judgment for themselves by invoking the constitutional fact doctrine to review factfinding and law application *de novo* in rights cases.⁴⁰⁰ But recall that the scale of judgment is measured by the distance between the law declared and the facts found. Thus, an alternative approach is to provide more elaborate legal guidance for lower courts, thereby shrinking the judgment-filled distance between the law and the facts. The Supreme Court has at least once employed this

396 The Court in *Williams* left open whether state decisions "extend[ing]" or refusing to extend existing precedents may be subject to reasonableness review. *Williams v. Taylor*, 529 U.S. 362, 408, 408–09 (2000).

397 See Blocher & Garrett, *supra* note 117.

398 *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

399 See, e.g., *Gordon v. Holder*, 721 F.3d 638, 645 & n.4 (D.C. Cir. 2013).

400 See *supra* text accompanying notes 261–62.

alternative when the factfinding burden created by the constitutional fact doctrine became too onerous (and unseemly).⁴⁰¹

Pragmatic Considerations: Finally, the functional considerations that animate the legislative-fact concept may come to play in guiding the court's discretion about whether to engage in law declaration or law application. An imperative to settle a uniform rule of law would militate in favor of law declaration;⁴⁰² factual complexity and instability would militate in favor of law application.⁴⁰³

In short, if one conceives of the court's task as making the law or guiding its development in a common-law-like fashion, then the distinction between premise and non-premise facts remains somewhat fluid and responsive to functionalist considerations. If one conceives of the court's task as finding and applying law, distinguishing premise from non-premise facts becomes, if not easy, at least disciplined. Standard conventions may emphasize the dispute-resolution function of the court. But law-declaration constraints accommodate both models of judicial power.

CONCLUSION

In *Fasti*, Ovid prays of Janus:

[W]hat god shall I say you are,
 Since Greece has no divinity to compare with you?
 Tell me the reason, too, why you alone of all the gods
 Look both at what's behind you and what's in front.⁴⁰⁴

Janus appears before him and answers, "The ancients called me Chaos"⁴⁰⁵

Modern constitutional doctrines introduced facts that, like Janus, had no obvious antecedent. The facts looked behind them, giving meaning to laws enacted in the past, yet they looked in front, too, to the effect those laws would have in the future. Chaos reigned.

This Article proposes to submit that chaos to order by organizing facts based on the role they play in resolving the parties' dispute. The increasingly heavy factfinding burden that led courts to look for

401 *Miller v. California*, 413 U.S. 15, 24 (1973); *see also* Blocher & Garrett, *supra* note 117, at 60–61 (describing the shift).

402 *See* Monaghan, *supra* note 8, at 236–37; *cf.* FAIGMAN, *supra* note 6, at 69–70 (arguing that, for certain types of claims, case-by-case consideration may prevent the court from perceiving a constitutional violation).

403 *See* Larsen, *supra* note 6, at 234; *cf.* Benjamin, *supra* note 6, at 272 (proposing that courts approach claims founded on rapidly changing facts differently than they approach other claims).

404 OVID, *FASTI* bk. 1, at 13 (A.S. Kline trans., 2004) (A.D. 8), <https://perma.cc/PCB5-WWM7>.

405 *Id.*

innovative procedures is a consequence of substantive legal doctrines that make the meaning of the Constitution turn on speculative predictions about the effects that laws and policies will have on the broader world. But on reflection, all theories of constitutional (and statutory) meaning call on courts to find facts. Recognizing the role facts inevitably play in law declaration—and, no less important, recognizing where that role ends—will enable courts to develop a more coherent approach to who decides, and how.

