

1988

Legislative Facts and Similar Things: Deciding Disputed Premise Facts

Robert E. Keeton

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Keeton, Robert E., "Legislative Facts and Similar Things: Deciding Disputed Premise Facts" (1988). *Minnesota Law Review*. 2241.
<https://scholarship.law.umn.edu/mlr/2241>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

The William B. Lockhart Lecture*

Legislative Facts and Similar Things: Deciding Disputed Premise Facts

Robert E. Keeton**

TABLE OF CONTENTS

I. Preliminaries.....	3
II. Illustrative Problem Cases.....	4
A. Case One: Asbestosis	4
B. Case Two: Boxing Titles	5
C. Case Three: Balance Billing by Physicians	6
III. The Nature of the Subject and the Words Used to Describe It	8
IV. Premise Facts: A Summary	13
A. Characteristics of Premise Facts	14
1. First Principle: Existence of a Contrast Between Premise Facts and Adjudicative Facts	14
2. Second Principle: The Distinction Between Premise Facts and Adjudicative Facts—The Purpose Served by the Fact Determination ..	14
3. Third Principle: The Nature of the Fact in Dispute is Not Decisive	16

* The following lecture was delivered in February, 1988 at the University of Minnesota Law School. The Lockhart Lecture Series is in honor of the former Dean William B. Lockhart.

** United States District Judge, District of Massachusetts. I gratefully acknowledge the valuable criticisms of preliminary drafts of this Article that I received from Ruth Borenstein, Lisa Burget, the Honorable Frank Coffin, Professor Kenneth Davis, James Johnson, Cary Perlman, Professor Maurice Rosenberg, Professor David Shapiro, and the Honorable Douglas Woodlock. Of course, responsibility for any shortcomings or errors is solely mine. Also, I gratefully acknowledge the invaluable assistance of Lillian Di Blasi in the preparation of the manuscript.

The initial draft of this Article was prepared for oral delivery as the 1988 William B. Lockhart Lecture. The editors have graciously permitted publication in a style more common in lectures than in law review articles.

4.	Fourth Principle: An Authorized Decision Maker's Premises	21
5.	Fifth Principle: Stare Decisis, Claim Preclusion, and Issue Preclusion	26
B.	Prevailing Practices in Deciding Premise Facts..	29
1.	Sixth Principle: Inapplicability of Formal Rules Regarding Judicial Notice	29
2.	Seventh Principle: Inapplicability of Formal Rules of Evidence.....	31
3.	Eighth Principle: "Standing" Requirements .	32
4.	Ninth Principle: Reasoned Decisions and Explanations	34
5.	Tenth Principle: Reasoned Choice of Method for Determining Premise Facts.....	36
6.	Eleventh Principle: Constraints on Method .	38
7.	Twelfth Principle: Reconsideration and Review of Premise-Fact Determinations	41
a.	Effect in Higher Courts of Trial Court Determinations of Fact.....	41
(1)	Characteristics of Determinations of Fact in Jury Trials.....	41
(2)	Characteristics of Determinations of Fact in Nonjury Proceedings	41
b.	Effect of a Legislature's Explicit or Implicit Fact Determinations and the Standards of Scrutiny	43
V.	The Law of Premise Facts: Its Practical Use to Lawyers and Judges	44

APPENDICES

I.	A Trial Court Log of Additional Cases.....	49
A.	Case Four: Computer Software Programs.....	50
B.	Case Five: Bank Robberies	51
C.	Case Six: Wrongful Death Actions	53
II.	Case One Revisited	54
III.	Applying Settled Law.....	57
A.	Distinctions Between Making and Applying Law and Among Kinds of Decisions Applying Law ..	57
B.	Types of Decisions Applying Settled Law That Involve Premise-Fact Determinations.....	69
C.	Purpose Revisited	70

I. PRELIMINARIES

This Article presents three illustrative cases concerning asbestosis, boxing titles, and balance billing by physicians. Each case poses a factually unique question, but the three questions are substantively similar. The primary focus is on the substantive issues common to the three problem cases:

Asbestosis: Who decides, and how, whether asbestos hazards were knowable to the industry in the 1930s?

Boxing Titles: Who decides, and how, whether a boxing association is engaging in state action, subject to due process requirements, when it awards or withdraws World Championship titles?

Balance Bills: Who decides, and how, whether the availability of medical care to the elderly will be substantially reduced if courts allow enforcement of a statute prohibiting physicians from billing Medicare patients for the balance of the physician's ordinary charges above the charges approved by regulatory authorities?¹

To help establish a base point from which to consider the

1. "The time has come," the Walrus said,
 "To talk of many things:
 Of shoes—and ships—and sealing wax—
 Of cabbages—and kings—
 And why the sea is boiling hot—
 And whether pigs have wings."

L. CARROLL, ALICE IN WONDERLAND 142 (D. Gray 1971).

I borrowed this verse verbatim from an Englishman, Lewis Carroll, a well-known creator of verse that grown-up children, wise in the ways of the world, like to read to their grandchildren. Lewis Carroll was not a rival of Charles Dickens as a critic of the legal system. Also, I acknowledge that I have never felt that I fully understood this verse, either as literature or as commentary. Still, it inspires me to parody, which I use to introduce three problem cases.

- The time has come, it must be said,
 To talk of asbestosis, [Case One]
 Of Marquis's rules for boxing rings, [Case Two]
 And accurate prognosis
 Of legal rules for balance bills, [Case Three]
 And knowing by osmosis.
 How who knows facts that make the law
 Controlling any matter,
 Including what the experts say
 When in the courts they spat, or
 Who decides the law and facts—
 Especially the latter.

The meaning of this parody may be no clearer on first reading than the meaning of "whether pigs have wings." I hope to clarify *both* matters.

"Knowing by osmosis," as I shall explain more fully in the Article, is a metaphorical description of unexplained "judicial notice."

three problem cases, I ask the reader to agree or disagree with two propositions. Both propositions concern who should decide disputed facts in jury trials in the United States.²

First Proposition: In United States jury trials, if judge and jury perform their respective functions well, the jury ordinarily decides all genuine disputes of fact that are material to disposition of the case.

Second Proposition: Under United States law, any party to a dispute over a material fact is entitled to have a jury³ decide that issue unless, on the evidence received in the trial court, jurors could not reasonably differ about the answer.⁴

II. ILLUSTRATIVE PROBLEM CASES⁵

A. CASE ONE: ASBESTOSIS

Numerous plaintiffs filed claims in the United States District Court for the District of New Jersey for personal injury caused by exposure to asbestos products.⁶ In many of these cases defendants asserted a "state-of-the-art" defense against strict products liability. If a court recognizes the defense, a defendant may escape liability for an injury caused by the defendant's product. The defendant, however, must prove that, although defective by present-day standards of knowledge and understanding, the product measured up to the state of the art at the time it was manufactured.

The New Jersey Supreme Court had rejected the defense shortly before the cases were filed. The defendants, however, challenged on a federal constitutional ground the New Jersey judge-made law precluding use of the defense.⁷ Plaintiffs ar-

2. In reacting to them, put aside the exceptional cases traced historically to equity and other exceptions for claims of statutory origin, such as those for worker's compensation benefits.

3. This proposition assumes that the party makes a timely demand for jury trial.

4. The audience in attendance at the William B. Lockhart Lecture, at which these two propositions were stated, voted overwhelmingly that they agreed with both propositions. The aim of this Article, as it was for the lecture, is to persuade you that you should disagree with both propositions.

5. Cases strikingly like two of these cases—the second and third—came before one particular trial judge who sits in the District of Massachusetts. In some respects, these two cases, and others stated in an Appendix to this Article, have been hypothetically modified to permit less-inhibited comment than might otherwise seem appropriate.

6. *E.g.*, *In re Asbestos Litigation*, 829 F.2d 1233 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1586 (1988).

7. The district court consolidated the pending asbestos cases for argu-

gued that because the New Jersey Supreme Court had not created a special rule precluding the use of the state-of-the-art defense for asbestosis cases, the defendants had based their constitutional claims on an erroneous premise. Rather, plaintiffs argued, the Supreme Court had merely determined *as a fact* that the hazards of asbestos exposure were *knowable* to the industry at all relevant times. Therefore, plaintiffs alleged, it was this factual determination and not a special legal rule that precluded application of the state-of-the-art defense in asbestos cases.

If plaintiffs' argument is correct, the answer to the question "who decides" whether asbestos hazards were knowable in the 1930s is the Supreme Court of New Jersey. Should the federal courts accept that answer?

B. CASE TWO: BOXING TITLES

On April 1, 1987, Marvelous Marvin Hagler filed suit against the World Boxing Association (WBA) in a Massachusetts court.⁸ Hagler moved for an order restraining defendant from withdrawing the World Championship title it had awarded him. A superior court justice entered a temporary restraining order and set the matter for prompt hearing on the motion for preliminary injunction. Defendant then removed the case to federal court.

Hagler claimed that the procedure the WBA would apply to withdraw his title denied him the due process guaranteed under the fourteenth amendment. The fourteenth amendment, however, declares that *states* shall not deny due process;⁹ it does not constrain private entities or individuals who are not performing a state function. One of the plaintiff's many claims

ment and disposition of the federal constitutional issue. Because the district court, sitting en banc, was closely divided, the following question was certified to the Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b): do "decisions of the New Jersey Supreme Court violate the Equal Protection Clause in abolishing the state-of-the-art defense in asbestos personal injury cases" while still allowing that defense in other product liability cases, including drug cases? 829 F.2d at 1235.

8. Hagler filed suit with the Clerk of the Probate and Family Court of the Commonwealth of Massachusetts, in Brockton, where he resided, which was the same court that some years earlier had granted Hagler's petition to change his name officially to Marvelous Marvin Hagler. The defendant removed to the United States district court. *Hagler v. World Boxing Ass'n*, No. 87-372-K (D. Mass. Apr. 1, 1987) (denial of preliminary injunction), *aff'd*, No. 87-1245 (1st Cir. Apr. 2, 1987).

9. U.S. CONST. amend. XIV.

was that the WBA's procedures for awarding and terminating titles were so intertwined with state regulation of boxing in Nevada, Massachusetts, and elsewhere that the WBA's action was state action for fourteenth amendment purposes.¹⁰

Question: Who decides, and how, whether the WBA engages in state action subject to due process requirements when it awards or withdraws World Championship titles?

C. CASE THREE: BALANCE BILLING BY PHYSICIANS

Plaintiffs¹¹ challenged the constitutionality of a state statute prohibiting balance billing as violative of the supremacy clause.¹² Balance billing occurs when a physician bills a patient for the balance of the physician's usual charge for services that is more than the amount that Medicare or some other insurer has paid.¹³ Plaintiffs contend that the statute, if upheld, will substantially reduce the availability of medical care to the elderly and that this result is directly contrary to the congressional intent objectively manifested in the enactment of the Medicare Act.¹⁴

At trial, the parties called expert witnesses to present testi-

10. As you will recall, many of our American states have determined that the rules for the gentlemanly sport of boxing developed by the Marquis of Queensberry are inadequate to meet modern American concerns. That explains why there is, at least to some extent, state action in the regulation of boxing rings. *E.g.*, ILL. REV. STAT. ch. 111, paras. 5001-5026 (1987); MINN. STAT. § 341.01.15 (1986); MO. REV. STAT. §§ 317.001-.021 (1983); TENN. CODE ANN. § 68-50-101 to -303 (1987 & Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 8501-1 (Vernon Supp. 1988).

11. Plaintiffs were the Massachusetts Medical Society, the American Medical Association, and a Massachusetts physician.

12. *Massachusetts Medical Soc'y v. Dukakis*, 637 F. Supp. 684 (D. Mass.), *aff'd*, 815 F.2d 790 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 229 (1987).

13. Patients also pay the 20% "co-insurance" required by Medicare, but that co-payment is a "reasonable charge" and billing the patient for it is not "balance billing" according to the state statute.

14. Different perspectives on congressional intent are expressed in the several opinions in *Thompson v. Thompson*, 108 S. Ct. 513 (1988). I am deliberately using the phrase *congressional intent objectively manifested in the enactment* of the statute. Not surprisingly, the arguments advanced by the parties included some that were cast in a different terminology that reasonably may be understood as involving a standard concerned with a state of mind of Congress, or members of Congress, rather than an objective standard such as I believe to be appropriate. The whole set of issues regarding legislative intent is a large subject that I do not explore here and have barely touched elsewhere. See *EEOC v. Massachusetts*, 680 F. Supp. 455, 457-60 (D. Mass.), *aff'd*, 858 F.2d 52 (1st Cir. 1988); *United States v. Vest*, 639 F. Supp. 899, 902-12 (D. Mass. 1986), *aff'd*, 813 F.2d 477 (1st Cir. 1987); Keeton, *Statutes, Gaps, and Values in Tort Law*, 44 J. AIR L. & COM. 1, 7-9 (1978); see also *infra* note 148.

mony bearing on disputed fact questions about the likely effect a prohibition against balance billing of Medicare patients would have on the availability of medical service for the elderly, given physicians' publicized threats to withdraw from the state. The court received some of this expert opinion testimony subject to objections under the Federal Rules of Evidence. The court deferred the evidentiary ruling to consider the implications of the distinction between adjudicative and nonadjudicative facts.¹⁵

Question: Who decides, and how, whether enforcement of the statute will substantially reduce the availability of medical care to the elderly?

Each of the illustrative cases raises a principal question: Who decides, and how, whether something is true? To determine whether or not something is true, one must consider fact¹⁶ questions. In contrast, to the extent that we are thinking about who decides and how, we are thinking about allocations of power (who?) and methods of exercising power (how?).¹⁷

15. I have just used the phrase *adjudicative facts*. Administrative law and evidence treatises and Rule 201 of the *Federal Rules of Evidence* have used this phrase. Quickly and roughly defined, adjudicative facts are simply the kinds of facts we ordinarily ask the jury to decide in jury trials. Who did what to whom, when, where, and how? Was the light red? Was the defendant negligent? Is the person in the courtroom as a defendant the same person who stuck a gun in the teller's face at the bank? These kinds of questions are adjudicative-fact questions. All other fact questions are nonadjudicative-fact questions.

16. I use *fact* as it is used in ordinary discourse.

17. For Case One, involving asbestosis, I will add, by way of illustration, a few explicit subsidiary questions—allocational and methodological—that we will need to think about in order to determine who decides and how. *How* do the decision makers, whoever they may be, go about deciding whether asbestos hazards were knowable in the 1930s? What kinds of evidence or record or other basis for deciding should decision makers consider? Should they consider affidavits or oral testimony of witnesses who are experts? If so, experts in what? Should they consider evidence that a single researcher published an article on the subject in a stated year? That within a decade several more articles appeared in trade journals and academic journals? Should they consider the findings made in previously tried cases in which a jury or a court found (1) that the hazards of asbestos exposure were known to a particular defendant manufacturer of asbestos products in a particular time period—for example, the 1930s—or (2) that the hazards were knowable in that time period and could have been discovered had manufacturers made reasonable inquiry? Will the answers to all these methodological questions bear also upon the allocational question of who should decide?

Consider also the following methodological questions, framed in relation to Case Three, involving the predicted effect of a ban on balance billing by physicians. What evidence or record should the trial court consider? Should the court exclude from consideration all evidence that would be objectionable on hearsay or other grounds under the *Federal Rules of Evidence*, even if the

III. THE NATURE OF THE SUBJECT AND THE WORDS¹⁸ USED TO DESCRIBE IT

This Article concerns facts that serve as premises—*premise facts*.¹⁹ More precisely, these are facts that explicitly or implicitly serve as premises used to decide issues of law.²⁰ The term *premise facts* is not limited to those about which society is in agreement. Premise facts include all facts that serve as premises for decisions of issues of law—even when one or more of these facts is genuinely in dispute.²¹ Moreover, after a court or

very same evidence was considered by the legislative committee that recommended enactment of the statute? Should the court exclude expert opinion testimony in the absence of a showing both that the expert had appropriate qualifications and that the subject matter of the opinions was a subject as to which expert opinion testimony may properly be received under the *Federal Rules of Evidence*? Should the trial court make explicit findings of fact, pursuant to Rule 52 of the *Federal Rules of Civil Procedure*? If it does, will these findings be controlling unless set aside by a higher court under the clearly erroneous standard of Rule 52(a) of the *Federal Rules of Civil Procedure*?

18. We may define words any way we wish. We cannot, however, control how others interpret them. Our choice of words is thus significant. The ways others use and understand the chosen words may have a stronger influence than the way we define those words.

19. The two contrasting terms, *adjudicative facts* (for those we usually submit to juries in jury trials) and *premise facts*, occupy almost the entire field of fact disputes. One reason for saying “almost, but not entirely” is the existence of a subset of fact disputes that a court must resolve in order to determine the admissibility of evidence bearing on adjudicative facts, pursuant to special provisions of the *Federal Rules of Evidence*. See *infra* note 185 and accompanying text. Perhaps a dispute about the citizenship of a party, when relevant to diversity of citizenship and decided under a motion made pursuant to Rule 12(b) of the *Federal Rules of Civil Procedure*, is another instance in which the fact is plainly not a premise fact but also is either not adjudicative or at least is not decided in the way adjudicative facts are usually decided (by the jury, in a jury trial).

20. This relationship to issues of law explains why I have been attracted in the past to the possibility of calling such facts *issue-of-law facts*, and have done so occasionally. I use *premise facts* and *issue-of-law facts* with exactly the same meaning.

21. Despite my preference for using the term *premise facts* in the broad sense I have described, I wish to note that in the most familiar and most commonly discussed contexts such facts are identified as *legislative facts*. I wish to invoke and to build upon the very substantial body of knowledge and understanding that has been developed under the rubric of legislative fact. For these reasons, I have chosen the title, *Legislative Facts and Similar Things*, and the subtitle, *Deciding Disputed Premise Facts*.

I gratefully acknowledge that the Honorable Frank Coffin first suggested that I use the term *premise facts* should I persist, as I have done, in searching for another term rather than using *legislative facts* in a sense broad enough to encompass all that I propose to discuss in this Article. In the interest of disclosure, I report also that Professor Kenneth Davis is critical, in a vigorous though entirely friendly way, of my reluctance to use *legislative facts* through-

legislative body *decides* on the premise facts, they are premise facts even if many people believe the asserted factual premises do not justify the legal decision.

The Article will discuss not only legislative facts which legislatures use as premises to enact statutes, but also lawmaking facts, which courts use as premises to make law when deciding issues of first impression or when overruling precedent.²² The

out, and explicitly with a meaning as broad as that which I propose for *premise facts*. Certainly it is true that the phrase *legislative facts* often is used with a very broad meaning that extends at least to facts used in lawmaking by courts and other entities as well as lawmaking by legislatures, if not to all the contexts I mean to include within the term *premise facts*.

22. The term *lawmaking facts* is not novel. Professor Kenneth Davis has referred to some categories of facts as "facts in lawmaking." He uses the term *lawmaking*, however, in a sense that differs from that used here. Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 931.32 (1980) [hereinafter Davis, *Facts*]; see also Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 7 (1986) [hereinafter Davis, *Proposed Research Service*]. The more common usage is to refer to all facts that are used in legal decision making as legislative facts. Professor Kenneth Davis first suggested this usage almost fifty years ago. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-10 (1942); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15:4 (2d ed. 1980). This usage is widely accepted, even if sometimes criticized, see, e.g., E. CLEARY, MCCORMICK ON EVIDENCE §§ 328, 331 (3d ed. 1984); 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 200[03] (1986); 9 WIGMORE ON EVIDENCE § 2565(b) (Chadbourne rev. ed. 1981); Davis, "There is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1542 (1987) [hereinafter Davis, *Judicial Absorption of Legislative Facts*]; Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 482-88 (1986); see generally Walker & Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988); Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). I am uneasy, however, about misunderstandings that may arise from using the term *legislative facts* to describe not only those premises a legislature uses to enact a statute but also those that a court uses for judicial lawmaking. For this reason, I will ordinarily refer to the latter as *lawmaking facts*. I will use the term *premise facts* with a broad meaning that includes legislative facts in the narrower sense as well as lawmaking facts as I have just explained the term.

I do not criticize the usage Professor Davis and others have advanced. Indeed, that usage seems quite appropriate for the contexts in which it most commonly appears. But facts that serve as premises for enactment of statutes serve a function similar to that of facts that serve as premises for judicial decisions, including not only those regarding validity and interpretation of legislation but also decisions on other kinds of issues of law. For the purpose of expressing clearly and unambiguously the ideas I wish to present in this article, I hope that using both *premise facts* and *lawmaking facts*, which are similar to but somewhat different from premises for enactment of legislation, will prove to be preferable to using *legislative facts* with a meaning broad enough to include all the things I propose to consider. I hope my usage will be less

Article uses the term *lawmaking facts* to make the point that such facts have a force of their own, independent of the credibility and influence of the people and institutions that recognize them,²³ only in decision making.²⁴ Although facts that are potentially lawmaking facts have an inherent force of their own,²⁵ they do not become lawmaking facts until human intervention occurs—until a court or some other entity uses them as premises for deciding an issue of law.²⁶ Thus, no facts are ever lawmaking facts until a lawmaking entity proclaims them to be such by explicitly or implicitly using them as premises when deciding an issue of law.²⁷

likely to inhibit open-minded probing and will contribute a little to deeper understanding both of lawmaking by courts and other kinds of judicial decision making that I will describe below.

23. Of course, lawmaking facts achieve greater influence to the extent that the people and institutions that recognize and use them have power and influence. But lawmaking facts are likely to have their day, even if that day happens to be a long time coming.

24. Because premise facts in general, and lawmaking facts in particular, have a force of their own, I agree with the observation of Professors John Monahan and Laurens Walker that such facts are aptly described as being a kind of authority to which courts may properly turn for guidance in deciding issues of law. See Monahan & Walker, *supra* note 22, at 488-95. I have a concern, however, that describing the reports of social science research as social authority, as Monahan and Walker do, may lead to overlooking the important distinction between what the social science research reports say about the studied phenomena, on the one hand, and the underlying phenomena themselves, on the other hand. Moreover, the term *social authority* embraces only one subcategory of all the premise facts that have the quality of authority to which courts may properly turn in deciding issues of law.

25. Lest I be misunderstood as overstating the independent force of lawmaking facts, I remind you of a story that illustrates by analogy a limitation on their power. A minister called on a member of his flock who was an avid gardener. It was springtime and the flowering shrubs and plants, all in orderly arrangement, were at the peak of their beauty. The gardener was also a beekeeper, and his bees were at work tending the blossoms and discouraging visitors from reaching out to pluck them. The minister approached the gardener at work and said, "This is a very beautiful garden that you and the Lord have created." Rising from his work and wiping the sweat from his brow, the gardener replied quietly, "Yes, pastor. And you should have seen it when the Lord had it all alone."

26. Such facts may be, though are not always, facts of the kind that *are* because they *are*, without regard to whether any human proclamation has occurred. The distinction between facts that are because they are—for example, facts about the physical characteristics of ladyslippers and bluebonnets—and facts that *are* by reason of *human proclamation*—for example, the facts as to whether or not ladyslippers and bluebonnets are officially the state flowers of Minnesota and Texas respectively—is another large and interesting subject that I do not explore in this Article.

27. The law that lawmaking facts help to produce therefore is more beautiful to behold when the inherent force of those facts is aided by wise human

This Article also emphasizes the scope of the influence of premise facts—legislative facts and similar things. Premise facts influence decisions by all kinds of decision makers, whenever they decide legal issues. Premise facts have influence when legislatures enact statutes, when courts set precedents, when administrative agencies make decisions that guide later decisions, and when any institution adopts official rules for practice, procedure, or decision making. Premise facts also influence other decisions such as the admissibility of expert opinion testimony bearing on adjudicative-fact disputes.²⁸

Premise facts are foundation facts. They are building blocks in the foundation on which the whole structure of reason is built for deciding cases. They are fundamental facts relevant to many cases, not just the case before the court. *Premise facts*, therefore, is shorthand for *facts that serve as premises for deciding an issue of law*. They are facts that serve as premises in the reasoned explanation of the decision of a legal issue.

In Case Three, for example, the court must determine whether settled doctrines of federal preemption apply to the Massachusetts anti-balance-billing statute and whether that statute is inconsistent with the federal Medicare Act.²⁹ We do not ordinarily call this kind of court decision “legislating” or even “lawmaking.” If the court’s decision depends on how disputed facts are decided, the court will decide a disputed premise fact. Thus, premise facts include not only legislative facts that a legislature decides and lawmaking facts that a court decides when making new law or overruling precedent, but also facts decided as a premise for a reasoned decision applying settled law, as in Case Three.³⁰

intervention. Indeed, the principal themes of this Article concern wise and respectful human intervention.

The concept that lawmaking facts have an inherent influence of their own is closely associated with the idea of “government by laws,” *cf.* MASS. CONST. pt. I, art. XXX, in contrast with government by individuals. With all our human imperfections, we shall come closer to our ideal of justice if we do our best to seek justice through a system of law, in which all officials who have any share in the responsibility for doing justice are bound to perform their respective functions within the constraints of law. Unrestrained discretion to mete out justice according to one’s own idiosyncratic views is the power to be arbitrary and capricious, even if one’s views are firmly founded in moral principle and reflect exceptional learning and insight. We shall come closer to our aim of “government by laws” as we develop a better understanding of lawmaking facts and how we decide disputes about them according to law.

28. See *infra* notes 182-84 and accompany text.

29. See *supra* notes 11-15 and accompanying text.

30. Another example may help to clarify. In some cases, before a court

Premise facts therefore is an expression that seems apt for both lawmaking in the more general sense and for deciding an issue of law of the more limited kind concerned with applicability of a well-settled rule to a type of circumstance not previously determined³¹ to be within its scope.³²

determines the applicability of a settled rule of law, it must decide adjudicative-fact disputes distinctive to the case at hand, and also must elaborate on a general legal norm. Thus, in applying the settled general norm defining negligence as failure to exercise the care that an ordinarily prudent person would exercise in the same or similar circumstances, a court may determine that it should elaborate on that general norm by developing a supplemental norm applicable to a relatively small class of cases dealing with exceptionally aged persons. Should the court base such a proposed rule on a fixed chronological age or on some definition of mental and physical capacity? Or should the court reject a proposal to adopt such a supplemental rule? May the choice depend on resolving disputed factual assertions about the percentage of the population that the decision would affect and how it would affect their conduct and their positions? When a court considers making another subsidiary or implementational rule of law (with its own factual premises), any subsidiary rule the court adopts will become precedent, applicable in similar cases. The subsidiary rule, however, will affect a smaller body of cases than those that the more general norm affects. When a court acts in this way, it is not merely deciding adjudicative facts that bring the case within the settled rule or that place the case outside that rule. The court is making law, and almost certainly its decision to do so is based on disputable factual premises.

Problems of identifying exactly in which of these different ways a court acts—using facts as adjudicative facts or using them as premise facts—in deciding whether a settled rule of law applies to a particular case are considered in Appendix, Part III, *infra*.

31. As a matter of convenience and clarity of communication, I will use the word *determine* and its derivatives as broadly including both finding adjudicative facts and deciding premise facts. This is compatible with a common practice of using *determinations* to include both a trial court's findings of adjudicative facts and its conclusions of law. As to a trial court's obligations to make a record of its findings and conclusions, see FED. R. CIV. P. 52.

32. Professors John Monahan and Laurens Walker have criticized Professor Kenneth Davis as "tacitly rely[ing] upon a pre-Realist conceptualization of the difference between fact and law" in his elaboration of the distinction between legislative facts and adjudicative facts. Monahan & Walker, *supra* note 22, at 487-88. They may well extend that criticism to the terminology I use. One may read their article as urging that we describe as law, rather than as facts in any sense, the determinations that in my terminology serve the function of *premise facts* or *issue-of-law facts*, that is, facts that serve as premises for a reasoned decision of an issue of law. My response is that I think the terminology I am using, and the somewhat different but quite similar terminology Professor Davis and others have used, reflects not a "pre-Realist" but a "more Realist" view. Not all, but many, of the facts used as premises for deciding issues of law are facts of life in a very deep sense that we cannot change by changing the label we use. The community speaks of them as facts. We legal professionals increase our difficulty of communicating with the community, and with each other, if we insist on talking about them as if they were not facts in any sense.

Finally, this Article speaks of “deciding” premise facts or lawmaking facts—or “deciding disputes about” premise facts. Most courts and commentators refer to “finding,” rather than to “deciding” or “determining,” facts of this kind. I prefer the term *deciding* to *finding*, to emphasize that the law that bears on who *decides* premise facts and how they do it is quite different from the law that bears on who *finds* adjudicative facts and how. I hope that *deciding disputes about premise facts* will convey more accurately the intended meaning than would *finding legislative facts*.³³

I emphasize that I do not suggest that choice of terminology should determine the outcomes we reach. Indeed my central message is precisely the opposite. I am primarily interested in inviting you to consider which outcomes we should reach in answering questions about who decides, and how, and about why we should reach those outcomes. We may discover good reasons for answering differently, in different contexts, questions about who decides and how, even though premise facts are involved in all the contexts compared.³⁴

IV. PREMISE FACTS: A SUMMARY

The law of premise facts can be summarized in twelve principles.³⁵ Understanding principles is essential to under-

33. I emphasize, however, that this is a choice of expression, and should not be misunderstood as urging that other terminology is in some way erroneous, or even less acceptable. If you prefer to speak of legislative facts, however, I do urge that you either permit the general extension of the terminology to all facts used as premises for deciding issues of law, or that you invent some other terminology to apply when a court is plainly not legislating in any traditional sense but is deciding an issue of law that bears, for example, on the applicability of a well-settled constitutional doctrine or an issue of law determining admissibility of expert testimony. In these circumstances, the court must first decide a fact dispute in order to decide the issue of law.

34. This conviction that terminology should not control decision making is forcefully stated in Justice O'Connor's opinion for the United States Supreme Court in *Miller v. Fenton*, 474 U.S. 104, 113-15 (1985), and by Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985). Professor Monaghan explains his use of *constitutional fact* as often referring to adjudicative rather than to legislative fact. *Id.* at 253.

35. Professors Austin Scott and Warren Seavey started their draft of the American Law Institute's *Restatement of Restitution*, for which they jointly served as reporters, with a statement of principles of the law of restitution. RESTATEMENT OF RESTITUTION §§ 1-3 (1937). Professor Scott later informally remarked in substance (though I cannot assure you these were the precise words he used): “a principle is a proposition that is not true, exactly.” A principle states a strong general tendency. It cannot be bothered by details or exceptions.

standing the law in action. Principles, even when in conflict, always influence decisions. Moreover, when decision makers identify no competing principle, they probably will not recognize an exception to the key principle they invoke.

The first five principles concern characteristics of premise facts. Principles six through twelve concern practices that courts currently use to decide disputed premise facts.

A. CHARACTERISTICS OF PREMISE FACTS

1. First Principle: Existence of a Contrast Between Premise Facts and Adjudicative Facts

*For the purpose of determining who decides fact disputes, and how, the legal system has developed one set of rules and practices for adjudicative facts and a different set of rules and practices for premise facts.*³⁶

An impartial observer may suggest that one can find many exceptions to this first principle—instances in which a court appears to have used methods characteristic of adjudicative fact finding to determine premise facts and other instances in which a court appears to have used premise methods to determine an adjudicative fact. The evidence referred to in the remainder of this Article overwhelmingly supports the principle, however, when one takes it as truly a principle and not as a universal rule. Some courts nevertheless may have deviated from the principle, partly because relatively little explicit discussion of this distinction has appeared in judicial opinions. The deviations therefore may have occurred because of oversight rather than considered choice.

2. Second Principle: The Distinction Between Premise Facts and Adjudicative Facts—The Purpose Served by the Fact Determination

A premise fact is one that serves as a premise for a reasoned decision of an issue of law.

Underlying every decision of an issue of law is a set of factual premises. As Professor Kenneth Davis has stated the point in relation to judicial lawmaking, “[n]o judge can think about law, policy, or discretion without using extrarecord facts.”³⁷

36. This first principle is basic to the entire subject matter of this Article. The precedents and commentaries cited in support of other principles also implicitly support this principle.

37. Davis, *Proposed Research Service*, *supra* note 22, at 7.

This observation is partly descriptive. It is not just a statement about what judges *should* do. It is an observation about human nature, about what judges do whenever they think about law.³⁸ The statement is also prescriptive, however. A judge may consciously limit the use of facts to the facts in the record. Judges ought not to so restrict their thinking, because to do so is not to think through a problem fully. This prescriptive point has support in case law. For example, Judge Weinstein had before him a motion to dismiss for lack of personal jurisdiction a New York corporation's claim against a Japanese corporation. He explained his use of *judicial notice*—the term he chose to describe the process of deciding disputes of premise facts—in the following way:

There is always a danger in the superficial sociological musings of lawyers and judges who must perforce be relatively ignorant of the realities underlying the diverse situations with which they must deal and which they must try to understand. Yet, whether we explore the economic, political or social settings to which the law must be applied explicitly, or suppress our assumptions by failing to take note of them, we cannot apply the law in a way that has any hope of making sense unless we attempt to visualize the actual world with which it interacts—and this effort requires judicial notice to educate the court.

A court's power to resort to less well known and accepted sources of data to fill in the gaps of its knowledge for legislative and general evidential hypothesis purposes must be accepted because it is essential to the judicial process. Here flexible judicial notice is required first, in interpreting New York [law] and, second, in understanding the relationship of the Japanese parent to its American subsidiaries.³⁹

Judges do come to their roles of judging with knowledge that has influence on their legal thinking. Descriptively that is so, whether it is acknowledged or not.⁴⁰

A set of factual premises underlies each decision of an is-

38. Professor Kenneth Davis made this observation about what judges do when they think about "law, policy, or discretion." *Id.* Of course, when policy or discretion bears on deciding an issue of law, the addition of these terms does not change the meaning of the statement. I omit the terms from my observations about what I call premise facts, however, because a judge may consider policy and exercise discretion in deciding an evaluative, adjudicative-fact question. Using premise-fact methods of decision in such a circumstance may sometimes be inappropriate.

39. *Bulova Watch Co. v. K. Hattori & Co. Ltd.*, 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981) (citation omitted).

40. Prescriptively, I would urge that we acknowledge this fact of life so we may consider, on the one hand, when and how and to what extent judges should allow extra-record facts to influence their decision making and, on the other hand, when and how and to what extent judges should do their best to constrain or limit the influence of extra-record facts.

sue of law in all of the following kinds of decisions of issues of law:

(1) a legislature's decision of a set of issues of law (substantive, procedural, or both) incorporated into a proposed statute that the legislature enacts or rejects;

(2) a decision by an authorized body adopting regulatory or procedural rules (including a court's adoption of procedural or evidentiary rules and an administrative agency's adoption of regulatory rules);

(3) a court's decision of an issue of first impression or the overruling of a precedent (of either substantive or procedural law);

(4) some court decisions determining whether a settled rule of law applies to an aspect of the case before the court.⁴¹

The first three of these subcategories are easily understood as lawmaking—lawmaking by a legislature enacting a statute, by a court or agency adopting a set of regulatory rules or rules of procedure, or by a court deciding an issue of first impression or overruling precedent. Because each of these instances is a part of the lawmaking process, deciding the factual premises for such decisions may aptly be called deciding lawmaking facts.⁴²

3. Third Principle: The Nature of the Fact in Dispute is Not Decisive

The nature of the fact in dispute does not determine whether it is an adjudicative or a premise fact. Both adjudicative and premise-fact disputes may involve either historical or evaluative assertions of fact about the past or the present, or predictive or evaluative assertions about the future. Nevertheless, premise facts (which are used as premises for deciding issues of law) (a) usually are generalized in nature, (b) often are evaluative or predictive in nature, or both, and (c) only occasionally are historical in nature.

Each question arising out of the illustrative cases concerns

41. Some special problems regarding this fourth subcategory are discussed in Appendix III, *infra*.

42. I was tempted to use the label *lawmaking facts* more broadly, much as others have chosen to use the label *legislative facts*. In the end I was dissuaded by the thought that using either label for the fourth subcategory is likely to invoke concerns about judicial activism that have no relevance to the subcategory and are more likely to impede than to aid probing inquiry and candid discussion of the substantive issues that bear upon the fourth as well as the first three subcategories.

a premise fact. In the first case, the question of who decides, and how, whether asbestos hazards were knowable to the industry in the 1930s, is at least partly a historical determination. The question is also partly evaluative because one must use an evaluative standard to determine with what degree of inquiry and to what groups the hazard was knowable.⁴³ The question concerning state action in Case Two is definitely evaluative. The question may also, however, involve a dispute about historical facts. Historical-fact questions might include whether persons in regulated groups had social, political, and economic contacts with regulators. The question in Case Three concerning the issue of whether enforcement of a statute will reduce access to medical care is both evaluative and predictive.

It is not the *nature* of these questions, however, that makes the facts to be decided premise facts. They are premise facts because courts use them as premises for deciding issues of law. Courts use them as foundation facts to make rules of law they will apply when deciding similar cases, rather than using them as adjudicative facts that complete the superstructure of reasoning to a decision of a particular case.

The question "Who decides and how, whether [something] is true?" emphasizes that the disputed assertions this body of law concerns are assertions that, in accordance with common usage, can be said to be true or false. They are, in this sense, assertions of fact. The disputed assertions do, however, include several distinct types of assertions of fact that may be organized into four categories:

- (1) events, commonly called historical facts;
- (2) evaluative (interpretive) assertions, sometimes called evaluative facts;
- (3) predictions about future events, which may also be called predictive event facts;
- (4) predictions about future evaluative (interpretive) assertions, which may be called predictive evaluative facts.

It is possible to have a dispute about an event, or historical fact, that, when decided, serves as a premise for a court's adoption of a rule of law,⁴⁴ or a legislature's enactment of a statute. Indeed, legislative bodies sometimes state historical factual

43. This point is developed more fully in Appendix II, *infra*.

44. For example, to determine whether asbestos hazards were knowable to the industry in the 1930s, or at some other particular time, a court must decide some historical facts, even though the court also must decide some evaluative facts. See *supra* text accompanying note 43.

premises in the text of an introductory section of a statute, and even more often the legislative history recites such factual premises. Many historical-fact⁴⁵ disputes, however, are those the determination of which serves to decide a particular case. These historical-fact determinations serve the function of adjudicative facts rather than premise facts. Typical of such disputes concerning historical facts that serve the function of adjudicative facts are disputes about who did what, when, and where, and about whether one acted with a defined state of mind.⁴⁶

A typical dispute of interpretive or evaluative *premise* facts is that in the Third Case, requiring a determination of whether implementation of a state statute will conflict with the objectively manifested congressional intent in a federal statute. Deciding this disputed evaluative-fact question in the Third Case will serve as a basis for a reasoned decision on the statute's validity under established federal preemption precedents.⁴⁷

A typical dispute of interpretive or evaluative *adjudicative* facts deals with whether a person's act violated a legal standard for evaluating conduct. A finding that conduct violated a prerequisite of liability, such as the negligence standard or the proximate cause standard, is a finding of adjudicative fact.⁴⁸ So, too, is a finding of substantial similarity in a copyright case.⁴⁹

The treatment of evaluative-fact issues in tort law illustrates that courts determine the purpose for which an evalua-

45. A determination that contrasts with a finding of historical fact is often described as a finding on a "mixed question of fact and law." The opinion in *O'Neill v. Dell Publishing Co.*, 630 F.2d 685 (1st Cir. 1980), illustrates such a determination. To determine who decides a dispute over an evaluative fact, and how, one must distinguish between the mixed question of fact and law in which all factual elements concern *adjudicative* facts and the mixed question of fact and law in which one or more of the factual elements concerns *premise* facts. The factual element in applying the "substantial similarity" test to a copyright case, if reasonably disputed, is adjudicative. *O'Neill*, 630 F.2d at 687. In contrast, the factual element in deciding the dispute about the future effect of an anti-balance-billing statute is a premise fact. The distinction lies not in the nature of the disputed facts, but in the purpose for which the disputed fact is material under the precedents the court invokes in reaching its decision.

46. FED. R. EVID. 201 advisory committee's note, subdivision (a); see also *Sandstrom v. Montana*, 442 U.S. 510, 521-23 (1979) (requiring fact finding as to state of mind of defendant in criminal case, rather than allowing imposition of criminal liability for presumed intent).

47. More is said about this in Appendix III, *infra*.

48. See RESTATEMENT (SECOND) OF TORTS §§ 291, 431 (1965).

49. See *O'Neill*, 630 F.2d at 687 (concluding that ultimate finding of substantial similarity in copyright case is mixed question of fact and law, not to be decided on summary judgment if evidence must be weighed).

tive determination is made and that this purpose is decisive as to whether the evaluative determination is in nature an adjudicative-fact finding or a premise-fact decision.⁵⁰ For example,

50. Judge Becker commented in *Asbestos Litigation*: "The state-of-the-art defense decides not what the defendant or another party knew—a fact relating to a particular party—but what was knowable—a fact about the state of the world." *In re Asbestos Litigation*, 829 F.2d 1233, 1246 (3d Cir. 1987) (Becker, J., concurring), *cert. denied*, 108 S. Ct. 1586 (1988).

The distinction between facts about the particular case and facts about the state of the world is an underlying theme of the contrast between adjudicative and premise facts. Adjudicative facts are material specifically to the case at hand (case facts or discrete facts) and, in contrast, premise facts bear on the determination of what legal rule courts should apply to a specific case and other like cases generally (general facts).

Courts often use the term *general*, either alone as a modifier of *facts* or as part of a phrase describing facts that form the basis for a lawmaking decision. See, e.g., *Asbestos Litigation*, 829 F.2d at 1246 (Becker, J., concurring) (noting that "there were or may have been data generally available" concerning toxicity); *Menora v. Illinois High School Ass'n*, 683 F.2d 1030, 1036 (7th Cir. 1982) (describing legislative facts as "those general considerations that move a lawmaking or rulemaking body to adopt a rule, as distinct from the facts which determine whether the rule was correctly applied"), *cert. denied*, 459 U.S. 1156 (1983); see also *United Steelworkers v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987). The court in *United Steelworkers* upheld a preliminary injunction after considering "specific, undisputed fact[s]" and

add[ing] general facts that either are commonly believed or which courts have specifically held sufficient to show irreparable harm; such general facts as (1) most retired union members are not rich, (2) most live on fixed incomes, (3) many will get sick and need medical care, (4) medical care is expensive, (5) medical insurance is, therefore, a necessity, and (6) some retired workers may find it difficult to obtain medical insurance on their own while others can pay for it only out of money that they need for other necessities of life.

Id. It may be argued, however, that the opinion is compatible with taking judicial notice of undisputed adjudicative facts rather than treating the general facts as premise facts.

Often general-fact decisions are generalizations about human behavior or human institutions, including economic and social phenomena. General-fact decisions may concern other aspects of the broad context in which particular cases arise, however; they may be about laws of nature, for example.

Professor Harold Korn brings another illuminating perspective to our attention in his observations comparing law and the sciences, including social sciences. He notes that "[l]aw—whether statutory or judge-made—and the sciences both involve bodies of generalized, systematized, and transmissible knowledge." Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1101 (1966). An important difference, however, as Korn notes, is that law is candidly normative and social science is commonly aimed at being positive. *Id.* Korn also observes:

A further, and perhaps the most fundamental, source of difficulty in technical fact determination is that the law and the scientific knowledge to which it refers often serve different purposes. Concerned with ordering men's conduct in accordance with certain standards, values, and societal goals, the legal system is a prescriptive and normative one dealing with the 'ought to be.' Much scientific knowledge,

courts treat the evaluative issue of whether the transportation of explosives on the highways is abnormally dangerous,⁵¹ therefore supporting strict liability, as a premise-fact question. In contrast, courts treat the evaluation of a driver's allegedly negligent conduct in driving a truck loaded with explosives at a speed barely within posted limits as an adjudicative-fact question.⁵² Another type of evaluative determination in tort law occurs in the large body of precedents bearing on whether juries or courts determine disputes over proximate cause. The legal decision making includes not only laying down rules and standards that are precedents but also establishing patterns of decision making in the evaluative determinations of whether the issue goes to the jury. These patterns serve as precedents that enable lawyers and lower courts to understand how a higher court will address the issue in a particular case.⁵³

In contrast with adjudicative-fact disputes, which usually involve historical facts and evaluative or interpretive facts,⁵⁴ premise-fact disputes less often concern historical facts; that is, disputes of premise fact do not usually focus on happenings, such as who did what, when, or where. Even when data are introduced,⁵⁵ the emphasis of the dispute is not on the uninterpreted multitude of historical facts that constitute the data but

on the other hand, is purely descriptive; its 'laws' seek not to control or judge the phenomena of the real world, but to describe and explain them in neutral terms.

Id. at 1093-94.

I understand Korn as recognizing that the use of the terms *generalized* and *systematized* to describe premise facts may mislead. We should bear in mind that it is the purpose for which the fact determination is to be used, not the inherent nature of the fact itself, that distinguishes between premise facts and adjudicative facts. It is true that facts material to lawmaking tend to be generalized and systematized—facts about the state of the world in which we live, rather than facts about specific events in history. Nevertheless, facts are in some instances less generalized even when they are material premises for a reasoned decision of an issue of law and, according to precedent and prevailing practice, are decided as premise facts.

51. See RESTATEMENT (SECOND) OF TORTS § 484 (1965). The term *ultrahazardous* served the same function in the first *Restatement*.

52. For discussion of these and other illustrations of evaluative determinations in tort law, see R. KEETON, VENTURING TO DO JUSTICE 64-77 (1969); R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 49-60, 88-90, 105-17 (1963); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 498-506 (1962).

53. See R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 49-60, 88-90, 105-17 (1963).

54. See *O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 687 (1st Cir. 1980) (involving determination of "substantial similarity" in copyright).

55. Cf. *EEOC v. Trabucco*, 791 F.2d 1, 2 (1st Cir. 1986) (describing starting

on disputed assertions about whether the data are complete and what interpretive inferences or evaluative determinations courts properly may derive from them.

Courts and legislatures also often use data as a basis for predicting the future. Such use demonstrates that a dispute over a prediction about the future that may serve as a factual premise for the decision of an issue of law may involve both predicted events (predictions about data) and predicted evaluative facts (inferences drawn from the data by extrapolation or otherwise). Thus, a court may base a legal decision in part on the decision of a dispute about evaluative inferences but also in part on the decision of a dispute about predicted future events, which, after they occur, may be organized and counted as data. In part, the decision of an issue of law may depend on predictions about the future—what will become, from the perspective of one even farther in the future, historical facts.⁵⁶

The essence of the distinction between premise facts and adjudicative facts is the purpose for which they are used in deciding a case. The illustrations considered above demonstrate that to determine whether a fact is an adjudicative fact or a premise fact we must probe more deeply than simply determining which among the four types of facts is involved in a dispute. We must answer the questions: "Why, under the reasoning of the court, is the disputed fact material to disposition of the case before the court, and is it, or was it, material to decision of an issue of law?"

4. Fourth Principle: An Authorized Decision Maker's Premises

*A decision maker who is authorized to decide an issue of law is authorized to decide any dispute of fact that is a premise for that decision maker's reasoned decision of the issue of law.*⁵⁷

point of stare decisis analysis as determination of "database" available to court).

56. For fear of confusion, however, perhaps we should resist the temptation to call them "future historical facts."

57. Expressing it another way, one may say that deciding the truth or falsity of asserted factual premises for a decision of law is a function of the same person or entity that is authorized to make the decision of law, if that person or entity concludes that resolving that dispute of fact is essential to the reasoned decision of the issue of law. Judge Becker underscores this point in his opinion in *Asbestos Litigation*, calling attention to a relevant passage in an opinion of Justice Holmes:

As Justice Holmes recognized long ago, "the court may ascertain as it

In each problem case a court is the decision maker. The court and not the jury decides the disputed premise facts, even if a jury is to decide disputed adjudicative facts. The trial court decides disputed facts that are premises for its decision of a legal issue. On appeal, the appellate court has authority to decide disputed facts that are premises for its decision of a legal issue rather than deferring to the trial court's decision; that is, the appellate court may decide by a no-deference standard, rather than deferring to the trial court decision unless it is clearly erroneous.⁵⁸ If the appellate court defers to a trial court determination of a premise fact, it does so by choice, not by reason of any limitation upon its authority.

In applying this Fourth Principle, one must be precise about the issue of law being decided. Thus, when a legislature enacts a statute on a particular subject and an appellate court subsequently rules on its constitutionality, in a broad sense the legislature and the appellate court are dealing with the same subject matter. The precise description of these two different entities' decision making, however, identifies different issues of law and different factual premises in their respective decisions.

sees fit any fact that is merely a ground for laying down a rule of law." *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548-49, 44 S. Ct. 405, 406, 68 L.Ed. 841 (1924). To forbid such recognition would force courts to fashion laws without reference to reality.

In re Asbestos Litigation, 829 F.2d 1233, 1247 (3d Cir. 1987) (Becker, J., concurring), *cert. denied*, 108 S. Ct. 1586 (1988).

Perhaps the phrase *as it sees fit* is an overstatement of the court's freedom. Precedents that were developed during the more than 60 years since Justice Holmes made this statement in 1924 and during the more than 100 years since he made a similar statement in 1881, *see* note 100 and accompanying text, *infra*, have established some constraints. The point is that the person or entity that decides the issue of law also is authorized to decide any dispute over an asserted fact that is a premise for its reasoned decision of the issue of law.

It may help to avoid confusion to underscore the point that it is decisions *of* law and not all decisions *under* law to which this principle applies. Many decisions under law are decisions of disputes about adjudicative facts that determine whether a particular case is within the scope of an identified legal rule—whether, for example, the defendant did or did not enter the intersection when the light was red, thus invoking the statute forbidding such conduct.

58. I am indebted to Professor Maurice Rosenberg for the suggestion that the appellate court action be described as decision by a no-deference standard rather than decision *de novo* (which suggests deciding on an entirely new record rather than merely using an expanded record by turning to additional sources, if the court chooses to do so). Professor Rosenberg would also emphasize the point that the appellate court is not bound to apply a no-deference standard. The court may choose to apply a more flexible standard that involves some degree of deference. *Cf. Miller v. Fenton*, 474 U.S. 104, 112-18 (1985) (discussed in note 166, and notes 169-73 and accompanying text, *infra*).

When a legislature considers a proposed anti-balance-billing statute, as in Case Three, it has before it a whole array of issues of law that the legislature will decide one way if it enacts the statute and another way, by default or otherwise, if it does not. The legislature may, as a premise for its decision making, decide a factual dispute about whether enactment of the statute will reduce costs without reducing access of the elderly to medical care. When physicians challenge the statute in an appellate court as allegedly in conflict with the Medicare Act and in violation of the supremacy clause, the issue of law the appellate court considers is not whether it should cast a vote for such a statute—the set of issues legislators considered—but whether it should hold the statute unconstitutional.⁵⁹

Another contrast is illustrative. A dispute about whether a particular physician billed a particular patient for a balance after collecting Medicare payments is an adjudicative-fact dispute if the physician is charged in a disciplinary hearing with violating the statute. In contrast, a dispute about whether the anti-balance-billing statute will reduce access to medical care for the elderly and thus conflict with the Medicare Act in violation of the supremacy clause is a dispute that is material to the decision of an issue of law. The appellate court will make a decision that is precedent applicable to the constitutionality of the particular state statute before the court and perhaps more widely by analogy.

The Fourth Principle also permits the appellate court, as the authorized decision maker for the issue of law, to decide any disputed question of fact that is a premise for its reasoned decision of the issue. The appellate court makes such a decision without any obligation or practice of deference to a trial court decision, even though it might view the trial court's decision as not clearly erroneous. The appellate court's role in deciding this type of fact is thus in sharp contrast with its role in reviewing findings of adjudicative facts made in trial courts, either by

59. Whatever the court's decision may be, whether it declares the statute unconstitutional or upholds it, the decision is precedent. It is law. This is true even when the court has merely applied well-settled precedent, rather than deciding the issue as one of first impression. In the former circumstance, the decision of the court is a very minimal act of lawmaking, if lawmaking at all. In ordinary usage this is more often described as applying settled law than as making law. It is nevertheless a decision of an issue of law—the constitutionality of a specific statute, when challenged on a particular ground or grounds in a particular case.

juries or by trial judges.⁶⁰

The same analysis applies when an issue of constitutionality is before a trial court. When a trial court must rule on constitutionality, it must also decide any factual dispute essential to its reasoned decision of the issue of constitutionality. The trial court's decision of the premise fact has exactly the same force as its decision of the law and is subject to being set aside on appeal as readily as is its decision on a question of law.

If the trial court misconceived the issue of law and thought it necessary to decide a specified fact dispute as a premise for its decision, the trial court properly addressed and decided that fact dispute,⁶¹ even though its decision is overturned because the appellate court re-frames the legal issue and determines that it need not decide the fact dispute. The appellate court deciding an issue of law previously considered by the trial court is not only authorized but obligated to address any premise fact that serves as part of the basis for its decision of the issue of law, and in general will be likely to apply a no-deference standard in making its decision.

Circumstances may arise, however, in which one decision

60. This description of the appellate court's role is consistent with the First Circuit's decision in *Massachusetts Medical Soc'y v. Dukakis*, 815 F.2d 790 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 229 (1987). Although the First Circuit did not adopt my identification of the issue as a nonadjudicative, or premise, fact question, one may infer that it did not apply the rules of law and practice that ordinarily apply to adjudicative facts. It is true that the First Circuit based at least part of its reasoning on evaluation of the evidence offered in the trial court. The court stated that "[w]e are similarly unconvinced by MMS's efforts to prove factually in the district court that the Massachusetts balance billing ban will create an 'obstacle' to providing needy patients with access to care." *Id.* at 795. Courts are free, however, though not required, to receive and consider on-the-record testimonial evidence, as well as extra-record evidence, bearing on premise-fact disputes. See *infra* text accompanying notes 90-93. Bearing this point in mind, one may read the First Circuit opinion as treating the dispute as one over premise facts. For example, rather than applying the "not clearly erroneous" standard of FED. R. CIV. P. Rule 52(a), see *supra* note 17, the First Circuit examined the record, the briefs, and, one may infer, common knowledge of human behavior not recited in the record as a basis for saying later in the paragraph in which the foregoing passage appears, "[l]ike the district court, we cannot say that MMS has proved that the ban will hurt Massachusetts Medicare patients more than it will help them." *Massachusetts Medical Soc'y*, 815 F.2d at 795 (concluding that state statute conditioning licensure of person on that person's own agreement not to charge Medicare patients more than "reasonable charge" established by Department of Health and Human Services is not preempted by Medicare Act, which permits such charges).

61. It was *authorized* to do so in the sense that word is used in the statement of the Fourth Principle.

maker may properly accept as one of its premises another decision maker's authorized determination of disputable facts, rather than making a no-deference determination. This occurs when a court applies a rational-basis standard for determining the constitutionality of legislation.⁶²

The Fourth Principle, applied to an illustration in which the decision makers are a state court of last resort, a federal trial court, and a federal appellate court, demonstrates potentially conflicting federal-state interests. Consider Case One, the asbestosis case, as viewed by the defendants in federal court after a state court of last resort adopted a rule denying manufacturers of asbestos and asbestos products the state-of-the-art defense to strict liability claims. Defendants asked federal courts to hold that this rule of state tort law violated rights guaranteed to them by the fourteenth amendment to the United States Constitution.

According to one position asserted in this federal litigation, the answer to a fact dispute about whether asbestos hazards were knowable under the state of the art at a given time was a premise for the legal reasoning of the state supreme court. In contrast, the disputed premise fact before the federal court must be formulated differently. For example, plaintiffs contended that the federal court should decide in their favor⁶³ if the federal court decides that the evidence bearing on the issue-of-state-law fact dispute provided a rational basis for the state supreme court's decision; that is, the federal court should, in these circumstances, decide for the plaintiffs against the defendants' equal-protection challenge regardless of how the federal court itself might have decided the issue-of-state-law fact.

There is thus a contrast between a federal appellate court reviewing the decision of a federal trial court and a federal appellate court (or a federal trial court) considering a constitutional challenge to a state court's decision of an issue-of-state-law fact. In the former instance, the federal appellate court owes no deference to the trial court decision of the issue-of-federal-law fact dispute. In the latter instance, however, both federal courts must defer to the state court's decision and review only to decide whether the evidence available to the state court satisfied the rational-basis standard.

62. See Twelfth Principle, *infra* text accompanying notes 122-38.

63. Plaintiffs argued for the validity of the state law rule in the face of the equal protection challenge.

5. Fifth Principle: Stare Decisis, Claim Preclusion, and Issue Preclusion

*A decision of a dispute over a premise fact has a binding force analogous to that of precedent under the law of stare decisis and not merely a force analogous to that of a finding of adjudicative fact under the law of issue preclusion or claim preclusion (collateral estoppel or res judicata).*⁶⁴

An adjudicative-fact finding by a jury in one case, for example, has no force as precedent and no effect in subsequent cases except to the extent determined by the law of claim preclusion and issue preclusion.⁶⁵ In contrast, a premise-fact decision has force analogous to that of the decision of law for which it served as a premise fact, and it is doubtful whether it has any force at all under doctrines of claim preclusion and issue preclusion.⁶⁶ To the extent that it has force by reason of a court's using it as a premise fact, it is not subject to challenge except as part of the challenge to the precedent for which it served as a premise. A contention that its factual premises are false cannot evade the precedent. Rather, one may assert the falsity of the premises in support of the contention that a court should overrule the precedent.

The law of res judicata, including limitations on the applicability of claim preclusion and issue preclusion, does not apply to this effect of premise facts, which is analogous to stare decisis effect.⁶⁷ A decision of a premise fact *does* have force generally in later cases. A court decision of a fact as a premise for

64. In explaining this principle, I will discuss comparisons between premise facts and adjudicative facts in several different contexts.

65. The generally accepted law of claim preclusion and issue preclusion is outlined in RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-29 (1982).

66. I leave unexplored in this Article any arguments that might be made for holding that a premise-fact determination in one case has, for example, issue-preclusive effect in other legal proceedings between the same parties, so as to affect a later court determination of either (1) an adjudicative fact or (2) a premise fact bearing upon a different legal issue from that for which the earlier decision treated that fact as a premise fact. Expressed another way, I do not consider in this Article whether a premise-fact determination has any effect (by issue preclusion or otherwise) beyond its effect as an essential part of the reasoned decision of the issue of law for which it served as a premise fact. Among the problems to be considered is whether giving issue-preclusive effect in relation to an adjudicative fact in other litigation between the parties would be inconsistent with a right to jury trial.

67. Cf. *In re Asbestos Litigation*, 829 F.2d 1233, 1248-51 (3d Cir. 1987) (Becker, J., concurring) (stating that legislative fact finding need not conform to collateral estoppel requirements to provide due process), *cert. denied*, 108 S. Ct. 1586 (1988).

deciding an issue of law in a particular way is effective not only in the case at hand, subject to review in higher courts, but also in future cases in which the precedent for which it served as a premise is invoked. Such facts aptly may be called *precedential* facts.⁶⁸ Regardless of the terminology used to describe them, courts give the facts precedential effect.⁶⁹ A premise-fact decision that a legislature makes and then uses as a basis for enacting a statute (a legislative fact) is reviewable in courts only, if at all, under standards developed in constitutional litigation.⁷⁰

68. See *Massachusetts Medical Soc'y v. Dukakis*, 637 F. Supp. 684, 689 (D. Mass.), *aff'd*, 815 F.2d 790 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 229 (1987).

69. See, e.g., *United States v. Lynch*, 792 F.2d 269, 271 (1st Cir. 1986) (invoking as precedent earlier decision that persons 18 to 34 years old "do not sufficiently blend into one 'cognizable group' so as to permit the making of a prima facie case of juror discrimination simply by showing that the venire underrepresents persons falling within the broad spectrum of those ages"); *EEOC v. Trabucco*, 791 F.2d 1, 2 (1st Cir. 1986). The *Trabucco* court treated a request for "redetermination of an issue raised, considered, and decided in a prior case where the presentation of evidence has been 'one-sided,' with no proffer of rebuttal expert testimony" as raising a *stare decisis* issue; and concluded that "*stare decisis* still applies and, on this record, forecloses redetermination" when plaintiff challenged a Massachusetts statutory mandatory retirement age of 50 for all members of the uniformed branch of the state police as not being "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of [the branch's] business". *Id.* A recent opinion of the Seventh Circuit, written by Judge Easterbrook, noted that a class member who opts out of a class action may not invoke issue preclusion to bind the defendant in a separate action. Significantly, Judge Easterbrook added:

To say that issue preclusion does not apply [is not to end the matter]. Preclusion is not an all-or-nothing matter; there are degrees. The doctrine of *stare decisis* supplies some of the lesser degrees. A decision by the Supreme Court that the Agreement violates the Sherman Act would be authoritative A decision by the Fourth Circuit is not authoritative in district courts of the Seventh Circuit, but it is entitled to respect both for its persuasive power and because it involves the same facts. . . .

....

. . . We therefore approach the merits of this case with a strong presumption in favor of the Fourth Circuit's disposition. . . .

The Fourth Circuit held that the 1% contribution requirement is price-fixing, a per se violation of the antitrust laws. . . .

....

. . . The agreement alleged in this case affected 100% of an economically significant market; it was a naked agreement on price There is no escape from the conclusion of the Fourth Circuit that the agreement is unlawful per se.

Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358, 367-71 (7th Cir. 1987); see also *Remarks of the Honorable Robert E. Keeton*, 38 S.C.L. Rev. 535, 536-37, 538-39 (1987).

70. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106, 109 (1949) (holding that for purposes of due process challenge to state regulation

As Judge Becker's concurring opinion in *Asbestos Litigation*⁷¹ observes, once the the New Jersey Supreme Court made the determination of knowability of asbestos hazards the basis for deciding the legal issue of whether a state-of-the-art defense is available in asbestos cases, the court "was also justified in precluding the relitigation of the factual basis of the state-of-the-art defense."⁷²

Legislative-fact determinations⁷³ by a legislature as a basis for enacting a statute and precedential-fact determinations⁷⁴ by a court as a basis for deciding an issue of law are a part of the body of decisions that have a force at least analogous to, if not the same as, the force of law. Ordinarily it is the legal rule itself, rather than the factual determinations, that we speak of as law. Even so, a court is not free to hold a legal rule inapplicable to the case at hand because the court disagrees with the premise-fact decisions on which that rule was explicitly or implicitly based. Instead, a court must apply the legal rule unless the court determines that the rule is to be universally abrogated, not just disregarded in the case at hand. A court may abrogate a rule by holding a statute unconstitutional and a court may overrule its own precedents. If, for example, a court of last resort determines that the factual premises of a precedent are incorrect, either because circumstances have changed or because advances in knowledge have revealed error, the court may overrule the precedent.⁷⁵

court will not itself weigh evidence to determine wisdom of regulation but will defer to judgment of local authorities unless that judgment is shown to be "palpably false"); see also Twelfth Principle, *infra* text accompanying notes 122-38.

71. 829 F.2d 1233 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1586 (1988).

72. *Id.* at 1248 (Becker, J., concurring) (footnote omitted) (citing *Forté Towers, Inc. v. City of Miami Beach*, 360 So. 2d 81, 82 (Fla. Dist. Ct. App. 1978) (precluding relitigation of factual predicate), *cert. denied*, 370 So. 2d 459 (Fla. 1979)).

A pair of perceptive academic commentators, focusing primarily on determinations developed through social science methodology but apparently intending to apply more broadly to all of the kinds of facts that I refer to as premise facts, have observed that determinations of these kinds are "used to create a legal rule," are "more analogous to 'law' than to 'fact,' and hence should be treated much as courts treat legal precedent." Monahan & Walker, *supra* note 22, at 478.

73. Such determinations are decisions of premise-fact disputes.

74. Such determinations are decisions of premise facts.

75. *Cf.* *United States v. Lynch*, 792 F.2d 269, 271 (1st Cir. 1986) (recognizing that "conditions in our nation, and in the world, change over time," but concluding that none of the evidence presented in case before court "undercuts our holding in [a previous case] that persons 18 to 34 do not sufficiently

B. PREVAILING PRACTICES IN DECIDING PREMISE FACTS

1. Sixth Principle: Inapplicability of Formal Rules Regarding Judicial Notice

Formal rules regarding judicial notice of adjudicative facts do not apply to premise facts. In legal systems applying the Federal Rules of Evidence and state rules or statutes with identical or closely analogous provisions, a court may take judicial notice⁷⁶ of adjudicative facts "not subject to reasonable dispute."⁷⁷ A court may, but is not required to, follow analogous procedures as to premise facts that are not subject to reasonable dispute.

It is sometimes said that in the federal system, judicial notice concerns adjudicative facts only and does not apply to legislative facts or other kinds of premise facts.⁷⁸ The advisory committee for the *Federal Rules of Evidence*, however, uses *judicial notice* in a broader sense, despite noting that Rule 201 is the only formal rule on the subject.⁷⁹ A broader sense also characterized the usage that was common before the Supreme Court and Congress adopted the *Federal Rules of Evidence*.⁸⁰ The advisory committee comments:

This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of "adjudicative facts." No rule deals

blend into one 'cognizable group' so as to permit the making of a prima facie case of juror discrimination simply by showing that the venire under-represents persons falling within the broad spectrum of those ages").

76. Some confusion arises from the use of *judicial notice* in quite different senses, often without either explicit statement of the meaning intended or clear indications from the context.

77. FED. R. EVID. 201(b).

78. The only federal evidence rule on the subject of judicial notice is Rule 201. FED. R. EVID. 201 advisory committee's note, subdivision (a).

79. For the sake of clarity, I do not use *judicial notice* in a broad sense that encompasses reasonably disputable facts. Instead, I confine my use of this phrase to instances in which a fact is not subject to reasonable dispute. Again, however, I emphasize that I do this as a choice of expression. Many others have preferred to use *judicial notice* in a sense broadly applicable to all determinations of lawmaking facts, and some have continued to prefer the broader usage even after adoption of the *Federal Rules of Evidence* with their narrower focus upon judicial notice of adjudicative facts. *See, e.g.*, *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1327-29 (E.D.N.Y. 1981) (Weinstein, C.J.) (examining use of judicial notice where jurisdiction is sought over multinational firm).

80. *See, e.g.*, J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 308-09 (1898); 9 J. WIGMORE, EVIDENCE § 2583, at 580, 585 (3d ed. 1940); Davis, *Judicial Notice*, 1969 LAW & SOC. ORD. 513, 525-27; Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. FLA. L. REV. 723, 740-41 (1976).

with judicial notice of "legislative" facts. Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.⁸¹

Nevertheless, whenever Rule 201 or a similar state rule applies, the formal rule of evidence regarding judicial notice applies only to adjudicative facts and is inapplicable to premise facts.⁸² Rule 201 limits judicial notice to facts "not subject to reasonable dispute."⁸³ Thus, in courts where Federal Rule 201 or a similar state rule applies, if a court uses judicial notice in relation to premise facts, the term must be understood to have a more expanded meaning in relation to premise facts than in relation to adjudicative facts or else the term applies to only a very small percentage of premise facts. This is true because premise facts are typically in sharp dispute, as controversies over legislation illustrate. This applies to lawmaking by courts as well as to lawmaking by legislatures.⁸⁴

Courts sometimes use judicial notice, however, in a different sense than that suggested by the formal rule. Courts sometimes use the term to indicate that the court determines some facts independently of evidence offered at trial—that is, on the basis of extra-record factual information. In this broad sense one may extend the phrase judicial notice to all premise-fact determinations. Such an extension of the terminology of judicial notice, however, does not justify extending the method of taking notice of disputed facts without allowing an opportunity for a contradictory showing in some form.

Whenever courts use judicial notice to decide disputed premise facts, they are constrained by obligations regarding method and process even though those obligations are ill-defined. For example, courts have an obligation to give a reasoned elaboration of the grounds for a decision.⁸⁵ This obligation is incompatible with taking judicial notice without explaining why a reasonably disputable fact issue is resolved in one way rather than another. Courts also have an obligation to

81. FED. R. EVID. 201 advisory committee's note, subdivision (a).

82. See generally 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15 (2d ed. 1980) (discussing role of adjudicative and legislative facts in agency and judicial decision making and role of judicial notice).

83. FED. R. EVID. 201(b).

84. Cf. Judge Becker's concurring opinion in *In re Asbestos Litigation*, 829 F.2d 1233, 1247 (3d Cir. 1987), cert. denied, 108 S. Ct. 1586 (1988) (citing Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 82 (1964)). The Davis article also was quoted in FED. R. EVID. 201 advisory committee's note, subdivision (a).

85. See Ninth Principle, *infra* text accompanying note 98.

give litigants notice and an opportunity for a hearing before making a final determination of reasonably disputable premise facts.⁸⁶

2. Seventh Principle: Inapplicability of Formal Rules of Evidence

In making adjudicative-fact findings, courts apply formal rules of evidence and may not base findings on evidence that is inadmissible under those rules.⁸⁷ In contrast, both trial and appellate courts, in making premise-fact decisions, are free to draw upon sources of knowledge not admissible under the formal rules of evidence that apply to adjudicative-fact finding.

There is little explicit authority that explains how the rules of evidence bear upon premise-fact decisions. An Eighth Circuit decision, however, supports the proposition that rules of evidence governing adjudicative-fact finding do not apply to deciding legislative facts.⁸⁸ The court held that trial court instructions requiring the jury to accept the judicially noticed facts were not erroneous because the federal rule declaring that the court must instruct the jury that it may, but is not required to, accept any judicially noticed fact does not apply to legislative facts.⁸⁹

The Seventh Principle also has implicit support in many other judicial opinions.⁹⁰ In relation to premise facts, courts may read books and articles and even listen to lectures.⁹¹ An appellate court is not confined to the record of evidence presented to the trial court. It may, for example, consider addi-

86. See Tenth Principle, *infra* text accompanying note 108.

87. Courts may base findings on inadmissible evidence, however, if the *Federal Rules of Evidence* provide an exception, as in Rule 104(a). See *infra* note 185.

88. *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (referring to taking "judicial notice" that cocaine hydrochloride is derived from coca leaves and is a schedule II controlled substance).

89. *Id.* The court referred to Rule 201(g), which states, in full, "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." FED. R. CRIM. P. 201(g).

90. Professors Monahan and Walker have marshalled a substantial array of instances in which reported judicial decisions have implied that courts need not restrict their determinations of legal issues to a basis in factual premises developed by methods consistent with the rules of evidence that apply to determinations of adjudicative fact. Monahan & Walker, *supra* note 22, at 481 nn.14 & 15, 485 n.25.

91. Some judges were invited to and attended this Lockhart Lecture. A court may not, however, listen to a lecture if it is designed to influence the decision of the court in a *particular* case before it.

tional sources referred to in appellate briefs and may conduct independent library research. The Supreme Court also has not confined itself to record evidence. In *Brown v. Board of Education*,⁹² for example, the Court did not limit itself to considering the record evidence bearing on the fundamental factual issues presented in the case.⁹³

Litigants may present testimonial evidence of expert witnesses on disputed premise-fact questions and trial courts may receive and consider such evidence. The parties need not offer such evidence, however, and trial courts are not bound to receive it, or having received it, are not bound to consider it as if it were presented in relation to an adjudicative-fact dispute.

Only a small percentage of cases involve premise-fact disputes. Most cases that involve factual disputes relate to adjudicative facts. Indeed, only a very small percentage of judicial opinions even take note of a distinction between adjudicative and other types of facts. Because of the small number of cases that involve premise facts and the fundamental differences between using facts as adjudicative facts and using them as premise facts, the rules of evidence and procedure fashioned for resolving adjudicative-fact disputes were not designed for and are not well suited for resolving premise-fact disputes. If a court uses a formal rule of evidence, the rule should be closely examined and its suitability reconsidered before it is used in resolving premise-fact disputes.

3. Eighth Principle: "Standing" Requirements

Standing requirements⁹⁴ applicable to adjudicative-fact disputes do not apply to premise-fact disputes. Any standing requirements or analogous limitations relating to premise-fact disputes are far less rigorous than those applying to adjudicative-fact disputes.

The key factual dispute between the parties in *Massachusetts Medical Society*, Case Three, was whether a statute would have the effect of restricting the elderly's access to medical

92. 347 U.S. 483 (1954).

93. See *id.* at 494 n.11 (citing articles discussing psychological and other effects of racial discrimination); see also *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (citing other cases in which "[t]he writings and studies of social science experts on legislative facts are . . . considered and cited by the Supreme Court with or without introduction into the record"); FED. R. EVID. 201 advisory committee's note.

94. Standing requirements define who may properly raise a particular issue.

care. In considering the central issue of that case, the court assumed that such a restriction would conflict with an important purpose of the Medicare Act: insuring the availability of medical care to the elderly.

A standing issue arose because it was the physicians who attempted to prove the detrimental effects of the statute on the health care of the elderly. Although the interests of physicians and elderly patients are in some respects compatible and reinforcing, in other respects there are serious conflicts of interest between physicians (who bill) and the class of elderly patients for whose benefit Medicare was enacted (and who must pay those bills). Moreover, two organizations whose stated purpose is the promotion of the interests of the elderly chose to intervene on the side of the defendants. Neither the trial court nor the court of appeals, however, invoked standing requirements to preclude any argument or proffer of evidence by either the plaintiffs or the intervenors.⁹⁵

A court may, and should, fashion less restrictive standing requirements or analogous limitations for premise-fact disputes than those applying to adjudicative-fact disputes. It may do so because the concern about limiting judicial decisions to cases or controversies that underlies standing requirements for adjudicative-fact decisions is much less likely to apply to premise-fact decisions. For example, when a court takes evidence offered by adversarial parties in relation to an adjudicative-fact dispute and makes findings based on the weight of that evidence, the requirements of standing plainly serve an important purpose. The underlying objective of standing requirements—assuring that a genuine case or controversy is before the court with the adverse interests adequately represented—is implicated. Thus, when a court considers evidence presented by opposing sides in accordance with the rules of evidence for the purpose of making a finding about an adjudicative fact, the Constitution and case law traditionally have set well-defined limits on who may present what proof and argument.⁹⁶ When, on the other hand, the court is considering premise facts—for example, the infor-

95. This is not to say, however, that the court recognized a right of the intervenors to proffer evidence or participate in oral argument. Those issues were deferred in the trial court and were never addressed, because the intervenors did not proffer evidence or oral argument as the case developed.

96. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 112 (1976) (requiring plaintiffs to allege "injury in fact" and to be "proper proponents" of the rights for which they bring suit); *Friedman v. Harold*, 638 F.2d 262, 265-87 (1st Cir. 1981) (applying *Singleton* two-part standing test).

mation on which it is to determine the constitutionality of a statute—it is less important that the court sharply define who may present what information and argument. Indeed, the court itself may go to reference books for enlightenment with respect to this kind of information.

There are compelling reasons that courts not only may, but should, fashion less-restrictive standing requirements for premise facts than for adjudicative facts. Because a decision of premise fact is a precedent, it has a more general effect, extending beyond the interests of the parties to the case before the court and other parties affected by claim preclusion or issue preclusion. It is both fair and appropriate that courts allow formal participation by interested persons who may aid in the premise-fact decision making without unduly interfering with the roles of advocates for the parties to the case before the court.

This is not to say, however, that courts should not invoke any standing requirements or analogous limitations. The amici who come forward are likely to be partisans of special interests.⁹⁷ They may aid a court substantially, especially in reducing risks that a court may be uninformed about implications of its decision, but a court should evaluate their submissions with awareness of interest and potential bias.

4. Ninth Principle: Reasoned Decisions and Explanations

A court deciding an issue of law has the dual obligation of reasoned decision making and candor about reasons; that is, a decision should be reasoned, and reasons should be disclosed. This dual obligation applies to decisions of premise facts and imposes constraints on methods of deciding disputes about premise facts.

The principle of reasoned elaboration of decisional grounds is one of general application in our legal system.⁹⁸ A number of distinguished judges and commentators, however, have described the freedom of courts to determine premise facts in

97. Judge Aldrich's comment in *Strasser v. Doorley*, 432 F.2d 567, 569 & n.2 (1st Cir. 1970), illustrates this point. Observing that "an amicus who argues facts should rarely be welcomed," he quoted from one adversary of an amicus position who warned: "That fellow isn't any more a friend of the court than I am." *Id.*

98. See H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 588-89 (tent. ed. 1958) (unpublished manuscript). I acknowledge that I am not able to marshal substantial explicit authority for applying this principle in the present context.

terms so broad as to appear incompatible with the Ninth Principle. For example, Justice Holmes stated that "the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law."⁹⁹ Justice Holmes had earlier advocated that judges use their conscience as a constraint, however, by arguing that when disputed facts are grounds for "decisions upon the law—grounds for legislation, so to speak—the judges may ascertain them in any way which satisfies their conscience."¹⁰⁰ Even if interpreted as meaning that judges are not answerable to any other institution, this passage implies that they should be constrained by what we might call judicial conscience rather than purely personal conscience.

Moreover, although this Ninth Principle imposes more rigorous constraints than a court's conscience, the principle is not novel. For example, the premise was implicitly and perhaps explicitly a basis for the defendant's argument in Case One, *Asbestos Litigation*, that "the New Jersey court's reasoning is *unarticulated* and irrational . . ."¹⁰¹ Judge Weis rejected the contention "in light of the steady evolution over the last twenty years of the doctrine of strict products liability in [New Jersey's] law."¹⁰² Significantly, Judge Weis chose to challenge the factual assertion that the New Jersey court had not articulated its reasoning rather than the implicit premise that courts generally have an obligation to articulate their reasons.

The principle of requiring elaboration of the grounds of decision is implicit in what many courts have said and done in addressing premise-fact disputes. This point is underscored by commentators who have undertaken a thoughtful evaluation of judicial performance in particular areas of the law.¹⁰³

99. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548-49 (1924). See also other broad descriptions of a court's freedom, discussed *supra* text accompanying notes 38-39, and *infra* text accompanying note 144. Nevertheless, it seems doubtful that this passage in Justice Holmes's opinion should be interpreted as supporting a wholly unrestrained freedom.

100. O.W. HOLMES, JR., *Lecture IV, Fraud, Malice, and Intent.—The Theory of Torts*, in *THE COMMON LAW* 151 (1881).

101. *In re Asbestos Litigation*, 829 F.2d 1233, 1244 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1586 (1988) (emphasis added).

102. *Id.*

103. Professor Kenneth Davis would very likely be more critical than I have been of what courts have thus far said and done in this respect. See, e.g., Davis, *Facts*, *supra* note 22, at 931. But in any event his many treatments of legislative-fact issues call attention to instances of judicial performance consistent with the views he advances. Those views, as I understand them, strongly support the principle of a judicial obligation of reasoned elaboration of grounds of decision of all legislative facts in the very broad sense he uses that

Judge Frank Coffin¹⁰⁴ calls attention to the critical significance of a court's choice of "[t]he level of generality on which a case is to be decided"¹⁰⁵ and the bearing this choice has on the sufficiency of the court's inquiry into legislative facts.¹⁰⁶ Judge Coffin notes:

If the case is one that should be decided on a very broad basis, I would not propose that the Court set itself up as a legislative factfinder or that it be equipped, as Kenneth Culp Davis has suggested, with its own enclave of fact researchers. I do wonder, however, if, in a balancing case where the decision is likely to be broad, the trial court from the beginning should not expect some expert evidence on the wider scene, and counsel on appeal should not be expected to submit something approaching the contemporary version of a Brandeis brief. In any event, a self-conscious effort should be made to gather a factual framework as commensurate as feasible with the scope of the issue decided.¹⁰⁷

Finally, the obligation of reasoned elaboration of the grounds of a premise-fact decision is implicit in even more fundamental ideas about the roles of judging in a system of government under law. A judge is obliged to apply not his or her own norms but the community's norms, as developed in authoritative sources that include, along with constitutions, statutes, and precedents, premise-fact determinations that have the force of precedent, as stated in the Fifth Principle.

5. Tenth Principle: Reasoned Choice of Method for Determining Premise Facts

*When there is no precedent regarding the method for deciding premise facts, the court has the dual obligation of reasoned decision making about method and disclosure of reasons.*¹⁰⁸

term (nearly, if not identical with, the scope of the term *premise facts* as I have used it). See also the thoughtful treatment of judicial notice of legislative as well as adjudicative facts in Note, *supra* note 80, at 740-58.

104. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16 (1988) (James Madison Lecture delivered at New York University School of Law in 1987).

105. *Id.* at 33.

106. *Id.* at 33-37.

107. *Id.* at 37 (footnotes omitted).

Another thoughtful commentator, formerly Judge and now Professor Peggy Davis, advances what she refers to as processes of "absorption" and "evaluation" of extra-record evidence used in deciding legislative facts. Davis, *Judicial Absorption of Legislative Facts*, *supra* note 22, at 1593-1604. Her proposals are surely compatible with an obligation of reasoned elaboration of the grounds of decision of all premise facts.

108. I acknowledge that I am not able to cite explicit authority for the

Deciding what a court's methods shall be in deciding premise facts is deciding a procedural issue of law.¹⁰⁹ Courts should develop a body of reasoned decisions concerning the legitimacy of using extra-record fact submissions, whether in the form of amicus submissions, invited or volunteered, in the form of Brandeis briefs¹¹⁰ submitted by the litigants, or in some other form.

An objection to Brandeis briefs is that "the data presented ought to be placed in the record and not left simply for the brief. If the data are presented for the record, there will be an opportunity for impeaching them and offering countervailing data."¹¹¹ In reported judicial opinions¹¹² and other writings¹¹³ of the last quarter century, one can find a number of examples of techniques devised for placing factual submissions "on the record" in a practical sense, even when the submissions are not formally received in evidence, as if the court were determining an adjudicative-fact dispute.¹¹⁴

General recognition of an obligation of reasoned decision making about methods of deciding disputed premise facts

Tenth Principle. For the present, until further developments occur—and I believe they will soon—I rest my submission on the challenge to you to consider whether you do not agree that this Tenth Principle is an appropriate extrapolation from the Ninth Principle, if not merely a corollary of the Ninth.

109. The obligations of reasoned decision making and candid explanation should apply to procedural issues of law as well as substantive issues of law.

110. More than a quarter of a century ago, Professor Paul Freund, commenting on the role of counsel in providing "data upon which the court may draw in deciding a case," remarked:

Probably the most notable contribution to the lawyer's technique in constitutional cases was the so-called Brandeis brief submitted in the Oregon hours of labor for women case. . . . This type of brief has been in fairly common use ever since. . . . It is one of the few inventions in legal technique that can be identified in a profession that is not notable for wandering off the beaten path. The invention has been widely and justly acclaimed. Yet it raises a number of very real problems, which I shall simply suggest.

P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 150-51 (Meridian ed. 1961) (footnote omitted).

111. *Id.* at 151.

112. The temptation to initiate research into the body of unreported examples is limited because examples not formally reported would be likely to be also examples not explicitly reasoned.

113. See, e.g., Rosenberg, *Improving the Courts' Ability to Absorb Scientific Information*, in *SCIENCE AND TECHNOLOGY ADVICE TO THE PRESIDENT, CONGRESS AND JUDICIARY* (W. Golden ed. 1988).

114. See discussion following the Ninth Principle, *supra* text accompanying notes 98-107 and *infra* text accompanying notes 143-46.

would contribute greatly both to improved decision making and to making decisions more accessible as precedents.

6. Eleventh Principle: Constraints on Method

Principles of fair process impose some constraints upon methods of judicial determination of premise facts. Beyond complying with those limited constraints, courts do, at least in some circumstances, fashion special procedures, which in their nature are self-imposed constraints, to provide opportunities for submissions by the parties bearing on factual hypotheses that are potentially decisive of an issue of law. Courts are especially likely to do so when the factual assertions are subject to reasonable dispute.

Professor Kenneth Davis urged that the drafters of Rule 201 of the *Federal Rules of Evidence* fill the gaps in existing law with a wide-ranging rule on judicial notice in the broadest sense, extending to legislative as well as adjudicative facts and to disputable as well as indisputable facts.¹¹⁵ The drafters did not adopt his proposal. Indeed, the advisory committee's note states that "[n]o rule deals with judicial notice of 'legislative' facts."¹¹⁶ One should not read this statement, however, as rejecting the extension of the terminology of *judicial notice* to legislative as well as adjudicative facts, nor as declaring that no constraints apply to methods of judicial determination of legislative facts. The advisors were merely saying that no rule stated in the *Federal Rules of Evidence* applies to legislative-fact determinations. Although Professor Davis's proposal was not received favorably, the gaps in the *Federal Rules of Evidence* and other sources of law to which one might turn for guidance do not constitute a void.

Many courts have adopted particular ways of providing opportunities for the parties to file written submissions, present oral arguments, and, sometimes, to present evidence without invoking all the constraints incident to the trial of disputed adjudicative facts.¹¹⁷ The principal difficulty one encounters at present in finding and comparing all these instances of choice of method is, more often than not, that the court has taken action without making a conscious, reasoned choice—without re-

115. Davis, *Judicial Notice*, 1969 LAW & SOC. ORD. 513, 530-32.

116. FED. R. EVID. 201 advisory committee's note, subdivision (a).

117. See, e.g., Davis, *Judicial Absorption of Legislative Facts*, *supra* note 22, at 1593-1604.

lating the specific choice to some guiding principle or rule.¹¹⁸ Indeed, the choice of method for fact determination often has occurred, without even explicit acknowledgment that something other than adjudicative-fact finding was occurring.¹¹⁹

There is no reason for declining to use the common-law method of reasoned explanation of decisions and growth of law through precedents, not only in developing substantive law but also in developing rules of procedural law—and, in particular, rules regarding how courts go about deciding disputed premise facts. An extraordinarily general standard of constraint such as fair process or, in Professor Davis's formulation, "maximum of convenience that is consistent with procedural fairness,"¹²⁰ leaves greater discretion to individual decision makers than is needed and, correspondingly, less guidance than is desirable.

In a substantial number of opinions, courts have explicitly considered methods for permitting interested persons to participate in the process of informing the court or for presenting oral or written submissions responding to a court's tentative determination.¹²¹ Thus, courts have developed ways of placing data, expert opinions, and other materials they use in deciding premise facts on the record. One may continue to view materials re-

118. *Cf. id.* at 1600-01 (calling for clarity about need for judicial lawmaking and for rigorous attention to limitations that should surround it).

119. See, for example, an array of instances recited in Davis, *Facts, supra* note 22. This is the most underdeveloped area of the law of deciding premise-fact disputes. *Cf. Davis, Judicial Absorption of Legislative Facts, supra* note 108, at 1593-1604 (describing processes of absorption and evaluation of legislative facts). Professor Peggy Davis observes that courts should be sensitive to the interests and capabilities of the parties to develop evidence bearing upon disputed legislative facts, including resource disparities and their effect on the evidence-gathering process. *Id.* at 1599.

120. Davis, *supra* note 115, at 531.

121. See, e.g., *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1328-29 (E.D.N.Y. 1981). In *Bulova Watch*, Chief Judge Weinstein stated:

In view of the extensive judicial notice taken, based partly upon the court's own research, the court issued a preliminary memorandum and invited the parties to be heard on the "propriety of taking judicial notice and the tenor of the matter noticed" upon motion made within ten days. This procedure complies with the spirit of Rule 201(e) of the Federal Rules of Evidence reading as follows:

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Inviting parties to participate in such ongoing colloquy has the advantage of reducing the possibility of egregious errors by the court and increases the probability that the parties may believe they were fairly treated, even if some of them are dissatisfied with the result.

ceived and considered in this way as extra-record evidence, because the use of these materials is not limited by rules of admissibility applied to adjudicative-fact findings. Nevertheless, placing such materials on the record contributes, in a broader sense, both to regularity in process and wisdom in decision making.

Id.

In *O'Hanlon v. Hartford Accident & Indem. Co.*, 457 F. Supp. 961 (D. Del. 1978), Judge Stapleton wrote:

The sole question now before the Court is whether Section 3902 of Title 18 of the Delaware Code, pertaining to uninsured motorist insurance, applies to an excess liability insurance policy which, up to a limit of \$1,000,000, insures the policy holder, *inter alia*, for bodily injury, death and property damage liability to a third party in excess of the \$100,000/\$300,000 retained limits of primary coverage. This issue was raised earlier on cross-motions for summary judgment. Although there was no dispute at that time regarding any relevant adjudicative facts, I nevertheless concluded that disposition of this issue should await a fuller development of the record. An evidentiary hearing was subsequently held at which the parties were afforded the opportunity to present any evidence which might shed light on the "legislative facts" surrounding the enactment of Section 3902.

Legislative facts are "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge . . . or in the enactment of a legislative body." Advisory Committee Notes to Federal Rule of Evidence 201. The Federal Rules of Evidence prescribe no procedure by which courts are to go about receiving information regarding legislative facts, but the approach discussed there "leave[s] open the possibility of introducing evidence through regular channels in appropriate situations." Advisory Committee Notes to Federal Rule of Evidence 201.

Courts regularly and inevitably engage in findings of legislative facts. While these facts are not normally developed through the presentation of evidence, there are instances when access to the pertinent data is most appropriately received through live testimony presented by the parties. This is one of those cases.

When a court is attempting to ascertain information relating to the marketing practices of an industry at a point in time, and to draw inferences from those practices regarding the intent of the legislature in fashioning legislation, the relevant data is most readily available through witnesses familiar with those practices. Those witnesses not only can provide information through direct examination, but are also available for cross-examination and to answer any inquiries which the Court might have. For these reasons, I agree that "[o]nce the court decides to advise itself in order to make new law, it ought not add to the risk of a poor decision by denying itself whatever help on the facts it can with propriety obtain." 1 Weinstein and Berger, *Weinstein's Evidence* (1977 ed.), [para.] 2000[03], p. 200-16.

The hearing held in this case fulfilled its purpose. As the remainder of this Opinion will demonstrate, the evidence of legislative facts submitted at that time was of substantial assistance in understanding and resolving the issue before the Court.

O'Hanlon, 457 F. Supp. at 962-63 (footnotes omitted).

7. Twelfth Principle: Reconsideration and Review of
Premise-Fact Determinations

Standards for reconsideration and review of premise-fact determinations vary significantly from the standards applying to reconsideration and review of adjudicative-fact findings.

a. *Effect in Higher Courts of Trial Court Determinations of Fact*

(1) Characteristics of Determinations of Fact in Jury Trials

In a jury trial, adjudicative-fact findings by the jury on issues as to which, under the evidence, reasonable persons could differ are binding on the parties and cannot be set aside, either by the trial court or on appeal, merely because a court would find differently on the evidence.¹²²

In contrast, premise-fact disputes are not submitted to a jury. The judge decides such disputes in both jury and nonjury trials.¹²³ On appeal, reconsideration of premise facts is like appellate reconsideration of the trial court's legal rulings. It is very different from review of adjudicative-fact findings.

(2) Characteristics of Determinations of Fact
in Nonjury Proceedings

A trial judge's adjudicative-fact findings in a federal nonjury trial are reviewable under the standard prescribed in the *Federal Rules of Civil Procedure* and are set aside on appeal only if "clearly erroneous."¹²⁴ This proposition is amply supported by precedent.¹²⁵

In contrast, with respect to premise-fact decisions, higher courts owe no deference to a trial court and may make their own determinations of such facts. This conclusion is implicit in the United States Supreme Court's decision concerning the effects of "death qualification" of jurors during voir dire on the impartiality of the trial jury in the guilt phase of a capital murder trial.¹²⁶ Although the criminal trial itself was a jury trial,

122. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 95, at 473 (3d ed. 1976).

123. This conclusion is implicit in decisions such as those of the New Jersey Supreme Court in the asbestos cases. See the analysis of the New Jersey decisions in *In re Asbestos Litigation*, 829 F.2d 1233, 1235-45 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1586 (1988).

124. FED. R. CIV. P. 52(a).

125. See, e.g., *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

126. See *Lockhart v. McCree*, 476 U.S. 162, 178-79 (1986).

the issue regarding death qualification of jurors was not subject to jury trial. The court determined the issue in nonjury proceedings. The defendant argued that the factual findings of the district court and the Eighth Circuit on the effects of death qualification were reviewable by the Supreme Court only under the clearly erroneous standard set forth in the *Federal Rules of Civil Procedure*.¹²⁷ The Supreme Court answered:

Because we do not ultimately base our decision today on the invalidity of the lower courts' "factual" findings, we need not decide the "standard of review" issue. We are far from persuaded, however, that the "clearly erroneous" standard of Rule 52(a) applies to the kind of "legislative" facts at issue here. The difficulty with applying such a standard to "legislative" facts is evidenced here by the fact that at least one other Court of Appeals, reviewing the same social science studies as introduced by McCree, has reached a conclusion contrary to that of the Eighth Circuit.¹²⁸

A recent Seventh Circuit decision also indicates that higher courts owe no deference to a trial court's decisions on premise facts.¹²⁹ The Seventh Circuit reversed a district court's factual determination that insecurely fastened yarmulkes do not pose a substantial hazard to basketball players.¹³⁰

The Fifth Circuit has also discussed a number of the reasons underlying the conclusion that premise-fact decisions should not be subject to the clearly-erroneous standard. In *Dunagin v. City of Oxford, Mississippi*,¹³¹ the court stated that a question about which premise facts are relevant "is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit

127. The defendant referred to FED. R. CIV. P. 52(a).

128. *Lockhart*, 476 U.S. at 168 n.3 (citations omitted).

129. *Menora v. Illinois High School Ass'n*, 683 F.2d 1030 (7th Cir. 1982).

130. *Id.* at 1036.

We are accused of having failed to apply the clearly-erroneous rule to the district court's finding that insecurely fastened yarmulkes do not pose a substantial hazard to basketball players. That rule, however, is designed for the review of findings of "historical," not "legislative," fact. Legislative facts are those general considerations that move a lawmaking or rulemaking body to adopt a rule, as distinct from the facts which determine whether the rule was correctly applied. There is no question that insecurely fastened yarmulkes are within the scope of the Illinois High School Association's no-headwear rule; the question is whether the Association's concern with safety is substantial enough to support the rule as so interpreted; and a fact that goes to the reasonableness of a rule or other enactment is a classic example of a legislative fact, to which as we have said the clearly-erroneous standard does not apply.

Id.

131. 718 F.2d 738 (5th Cir. 1983) (en banc).

to some partial empirical solution but is likely to remain subject to opinion and reasoning.”¹³² Thus, higher courts do not give decisions on “social factors and happenings” the same deference that they give to findings on discrete occurrences between particular parties that are material only to issues of fact between those parties.¹³³

Substantial support therefore exists in both precedent and principle for the proposition that higher courts are free to consider disputes over premise facts on a no-deference basis. They are not obliged to accept all but clearly erroneous decisions of premise facts by the trial court.

b. *Effect of a Legislature's Explicit or Implicit Fact Determinations and the Standards of Scrutiny*

Neither a trial court nor an appellate court may set aside or disregard legislative determinations of fact that were the basis for a statute's enactment, except to the extent that the court determines that, as a matter of constitutional law, the legislature's reliance on those asserted facts cannot withstand scrutiny.¹³⁴

Consider a municipality's enactment of a horse-and-buggy ordinance, prohibiting a person from sounding an automobile horn within fifty feet of a horse and buggy. The implicit, if not explicit, factual premises are: people will come into town by horse and buggy (a prediction about future events) and safety interests outweigh the automobile owners' interest in attracting attention by the use of a horn (a predictive-evaluative-fact determination). Fifty years later, any reasonably prudent observer would say the facts have changed. Who should determine whether the predictive-evaluative-fact determination on which the legislature originally based the ordinance shall be changed? Should only the legislature be permitted to make a change, or may a court properly make the change under the ru-

132. *Id.* at 748 n.8 (plurality op.).

133. The *Dunagin* plurality opinion also implicitly noted the special role of the appellate courts in resolving issues of constitutional law. That role would be significantly eroded if the higher courts' determinations were made to “hinge on the views of social scientists who testify as experts at trial.” *Id.*; see also *Miller v. Fenton*, 474 U.S. 104, 112-18 (1985) (adhering to precedent establishing that “voluntariness” of confession is matter for independent federal determination).

134. See *Railway Express v. New York*, 336 U.S. 106, 109 (1949); see also *Dunagin*, 718 F.2d at 748 n.8 (“If the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact.”).

bric of *desuetude*¹³⁵ or on some other theory?¹³⁶

Determining whether a statute or rule will pass constitutional muster in court does not depend on whether the factual premises¹³⁷ are correct. The determination may depend, however, on whether the person or legal entity that made the premise-fact decisions was authorized to do so, and then on whether enough evidence was (or is) available to make the premise-fact decisions supportable under the applicable standard of scrutiny.¹³⁸

Moreover, once a statute or rule has survived scrutiny and review under a constitutional attack or a court decision has established some precedent, the durability of that statute, rule, or precedent—its ability to withstand demands for abrogation, limitation, or modification—depends in part on the continuing validity, or continued accuracy, of the factual premises on which the lawmaking decision was based.

V. THE LAW OF PREMISE FACTS: ITS PRACTICAL USE TO LAWYERS AND JUDGES

Settled law about *how* disputes over premise facts are resolved has revealed more about what is not required¹³⁹ than about what is either required or is at least appropriate and useful. Rules of evidence do not apply. Constraints on appellate rejection of trial-court fact decisions do not apply. Appellate and trial courts are not restricted to the record of evidence presented by the parties. Nevertheless, judicial decisions and other sources of authority do provide more affirmative gui-

135. Desuetude is a doctrine of questionable applicability in American law. See *United States v. Elliott*, 266 F. Supp. 318, 325-26 (S.D.N.Y. 1967) (comparing civil and common-law traditions and holding that nonuse alone does not abrogate statute).

136. Compare G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 81-181 (1982), with F. COFFIN, THE WAYS OF A JUDGE 193-249 (1980) and Coffin, Book Review, 91 YALE L.J. 827, 841 (1982) (reviewing G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES).

137. The underlying factual premises of a statute are sometimes formally stated and sometimes tacitly assumed.

138. The varied standards of scrutiny or review have commanded the attention of many courts and commentators. The relationship between these standards and principles regarding premise-fact determinations is a subject of very substantial scope, which is not developed in this Article.

139. The Seventh and Eighth Principles, for example, emphasize well-established, negative procedural consequences of identifying a dispute of fact as a dispute over a premise fact; specifically, the rules of evidence and standing fashioned for adjudicative-fact disputes do not apply. Such rules may be used to suggest ways of proceeding, but they are not firm constraints.

dance. For this body of authority to be useful, it must be accessible when needed, and bench and bar must recognize the need.

Because we have no "Code of Premise Facts," no state or federal rules of premise facts, nor any good set of keynumbers or other research devices that guide us quickly to all the relevant judicial opinions, access to authorities is limited. Discussions of relevant precedents are available, however, in treatises on administrative law and evidence and in a growing body of law review articles. The major problem is that there is no general recognition that this body of law exists and that it can be useful to judges and advocates.

Professor Kenneth Davis has proposed the creation of a national fact-finding agency to which the United States Supreme Court would refer legislative-fact disputes for study and recommendation.¹⁴⁰ Proposals have been advanced from time to time for a "National Science Court" or a similar body to decide disputes of fact about issues identified as scientific in nature. Committees of the Judicial Conference of the United States, the National Conference of Commissioners on Uniform State Laws, or the American Law Institute might consider whether some entity should develop or adopt formal rules of procedure, a model statute, or a study and recommendation.¹⁴¹

I do not advocate proposals for a new agency or a specialized science court outside the judicial system. Moreover, I believe it would be far more difficult to draft a good statute on this subject than to develop more useful guidance through the common-law process. A set of procedural and evidentiary rules for deciding premise-fact disputes, analogous to the rules of procedure and rules of evidence for adjudicative-fact finding, is perhaps a more feasible target. There is no urgent need, however, for such formal rules. Moreover, even if formal rules eventually are warranted, drafting them should be deferred until there is more explicit case-by-case consideration of premise-fact disputes. Methods and practices useful in resolving disputed premise facts already are known. If these methods are not candidly and explicitly used as much as they should be, the

140. Davis, *Proposed Research Service*, *supra* note 22, at 17.

141. One might even envision an undertaking by the American Law Institute that would be consistent both with a preference for the common-law process of law development in this area and the Restatement tradition of the Institute—for example, a "Restatement of the Law of Lawmaking," covering a broad subject matter of which the law regarding premise facts would be one part.

explanation for their disuse is likely unease about candor¹⁴² or a lack of recognition of just how useful candid consideration of these processes might be.

The following are positive suggestions about steps courts may take to improve the quality of premise-fact decisions. First, courts may make tentative decisions and place them before the advocates with an invitation for submissions, such as affidavits and briefs, showing reasons for modification before the court enters them as decisions. This practice is already in moderate use in trial courts. It is a practice occasionally used in appellate courts—for example, by an order for reargument on specified issues. The burdens of cost and delay from using this procedure may be somewhat greater in appellate than in trial courts, but the benefits of engaging the advocates in the process before decisions are premised on factual determinations not explicitly addressed in briefs and arguments may outweigh burdens at both levels.

Second, a court may invite amicus submissions when it is about to set precedent based on a premise-fact decision that will significantly affect identifiable interests beyond and different from those of the parties before the court.¹⁴³

Third, the court may fashion procedures for receiving evidence to serve effectively the aim of timely, accurate (as to historical facts), and wise (as to evaluative facts) decisions of premise-fact disputes. Premise facts in their nature are typically so different from adjudicative-fact disputes that procedures for resolving adjudicative-fact disputes are cumbersome and likely to impair the quality of decision making. For example, a written submission may more effectively present the relevant evidence than can oral direct and cross-examination. Even when a court determines that it is useful to have expert opinion in testimonial form, the parties may file depositions, and even when an expert witness testifies at trial, the court may conclude that the evidence will be more understandable if the expert first presents evidence in an organized lecture before any oral examination by advocates or the court.¹⁴⁴

142. Cf. G. CALABRESI, *supra* note 136, at 178-81 (arguing for candor in all judicial opinions and especially Supreme Court opinions); Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 733-50 (1987) (discussing whether judge's role may justify departing from candor).

143. As to the need for caution, however, see *supra* text following note 96.

144. In considering more flexible procedures for effective use of experts in developing information bearing on disputed premise facts, we may profit from examining procedures commonly used in other legal systems. See, e.g.,

Experiences with alternative dispute resolution demonstrate the desirability of greater procedural flexibility. In several three to five-hour summary jury trials of short cases¹⁴⁵ and in several two-day nonjury conditional trials of long cases,¹⁴⁶ procedural orders divided the time equally between the parties and created an incentive structure for using the allocated time most effectively. In all instances, counsel chose to present only limited parts of the evidence in oral question and answers and far more of it, interspersed with argument, by reading from statements or depositions or simply calling to the attention of the court or jury relevant parts of the documents placed before them as exhibits.

Thus, question-and-answer form is seldom the most efficient and effective method of presenting a witness's direct testimony. Cross-examination may be essential, however, to testing critical aspects of the testimony. At least for premise-fact disputes, if not more generally, a flexible procedure allowing both an efficient and organized presentation of a witness's position and a testing of key elements of that position through questions by opposing counsel and the court is superior to the traditional direct and cross-examination of expert witnesses traditionally used for adjudicative-fact issues.

These suggestions about procedure are illustrative only, and I have left many questions unanswered.¹⁴⁷ The underlying principle I urge is flexibility and adaptability of procedures to

Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835-41 (1985) (discussing choice and use of experts in Germany).

145. By short cases I mean those that would have taken no more than a week to try.

146. By long cases I mean those that would have required two to six months for an ordinary jury trial.

147. Among these is the meaning of Lewis Carroll's playfully suggestive line, "And whether pigs have wings." See *supra* note 1. From the opening lines of the verse, "[t]he time has come . . . [t]o talk of many things," one might infer that, for some undisclosed reason, "shoes—and ships—and sealing wax— . . . cabbages—and kings . . ." have something in common. Charles Darwin theorized that the forelegs of some species of animals have something in common with the wings of birds and bats. His *The Origin of Species* was published in 1859. The immediate storm of controversy reached a notable peak at the British Association at Oxford in 1860, in a celebrated duel between T.H. Huxley, a champion of Darwinian hypotheses, and Bishop Wilberforce of Oxford. Who was, at that moment in history, a brilliant young mathematical lecturer at Oxford, a resident of the same college as Bishop Wilberforce? I hope you will not be disappointed that the answer is Charles Lutwidge Dodgson, son of an English vicar of Daresbury, Cheshire.

In 1865, just five years after the Huxley-Wilberforce duel, the first literary work of a previously unknown person was published. Nobody could remem-

the nature of particular premise-fact disputes. Yet, in one respect a competing principle of reasonable constraint merits at-

ber ever having met the man, much less having known him to be a writer. That book was Lewis Carroll's *Alice's Adventures in Wonderland*.

The brilliant mathematician Dodgson, whose published works during the next three decades included highly acclaimed algebraic proofs of opaque Euclidian theories, was often asked through the years about a rumored connection between himself and the author who delighted children of all ages with works published under the pseudonym, or as we say in courts, the a/k/a ("also known as") Lewis Carroll. Dodgson's consistent response, expressed in formal, third-person style, was: "Mr. Dodgson [has] neither claimed nor acknowledged any connection with the books not published under his name." 7 ENCYCLOPAEDIA BRITANNICA 66, 493-94 (1956 ed.).

The mathematical genius surely knew he was not causing anybody to believe that he was not a/k/a Lewis Carroll, but he continued to enjoy the formal pretense. Given his playful mind, could it be that in that phrase "whether pigs have wings" Dodgson was alluding to a controversy spawned by Darwin's *The Origin of Species*—a controversy still alive in the late 20th century in a version that recently has been called a clash between "Creation Science" and "Evolution Science"? If so, Lewis Carroll may have been as surely a commentator on the legal system as Charles Dickens, though a subtler, and perhaps more prescient, one. Did Lewis Carroll foresee what was perhaps the most interesting case on the docket of the Supreme Court of the United States in its last term—*Edwards v. Aguillard*, 107 S. Ct. 2573 (1987)?

Even a slim chance that this is so compels me to state another problem case, derived from *Edwards*, and to add to the three questions about asbestosis, boxing titles, and balance bills, one more, about "creation science." *Edwards* involved a Louisiana statute enacted under the title "The Balanced Treatment for Creation-Science and Evolution-Science in Public Schools Instruction Act." Though declared in its title as having been enacted for a secular educational purpose, the statute was challenged on the ground that it was enacted to foster a particular religious belief, in violation of the establishment clause of the first amendment, which clause has been extended by the fourteenth amendment to state action, including enactment of state statutes.

Who decides, and how, whether the Louisiana legislature enacted this statute with an entirely secular purpose rather than with a purpose forbidden by the establishment clause?

Who? *Edwards* provides us with an authoritative answer—the Supreme Court of the United States.

How? One part of the answer is that it was decided, not altogether surprisingly, by a less than unanimous Court. This premise fact was *disputed*. A second part of the answer is that in none of the opinions is there a reference even to legislative fact or, of course, to what I have called similar things. At least there is no explicit reference.

The thought may have crossed your mind that this is a rather powerful demonstration of lack of support in precedent for my Tenth Principle—that a court deciding a dispute about a fact that it uses as a premise of its reasoned decision of an issue of law has the dual obligation of reasoned decision making not only about the substantive issue on which the opinions focused but also about its method of deciding the disputed factual premise.

If we take that view of *Edwards v. Aguillard*, then I must restate my Tenth Principle not as part of a summary of existing law, but as a trial judge's respectful plea to adopt the Tenth Principle for the future, because we federal

tion. In the process of improving common practice in the ways suggested, we will have brought out into the open and examined more thoughtfully our procedures for deciding premise facts, including procedures that some have called, in the broadest sense, taking judicial notice. By practicing constraint against unexplained judicial notice, by candidly and explicitly acknowledging the distinctive nature of disputes over premise facts, and by using flexibly adapted procedures, we should be able to improve decision making and come closer to our aim of doing justice lawfully.

APPENDICES

I. A TRIAL COURT LOG OF ADDITIONAL CASES

Having encountered premise-fact disputes in several distinct contexts, my law clerks and I started a Chambers Log in early 1987. The Log recites instances in which we explicitly thought about premise facts while adjudicating disputes placed before a single federal judge under a random draw of cases in a metropolitan court. We did not always report our thoughts in

trial judges, along with the trial bar and other state and federal judges, need more explicit guidance.

I doubt that *Edwards* is fairly read, however, as rejecting the Tenth Principle. My proposed phrasing of the Tenth Principle starts, “[w]here there is no precedent regarding a method for deciding premise facts,” and continues, “the court has the dual obligation of reasoned decision making *about method* and disclosure of reasons” (emphasis added). *Edwards* involved an issue of disputed legislative intent, a very special kind of legislative-fact issue. For this special kind of legislative-fact issue, we have an enormous body of precedent that defines some additional constraints on judicial method—constraints beyond those addressed in my Twelve Principles. The clashing opinions of the Supreme Court Justices in *Edwards* were all reasoned from legal premises (precedents) within that more specialized body of law.

Relating the whole body of law on legislative intent to the Twelve Principles identified in this lecture is a very large subject in itself, and, having alluded to it, I do not propose to address it further here. See *supra* note 14.

I close with a further tribute to Lewis Carroll. The highest form of praise is, of course, imitation. My closing parody does not pretend to imitate the prescience and subtlety of Lewis Carroll, but only his verse form.

Who knows now what ill will be
 Tomorrow's asbestosis?
 If know they must to make the law
 About, let's say, thrombosis,
 Our courts should use more
 reasoned ways
 Than knowing by osmosis.

“Knowing by osmosis” is a metaphorical description of unexplained judicial notice. See *supra* note 1 and discussion of the Ninth and Tenth Principles, *supra* text accompanying notes 99-115.

memoranda of decision. We often concluded that it was unnecessary to decide disputes about premise facts, or, for reasons associated with constraints on a trial judge, that it was inappropriate to explain the complex nature of issues that were easily decided in any event. I hope that even the entries that were part of our unpublished ruminations nevertheless may contribute to understanding the scope and pervasiveness of the problems that are the subject of this Article.¹⁴⁸

A. CASE FOUR: COMPUTER SOFTWARE PROGRAMS

Plaintiff and defendant are competitors in the business of marketing computer software programs. Plaintiff has sued for alleged violations of one of its copyrights, claiming that some of the screen displays that defendant has marketed are substantially similar to some of plaintiff's screen displays. Defendant argues that screen displays created by a computer software program are not copyrightable because it is a scientific fact that any screen display created by any software program could also be created in some other way by an entirely different software program having no substantial similarity. Defendant therefore acknowledges that there is a genuine fact dispute concerning whether the screen displays are substantially similar, but contends that this is not a dispute material to disposition of the case and that the action should be dismissed. Plaintiff responds that the motion to dismiss should be denied because the alleged scientific fact is disputed.

Question: Who decides, and how, whether a screen display created by any one software program could also be created in some other way by a second, entirely different, software program having no substantial similarity to the first?

It is well settled that the courts treat the issue of substan-

148. One reason I have told you this much about the source of these issues is to give you a basis for judging for yourself how often issues like these arise in federal trial courts. In the District of Massachusetts, all the judges sitting in Boston (now 11) receive a random draw of various categories of cases. The method by which I selected these particular issues from all those before me was not random, however. Instead, I selected all cases that occurred within a three-month period—April to June, 1987—in which I thought that an issue presented for ruling involved disputed premise facts, as well as scattered instances from my docket, before and after that quarter. I also added a case from the docket of the United States Court of Appeals for the Third Circuit (Case One).

Now I will place before you several more cases, each based on or extrapolated from some other case before me. Cases Four, Five, and Six are adapted from entries on my log for the second quarter of 1987.

tial similarity in copyright cases as an adjudicative-fact question, which cannot be decided on a motion to dismiss if there is any genuine dispute about it. Is the dispute in this case, about the truth of the asserted scientific fact, an adjudicative-fact question or is it a premise-fact question bearing on the legal determination of whether computer screen displays are copyrightable?

B. CASE FIVE: BANK ROBBERIES

Defendant is accused of robbing a bank. The government offered evidence that defendant held an empty brown bag, an opaque plastic bottle, and an electronic device in the teller's view and said: "This bottle contains enough explosive to blow us all away. If I press the button on the remote control, it's all over. Fill up the brown bag with bills—big bills. Now!" The teller filled the bag with bills.

Defendant invoked the insanity statute as a defense. The applicable statute says a person is not criminally responsible if, at the time of acting, "as a result of a severe mental disease or defects [he] was unable to *appreciate* the nature and quality or the wrongfulness of his acts."¹⁴⁹ Defendant called a psychiatrist to the stand. After the psychiatrist testified that defendant was, at the time of the bank robbery, suffering from a severe mental disease, the direct examination proceeded:

Q. Have you an opinion, to a reasonable degree of certainty, as to whether defendant, at the time he was in the bank, was able to appreciate the wrongfulness of his act?

A. I do.

Q. What is that opinion?

Assistant U. S. Attorney ("AUSA"): Objection, Your Honor.

The AUSA contends that the psychiatrist's report discloses that the psychiatrist's opinion is based on an erroneous view of the law, specifically, an erroneous interpretation of the word *appreciate*.¹⁵⁰ The AUSA explains that he expects the defense witness to testify that psychiatrists use the term *appreciate* to involve affect as well as cognition. He adds that this witness will express the view, contrary to the opinion of a government witness, that the defendant could not have the affect required

149. 18 U.S.C. § 17(a) (Supp. IV 1986) (emphasis added).

150. A distinct issue, not discussed here, is whether the proffered evidence should be excluded because it goes to an "ultimate" issue. See FED. R. EVID. 704(b).

to appreciate wrongfulness unless he was able to feel that what he was doing was wrong and feel remorse for having done it.

Question: Who decides, and how, whether at the time the defendant acted he was unable to appreciate the wrongfulness of his act because of a severe mental disease?

It may happen that both judge and jury participate in the decision. To see how, we must break the question down into law and fact elements, and the latter into adjudicative facts and premise facts. With these points in mind, I frame still another question.

Question: Who decides, and how, whether it is true that a defendant did not *appreciate* the wrongful quality of his conduct if, although he knew that the law prohibited his conduct and that it was wrongful by community moral standards, his affect was such that he could not feel that what he was doing was wrong and could not feel remorse for having done it?

One might argue that this is not a fact question but a question of law—a question of interpretation of a word used in the statute. That is the way we would ordinarily hear this matter argued and decided in the courtroom.

A responsive argument for the defendant is that the statute includes a word in common usage in the psychiatric community, and the meaning of that word is therefore a fact issue for the jury if psychiatric expert testimony in a particular case presents a dispute of fact about that usage on which reasonable jurors might differ. This argument depends, however, on the unstated premise that this fact dispute is a dispute over an adjudicative-fact question.

If this is a premise-fact dispute, then it will not be subject to case-by-case decision, but will be decided in the manner that questions of law are decided. Trial judges will decide in the first instance, but appellate courts may, and probably will, decide by a no-deference standard rather than reviewing only to determine whether the trial court finding was clearly erroneous. That is essential to maintaining an answer that applies to all cases alike—an answer that is precedent.

In the circumstances of this case, the trial court should sustain the AUSA's objection if the court interprets the statute as the AUSA contends it should be interpreted. Any dispute of fact relevant to deciding the meaning of *appreciate* as used in the statute is a dispute over a premise fact that the court resolves in deciding the legal issue regarding the meaning of *appreciate*. The jury should not hear opinion evidence that is

premised on an erroneous interpretation of the statute.¹⁵¹

C. CASE SIX: WRONGFUL DEATH ACTIONS

In a nonjury admiralty case, the trial judge asked an economist to state his assumptions about the legal measure of recovery. The economist answered that he understood it was appropriate to do calculations in accordance with the Massachusetts Wrongful Death Act, and then proceeded to recite his understanding of the Act. When the economist finished, the trial judge asked plaintiff's counsel if plaintiff contended either that the Massachusetts Act applied or that the Act was as generous as the economist had stated. Plaintiff's counsel answered that he hoped the Act was that generous but could cite no precedent to support that interpretation; he added that in any event plaintiff was claiming under admiralty precedents rather than the Massachusetts Act.¹⁵²

Too many experts fundamentally misunderstand their role. An expert should be a witness, not an advocate. In the legal system in action, as distinguished from the one we profess to have in theory, the great majority of expert witnesses do not perform solely as genuine expert witnesses. Rather, they become advocates.

151. Opinion testimony that ought to be excluded because it is based on an erroneous but unstated legal premise often comes into evidence without objection. This has occurred even more frequently under the *Federal Rules of Evidence* than before they went into effect. The Federal Rules permit an opinion to be stated before all the assumptions underlying it have been disclosed, "unless the court requires otherwise." FED. R. EVID. 705. But that rule was designed, in part at least, to avoid the delays and injustice that often occurred under older practice when the proponent of expert testimony was inept at laying all the technical groundwork. I submit that a common sense interpretation of the present rules of evidence makes it appropriate for the trial court to require disclosure of the expert's assumptions, which might be done outside the jury's hearing, when the court has reason to be concerned that the expert may have based opinions on assumptions about the law that are contrary to the court's expected rulings.

152. Cases Five and Six illustrate some of the recurring problems about the role of expert testimony in the administration of justice. Expert testimony is the subject of much of the remainder of Appendix I. It is an excellent example of an area in which distinguishing between premise-fact decisions and adjudicative-fact findings is likely to help us come closer to our aim of doing justice lawfully. This is an area in which it has not been customary even to allude to the distinction, yet one in which the nature of many of the problems we encounter involves decision making in relation to both premise facts and adjudicative facts and often without adverting to the precedents that bear on that distinction. Another reason I select this area for special focus is that, in my view, it is one of the areas of law in action with respect to which there is great need for improvement in the performance of our legal system.

We, the professionals, are primarily responsible for the dysfunctional elements of this state of affairs. Trial rules and practices should prohibit experts from giving legal opinions. Judges should not, however, place the blame solely on the lawyer-advocates. If judges acquiesce in the abuses, they create incentives for continuing this unwanted behavior by both the lawyer-advocates and the experts. The lawyer-advocate responds to the judicially-created incentive to engage the expert who will express under oath the most partisan opinions. The expert responds to the opportunity that judicial acquiescence and partisan rewards present, and the expert shifts to the role of advocate rather than functioning solely or even primarily in the role of expert witness.¹⁵³

One basic question to consider is whether the subject on which the expert testimony is proffered is a proper subject of expert testimony. Trial judges repeatedly are asked to receive in evidence before a jury an expert opinion on some aspect of law. Is that proper? The answer to this question bears most fundamentally on the quality of adjudication. Experts should not be permitted to usurp or impede the judge's function of explaining law. Nor should experts be permitted to usurp jury functions.¹⁵⁴

II. CASE ONE REVISITED

The state law that the Third Circuit scrutinized in *Asbestos Litigation* developed through decisions over a span of twenty

153. One useful step for judges to take is to recognize and discharge their responsibility for requiring that expert opinion be limited to its defined role and not be allowed by shrewd advocacy to usurp the functions of the court as the source of authoritative guidance to jurors on the legal issues that frame adjudicative-fact questions. Performing this judicial function well will require careful attention to identification and separate consideration of premise-fact questions.

154. Inappropriate allowance of expert testimony also has implications for the costs to parties and to the public of resolving disputes. In his opinion in *Asbestos Litigation*, Judge Weis observed that concern about expert testimony influenced the New Jersey Supreme Court:

In reaching its decision, the *Beshada* court considered the possibility that a jury might become confused by the testimony of experts who would "speculate as to what knowledge was feasible in a given year." Consequently, the court opined that it should "resist legal rules that will so greatly add to the costs both sides incur in trying a case."

In re Asbestos Litigation, 829 F.2d 1233, 1244 (3d Cir. 1987) (citing *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 207-08, 477 A.2d 539, 548 (1982)), *cert. denied*, 108 S. Ct. 1586 (1988).

years or more, culminating in what Judge Becker termed “the *Beshada-Feldman-Fischer* trilogy.”¹⁵⁵ Let us assume that the three decisions reasonably may be read as establishing a rule for asbestosis cases that is somewhat different from the rule regarding a state-of-the-art defense in other strict product liability cases.

In *Asbestos Litigation*, the Third Circuit concluded, in reviewing the state law at issue—that is, the decisional rules that a state-of-the-art defense is available in general in products liability cases but not in asbestos cases—that it should apply the rational-basis standard.¹⁵⁶

Applying this test, Judge Weis added:

Moreover, we must not overlook the importance of allocating the burden of proof. In equal protection cases, those who challenge state law must convince the court that the factual assumptions on which the classification is apparently based could not reasonably be conceived as true by the governmental decision maker. We cannot say that the asbestos manufacturers have met that burden.¹⁵⁷

Only one of the three Third Circuit panel opinions, Judge Becker’s, explicitly addresses the question I have stated here as my Question One: Who decides, and how, whether asbestos hazards were knowable to the industry in the 1930s? Judge Becker’s answer is that the New Jersey Supreme Court decided that question by a method permissible for disputed premise facts.¹⁵⁸ Although Judge Becker joins in portions of Judge Weis’s opinion, he does not concur in that part of Judge Weis’s opinion quoted immediately above. In Judge Becker’s words:

... I do not believe that Judge Weis has identified with sufficient precision the New Jersey Supreme Court’s reasons for making the distinction under review, a distinction I believe to be supported by a valid government objective and rational within our equal protection jurisprudence. Specifically, I believe that, on the basis of adjudicative facts determined in cases that had the full panoply of procedural protections, the New Jersey Supreme Court has determined a legislative fact—that the hazards of asbestos exposure were knowable to the industry at all relevant times. The subject of legislative factfinding is rarely discussed in the jurisprudence, and I write separately to explain why I think it validates the New Jersey Supreme Court’s distinction.¹⁵⁹

155. *Asbestos Litigation*, 829 F.2d at 1245 (Becker, J., concurring).

156. *Id.* at 1235-40.

157. *Id.* at 1243.

158. The method used was not permissible, however, for adjudicative facts. See *id.* at 1249 n.6 (Becker, J., concurring) (distinguishing legislative and adjudicative facts).

159. *Id.* at 1245 (Becker, J., concurring).

The two opinions are compatible, however, with respect to the applicability of the rational-basis standard of scrutiny.¹⁶⁰ The passage just quoted from Judge Becker's opinion supports the rational-basis standard and Judge Weis explains the choice of that standard in this way:

It is by now well established that in confronting a problem in the area of economic and social welfare, a state does not violate the Equal Protection Clause merely because the classifications drawn by its laws are imperfect. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"

Having determined that the nature of the right asserted here does not place it in a category requiring heightened scrutiny, we must now consider whether the judicial rather than legislative origin of the alleged infringement mandates a more searching review.

....

We are not convinced that either the nature of the subject matter or the procedure utilized in arriving at the challenged ruling constitutes sufficient grounds for requiring a stricter standard of review for common law decisions subjected to equal protection attacks.

160. The two opinions do, however, take somewhat different routes of reasoning in applying the rational-basis test to the distinction made, explicitly or implicitly, in the *Beshada-Feldman-Fischer* trilogy. This can be observed, for example, by comparing the passage last quoted above from Judge Becker's opinion with the last two paragraphs just quoted from Judge Weis's opinion.

The contrast between the two opinions with respect to application of the rational-basis test in this particular instance is underscored by a passage from Judge Becker's opinion, which captures the difference between his position and that of Judge Weis in the following way:

Appellants complain that the New Jersey Supreme Court deprives manufacturers and distributors of asbestos-containing products of the state-of-the-art defense in products liability/failure to warn actions, which other manufacturers and distributors are entitled to assert in the same kind of lawsuits. Appellants urge that no rational theoretical basis exists for differentiating between these classes of litigants. Judge Weis in his opinion demonstrates that [it] is not clear that all other manufacturers may take advantage of the state-of-the-art defense, although he agrees that New Jersey "does treat asbestos cases differently than other product liability cases." Weis Op., at 1241. I believe that we need not find constitutional infirmity even if we assume for the sake of argument appellants' worst case scenario, i.e., that New Jersey singles out the asbestos industry.

As I read the New Jersey Supreme Court's cases, the court does not deny asbestos defendants the state-of-the-art defense on theoretical grounds. Instead, I believe that the New Jersey court, via the *Beshada-Feldman-Fischer* trilogy, has determined a legislative fact—that, at all relevant times, asbestosis harms were knowable to the industry. That being the case, the New Jersey Supreme Court has reasonably decided to preclude endless relitigation of what was "knowable" to the asbestos industry.

Id. (section caption and footnote omitted).

One other element present here—case management—tips the scale in favor of the state court ruling. The *Beshada* court gave prime consideration to this concern, a subject in which the expertise of a court substantially outweighs that of a legislature and deserves due deference.

Taking the significant elements entering into the state court's ruling and balancing them against the valid competency concerns of court and legislature, we discern no measurable imbalance that weakens the presumption of regularity attaching to the state's choice of alternatives. Considering the social, economic, and administrative nature of the issues before the state court, we cannot say that its action in deciding the state-of-the-art defense question warrants strict scrutiny. We therefore conclude that the rational basis test is applicable to the classification drawn by the *Beshada* and *Feldman* courts.¹⁶¹

III. APPLYING SETTLED LAW

A. DISTINCTIONS BETWEEN MAKING AND APPLYING LAW AND AMONG KINDS OF DECISIONS APPLYING LAW

Four different types of decisions have been identified above.¹⁶² The first three are lawmaking decisions (1) by a legislature enacting a statute, (2) by a court or agency engaging in rule making, and (3) by a court deciding an issue of first impression or overruling a precedent. The fourth involves applying settled law to a case before the court. This fourth type of decision is complex and requires close examination to distinguish between those applications of settled law that involve determining some fact that is a premise for deciding an issue of law and those applications of settled law that depend only on determining adjudicative-fact disputes.

A premise fact of the fourth subcategory is one that serves as a premise for a court's reasoned decision of a relatively narrow issue of law—a relatively more particular rule of law that, in the court's reasoning, determines whether some previously settled and more general rule of law applies to the case before the court. Some determinations of relatively narrow issues of law are commonly referred to as *rulings*. When a disputed fact is a premise for the court's reasoned decision of an issue of law, that disputed fact is a premise fact even though the legal rule or ruling is one of relatively narrow or limited applicability.

An interpretation of the scope of the definition of premise facts broad enough to include facts serving as premises for a

161. 829 F.2d at 1239-40 (citations omitted).

162. See *supra* text accompanying note 41.

ruling, as distinguished from a decision, is supported by a passage in the advisory committee's note to Rule 201(a), stating:

Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or *ruling by a judge* or court or in the enactment of a legislative body.¹⁶³

One of the different nuances of *rule* and *ruling* is that the term *ruling* is not ordinarily used to describe lawmaking. For this reason it seems unlikely that the advisory committee would have used the term *ruling* if it had meant what it called *legislative facts* to be limited to lawmaking facts. This interpretation of the advisory committee note is reinforced by examples the note gives of the "use of non-evidence facts in evaluating the adjudicative facts of the case"¹⁶⁴ to decide whether the evidence is sufficient to survive a motion for "nonsuit."¹⁶⁵

Because the fourth subcategory of premise facts extends to facts used in making rulings as well as rules, it is quite broad. Its exact scope may be a matter of dispute because distinguishing between an adjudicative fact and a premise fact is difficult in this fourth subcategory.

The difficulty of distinguishing between adjudicative facts and premise facts is illustrated by a substantial body of published materials regarding constitutional fact review. The phrase *constitutional facts*, in this context, is sometimes used to refer to factual premises that supporters use to enact a constitutional provision (premise facts of one type) and factual premises courts use to determine the validity of a statute under constitutional criteria (premise facts of another type). At other times the phrase *constitutional facts* is used to refer to adjudicative facts. An example of a dispute often treated as adjudicative is the dispute over whether a publisher of a particular statement knew of its falsity.¹⁶⁶

163. FED. R. EVID. 201(a) advisory committee's note (emphasis added).

164. *Id.* Further development of this point appears *infra* text accompanying notes 174-75.

165. FED. R. EVID. 201(a) advisory committee's note.

166. For example, Professor Henry Monaghan treats as a constitutional-fact issue the question of whether the defendant published its article with knowledge that what it said was false in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 486 (1984). A court may be deciding an adjudicative fact rather than a premise fact when it determines whether the publisher knew of the statement's falsity in a context in which the court examines that dispute not for the purpose of elaborating the legal norm of *reckless disregard* of truth or falsity, as used in First Amendment cases, but simply for the purpose of deciding whether the claimant has proved reckless disregard by clear and convincing

Professor Monaghan explains that courts also may use facts as a basis for modifying a legal norm. Facts that a court uses in this way are premise facts in the sense in which I am using that term. Although Professor Monaghan uses the term *constitutional facts* to mean only adjudicative facts,¹⁶⁷ he makes the point that labels—including such phrases as *question of fact*, *question of law*, and *mixed question of law and fact*—should not be allowed to constrain thoughtful consideration of substantive issues at stake.¹⁶⁸

In *Miller v. Fenton*¹⁶⁹ the Supreme Court made a similar point. Responding to a contention that the presumption of correctness of state court findings prescribed in a federal statute¹⁷⁰ limited the function of federal courts, including the Supreme Court, to determining whether a state court finding of “voluntariness” of a confession was “clearly erroneous,” the Court explains:

Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a “question of law,” a “question of fact,” or a “mixed question of law and fact” is sometimes as much a matter of allocation as it is of analysis. At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact’s conclusions presumptive force and, in so doing, strip a federal appellate

evidence in the particular case. The use of the phrase *constitutional facts* in this adjudicative-fact sense is illuminated by Professor Monaghan in an article published in 1985. See Monaghan, *supra* note 34, at 241; see also *Miller v. Fenton*, 474 U.S. 104, 112-18 (1985) (O’Connor, J., for the Court; Rehnquist, J., dissenting) (explaining Court’s decision to treat issue of “voluntariness” of confession as “a legal question meriting independent consideration in a federal habeas corpus proceeding” and therefore not within scope of presumption of correctness of findings of fact of state courts under 28 U.S.C. § 2254(d)). Some implications of *Miller v. Fenton* are discussed immediately below.

167. Professor Monaghan identifies the problem of “the scope of judicial review of the *adjudicative facts* decisive of constitutional claims” as a “systemic issue” of constitutional-fact review. Monaghan, *supra* note 34, at 230 (emphasis added). He adds that constitutional-fact review “does not implicate the legislative facts that underlie the statute or regulation.” *Id.* at 231 n.16.

168. *Id.* at 238.

169. 474 U.S. 104 (1985).

170. See 28 U.S.C. § 2254(d) (1982) (governing federal habeas corpus proceedings with respect to state convictions).

court of its primary function as an expositor of law. Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by way of bias or some other factor. . . ."

In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of federal judges reviewing an application for a writ of habeas corpus. Principally for that reason, the decisions held, juror bias merits treatment as a "factual issue" within the meaning of § 2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury.

For several reasons we think that it would be inappropriate to abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review. . . .

In addition to considerations of *stare decisis* and congressional intent, the nature of the inquiry itself lends support to the conclusion that "voluntariness" is a legal question meriting independent consideration in a federal habeas corpus proceeding. Although sometimes framed as an issue of "psychological fact," the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. It is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. This hybrid quality of the voluntariness inquiry, subsuming, as it does, a "complex of values," itself militates against treating the question as one of simple historical fact.

Putting to one side whether "voluntariness" is analytically more akin to a fact or a legal conclusion, the practical considerations that have led us to find other issues within the scope of the § 2254(d) presumption are absent in the confession context. . . .

. . . We reiterate our confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants. We note only that in the confession context, independent federal review has traditionally played an important parallel role in protecting the rights at stake when the prosecution secures a conviction through the defend-

ant's own admissions.¹⁷¹

The reasoning of the Court in *Miller v. Fenton*, though not using the terms *premise fact* or *legislative fact*, underscores the point that the question of who decides and how depends in part, at least, upon the Supreme Court's decision that "one judicial actor is better positioned than another to decide the issue in question."¹⁷² This determination allocates the function of deciding the issue, even if deciding it involves deciding a disputed fact as well as legal norms defining the nature and relevance of that fact. Although Justice (now Chief Justice) Rehnquist dissented from this allocative determination, his opinion is not inconsistent with the points for which the Court's opinion is cited here.¹⁷³

In defamation cases, if a decision maker (court or jury) merely applies the meaning of reckless disregard as settled in precedents (which are explained in the trial court's charge to the jury, if a jury is deciding) and decides that the evidence offered by the claimant in this case does or does not prove reckless disregard with convincing clarity, the decision maker may be using the determination of this fact dispute solely for an adjudicative rather than a premise purpose.

One must be cautious about reaching this conclusion, however, because of a point underscored in the advisory committee's notes on Rule 201 of the *Federal Rules of Evidence*. The Committee was commenting on a court's use of "non-evidence" facts reported in a table of automobile stopping distances as a premise for deciding (a) that a defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway, and (b) that the evidence for plaintiff was therefore insufficient to go to the jury. "It is apparent," the advisory committee declared, "that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treat-

171. 474 U.S. at 113-18 (footnotes and citations omitted). Note, however, the dissent of Chief Justice Rehnquist, *id.* at 118-19 ("I think it is difficult to sensibly distinguish the determination that a particular confession was voluntary from the determinations we have held to be entitled to a presumption of correctness under § 2254(d).").

172. *Id.* at 114.

173. Some additional evidence of Chief Justice Rehnquist's views on legislative facts appears in his opinion for the Court in *Lockhart v. McCree*, 476 U.S. 162, 168-69 n.3 (1986) ("We are far from persuaded, however, that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here.").

ment."¹⁷⁴ Because the formal rule of evidence regarding judicial notice governs judicial notice of adjudicative facts,¹⁷⁵ this note seems to say that the example given is one involving a decision of premise facts or, in terminology the advisory committee used, "nonadjudicative facts."

In contrast with merely deciding the sufficiency of the evidence, if the court (whether trial court or appellate court) concludes that existing precedents on reckless disregard and convincing clarity provide insufficient guidance and require further elaboration of the meaning of the terms, the elaboration of the legal norm the court then develops will be applicable and useful not only in the case at hand but also in like cases. When elaborating a norm in this way, a court is making a decision that will be precedent (unless overturned by a higher court). When the court acts in this way, almost certainly the ultimate decision of the adjudicative fact as to whether the defendant publisher acted with reckless disregard in the particular case (by whomever that issue is decided) will also be accompanied in the case at hand by decision of another fact dispute on a somewhat more generalized basis that will apply to other like cases. For example, elaboration of the legal norm of reckless disregard may be based on an explicit or implicit determination (of evaluative fact) that robust public discussion of issues of public interest and concern will be inhibited substantially unless the standard for reckless disregard requires a state of mind of knowledge of a strong likelihood of falsity. Similar elaboration may determine the standard for convincing clarity to be very close to beyond reasonable doubt. This evaluative factual determination is used as a premise for deciding an issue of law concerned with further elaboration of the legal norms invoked by the phrases *reckless disregard* and *convincing clarity*. This factual determination is a premise-fact determination.¹⁷⁶

Another illustration of an area of law potentially involving a dispute about applying a settled constitutional rule that may lead a court to treat a particular dispute as an adjudicative-fact dispute if it takes one course of reasoning or as a premise-fact dispute if it takes another course of reasoning is that area con-

174. FED. R. EVID. 201 advisory committee's note.

175. *Id.*

176. I submit that a similar analysis distinguishing premise facts from adjudicative facts is applicable to problems of constitutional fact review bearing on "whether a confession was voluntary and whether a conviction was tainted by race discrimination in jury selection." *See, e.g.*, G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 150 (3d ed. 1986).

cerning application of the "minimum contacts" test for personal jurisdiction of *International Shoe Co. v. Washington*.¹⁷⁷ If the court develops a further elaboration of the norms associated with the minimum contacts test, it is making law, and any fact determination it makes as a premise for the elaboration of the norms is a premise-fact determination. The court may make a fact determination, however, solely for the purpose of resolving credibility issues that determine whether in the case before the court the proof offered has shown by a preponderance of the evidence that the party haled into court did in fact have the particular contacts with the state that the plaintiff claimed, and that the historical facts were sufficient to satisfy the norms established in previous judicial decisions. A determination used for this latter purpose is an adjudicative-fact finding.

Part of the difficulty of distinguishing between adjudicative and premise facts concerns the mixture of historical and evaluative facts involved on both sides of the distinctions. Knowledge or lack of knowledge of a fact at a particular time in the past is a historical fact, and in decision making in the courts it is ordinarily, although not always, used as an adjudicative fact.

Like voluntariness, however, knowledge of hazards—whether asbestos hazards or any other kind of hazards—is a more complex idea. Indeed, knowledge of hazard is in some respects even more complex than voluntariness. Any notion of hazard or risk is a construct of the mind, not a reality totally external to the mind. It is a notion invented by the human mind to manage problems in human relations existing when we know part but not all of the facts relevant to making a decision. It is a device for managing ignorance.¹⁷⁸ Thus, because hazard is itself a concept involving a mixture of historical fact and prediction based on incomplete knowledge of the past and current forces at work in some changing set of circumstances, knowledge of a particular hazard is necessarily an idea at least as complex as hazard itself. It is more so to the extent that it may imply that one may have knowledge of hazard without knowledge of everything implicit in the definition of that hazard.

In view of these facts about what we mean when we use the term *hazard*, one may say that the state of knowledge of hazards of asbestos products at a particular time is a mixture of historical fact—what was known—and abstraction—the concept of hazard, which exists only as a construct of human minds.

177. 326 U.S. 310, 320 (1945).

178. See R. KEETON & A. WIDISS, *INSURANCE LAW* § 1.3(b) (1988).

Knowability of hazards is an exceptionally complex idea. In the first place, knowability involves some elements of historical fact as to what was known by some group or groups of persons. A decision of the issue of knowability therefore involves both a determination of any dispute about historical facts as to what some group or groups knew and a determination of any dispute about the evaluative facts as to the meaning of hazards of asbestos and as to what was knowable by others. Knowability of hazards of asbestos products at a particular time is a still more complex idea, because it involves some norm of accessibility at that time of information that bears upon a reasoned assessment of hazards of asbestos. For example, is it enough that one, or a dozen, academic or industrial researchers knew all that was then known to anyone that was relevant to assessing the hazards, or must their writings have been widely disseminated before what they have discovered is deemed to be knowable in the industry?

If the fact dispute about historical facts is distinctive to the particular case and not even moderately generalized, its resolution affects only the particular case and it is adjudicative. A court may determine, however, that other elements of knowability of hazards of asbestos products at a particular time are premises for decisions of an issue of law, or premise facts.

Moreover, even knowledge as a historical fact may be an adjudicative fact or a premise fact, depending on how the court uses it in decision making. A court may use knowledge of asbestos hazards in a way that serves as a basis for deciding only the one case at bar, as is true when the rule of law adopted is that a defendant's knowledge is a prerequisite to that defendant's liability; under that rule of law, knowledge is treated as an adjudicative fact. A genuine dispute about it is submitted to each jury case by case with potentially inconsistent findings. If the court determines, on the other hand, to reject a state-of-the-art defense because enough manufacturers knew enough about asbestos hazards that the court should adopt a legal rule that asbestos hazards were knowable to all manufacturers, the court has used its determination of knowledge by some as a premise of its reasoned decision that asbestos hazards were knowable to all. The court's determination of knowledge—a historical fact—was a premise-fact determination that served as a premise of its adopting a legal rule on knowable hazards.

Often a contrast will exist between the way a court uses a determination of a historical fact of knowledge and the way it

uses some associated evaluative fact in its decision making. For example, knowledge or lack of knowledge of falsity of a statement that is the subject of an action for defamation is a historical fact. There is a material difference between using a determination of a historical fact of knowledge, or lack of knowledge, of falsity of a published statement as an adjudicative fact, relevant to deciding only the defamation case before the court, and, for example, using, as a basis for elaborating norms to be applied in defamation cases, an evaluative determination concerning the effect of one or another rule upon robust debate of issues of public interest.

Using a determination of knowledge just to decide the case before the court differs materially from using an evaluative determination to decide whether the evidence bearing on this adjudicative-fact dispute about knowledge of falsity in the particular case is or is not sufficient to support a jury finding of knowledge of falsity as that adjudicative fact is defined by law. This evaluative determination is analogous to the illustration appearing in the advisory committee's note on Rule 201 of the *Federal Rules of Evidence* regarding a court's use of a table of automobile stopping distances to aid it in determining the sufficiency of the evidence to go to the jury in a case involving injury to a child who suddenly appeared in front of defendant's vehicle.¹⁷⁹ The numerous judicial evaluative determinations about sufficiency of the evidence in defamation cases, as in other types of cases, become precedents for future cases. The jury findings of knowledge or lack of knowledge in those same cases do not become precedents.

These illustrations are entirely consistent with the point that the contrast between historical and evaluative facts cannot be taken as the key to determining whether either kind of fact determination is adjudicative or is instead a premise-fact determination. The key is ascertaining how the decision maker used the fact determination, whether historical or evaluative. Was the fact determination used only to decide the case at hand, or was it used in a way that serves as a precedent that aids lawyers to predict and courts to determine outcomes in future analogous cases?

Sometimes courts have been very explicit about how they used the determination in their decision making. This was true, for example, in *Miller v. Fenton*.¹⁸⁰ The Court was ex-

179. FED. R. EVID. 201 advisory committee's note.

180. 474 U.S. 104 (1985).

plicit about both allocation of responsibility for the determination of voluntariness of a confession and about stare decisis effect.¹⁸¹ Often one must read judicial opinions closely, however, in search of implicit indications of exactly whether and how the court used a fact determination in its legal reasoning.

Some additional examples of the fourth subcategory of premise facts may serve to underscore the large scope of this subcategory and to aid us in understanding it and understanding what courts have said and done in relation to issues in this subcategory.

Consider Case Two—involving a dispute as to whether a boxing association is engaged in state action when awarding or withdrawing a championship title. A legislative decision has been made that the sporting rules developed by the Marquis of Queensberry are insufficient to govern modern bouts. That decision inevitably has led to relationships between state regulatory officials and privately created boxing associations. The decision of the state action issue may depend in part upon historical facts about the relationship between a particular boxing association and state administrative officials charged with regulating boxing. In part, however, the answer may depend also on applying a legal norm, either with or without further elaboration, defining the meaning of state action as that concept is used in the context of constitutional due process claims. Very likely such an application of a legal norm, even without further elaboration, will be made in a way that is precedent, binding not only in relation to other awards and withdrawals of titles by the same association, which is the ultimate reach of even the most expansive doctrine of issue preclusion, but also in relation to like awards by other similar associations. If that is the case, then any fact determined as a premise of the reasoned decision is used as a premise fact.

Another example is that, in order to decide an issue of law as to whether identified precedents about federal preemption apply to a claim of invalidity of a statute, a decision maker must decide the truth or falsity of a disputed evaluative factual assertion that an anti-balance-billing statute will cause reduced elderly access to medical care. That fact dispute is a premise-fact dispute, not an adjudicative-fact dispute, if the court uses the factual determination as a basis for deciding the validity of a statute against constitutional challenge—a decision that will be precedent applicable to other potential challenges to the va-

181. *Id.* at 114, 115.

lidity of that statute by other parties in other legal proceedings. The decision will result in a precedent regarding validity of the challenged statute and other similar legislation, and not merely an adjudication of the rights of the parties before the court in which the decision is made.

Other examples of the fourth subcategory include issues of fact essential to deciding an issue of law that bears on the admissibility of expert opinion.¹⁸² For example, is the presence of various symptoms, said by a proffered expert witness to constitute together a "rape trauma syndrome," a scientifically reliable method of proof, sufficiently probative to justify a determination that an opinion based on presence of the syndrome is admissible in evidence as proof that an alleged victim was raped?¹⁸³

Another frequently recurring type of problem bearing on admissibility of expert testimony is presented when a dispute exists about whether a proposed opinion proffered in the presence of a jury is not merely an opinion on a disputed-fact issue, as is claimed by the proponent of the opinion testimony, but is truly an opinion on a mixed question of law and adjudicative fact, expressed in a way that does not disclose precisely what view the expert is taking on the legal question involved. If the latter is the true nature of the opinion, the court should exclude the opinion testimony if there is doubt about whether the factual part of the opinion is premised on a view of the law consistent with instructions on the law the court has given or expects to give. If, on the other hand, it is clear that the opinion the expert proposes to express is based on a correct understanding of the law by the witness and thus is not affected in any way by forbidden assumptions of law, then the opinion may be admissible. I do not suggest that determining whether the proffered opinion is or is not premised on an incorrect view of the applicable law necessarily involves deciding some dispute of fact beyond the issue of what are the premises for the proffered

182. Examples beyond those discussed here are presented in Appendix I, *supra*.

183. See *State v. Black*, 109 Wash. 2d 336, —, 745 P.2d 12, 15 (1987) (en banc) (excluding expert testimony; no discussion, however, relating decision to distinction between adjudicative and lawmaking fact); see also *People v. Hampton*, 746 P.2d 947, 950-53 (Colo. 1987) (receiving rape trauma syndrome evidence to assist factfinder in understanding reactions of rape victim who delayed 89 days in reporting "date rape"; reversing intermediate appellate court that had held evidence failed to meet *Frye* test; allowing evidence under state evidence rules because it will assist trier of fact to understand evidence or resolve fact in issue).

opinion. Even so, that issue itself is a premise-fact issue, unless we should decide to use *premise* fact in a slightly narrower sense and develop another term for certain foundation facts bearing on admissibility of evidence.¹⁸⁴ Other premise facts also may be premises for the ruling on admissibility of a proffered opinion of an expert.

It will sometimes be difficult to distinguish between a question of admissibility of evidence that turns on an issue of law that itself depends on a fact determination and, on the other hand, a question of admissibility that turns on a fact finding that is used directly to decide the matter at hand and not to determine an issue of law that then is applied to decide the matter at hand. A fact finding that merely resolves admissibility in the case at hand in accordance with a rule of law otherwise established (either in this case as a case of first impression or in precedents establishing a settled rule) may be more like the kinds of facts ordinarily decided by juries (adjudicative facts) than facts serving as premises for deciding issues of law (premise facts). It is part of the basis for a ruling that does not depend in any way upon premises of reasoning that use this determination of fact in a way that applies beyond the case at hand. This kind of ruling is not a precedent. Because this kind of fact determination is not used as a premise fact, the court, in reaching its fact determination, is not free to disregard formal rules of evidence, as it is free to do in relation to issue-of-law facts. Nevertheless, the formal rules of evidence in some instances allow the court to make adjudicative-fact findings on evidence it would be bound to hold inadmissible for other purposes.¹⁸⁵

Difficult as it may be to elaborate and apply the distinction between premise facts in the fourth subcategory and adjudica-

184. See *supra* note 19.

185. With respect to special provisions regarding the applicability of rules of evidence to the court's consideration of a question of fact bearing on admissibility, see, for example, FED. R. EVID. 104(a) (stating that preliminary questions concerning qualification of person as witness, existence of privilege, or admissibility of evidence "shall be determined by the court," but in making its determination the court "is not bound by the rules of evidence except those with respect to privileges"); *id.* 104(b) (declaring that when a condition of fact is essential to relevancy, evidence is to be received if "sufficient to support a finding of fulfillment of the condition"); see also, e.g., *United States v. Petrozziello*, 548 F.2d 20, 22 (1st Cir. 1977) (establishing a special procedure for court findings on a preponderance of the evidence to support admissibility of a coconspirator statement in a criminal case pursuant to FED. R. EVID. 801(d)(2)(E)).

tive facts, that distinction is one that we must contemplate within a legal system that has different methods for resolving disputes over adjudicative and premise facts.

B. TYPES OF DECISIONS APPLYING SETTLED LAW THAT INVOLVE PREMISE-FACT DETERMINATIONS

Reviewing all the examples of decisions "applying" settled law, we may observe several distinctive types of court decisions that commonly involve the court's reliance on some fact determination as a premise for reasoned decision of an issue of law, rather than relying on that fact determination to resolve the case before the court without in any way adding another precedent to the settled law.

First, the court may be using a fact determination as a premise for building upon an established general norm by adding a supplementary norm that will apply to some group of cases, though a group that is small in number compared with the group to which the more general, settled norm applies.

Second, the court may be using a fact determination as a premise for a decision that applies as precedent by, for example, declaring a statute unconstitutional, or valid against constitutional challenge, even though no elaboration of previously established legal norms is part of the court's reasoning.

Third, the court may be using a fact determination as a premise for its reasoning that the evidence in the case before the court is, or is not, sufficient to support an adjudicative finding of a fact that is an element of a cause of action or defense, according to a previously settled legal norm. Even though no further elaboration of the legal norm is a part of the court's reasoning, the decision regarding sufficiency or insufficiency of the evidence is an evaluative determination that, along with similar determinations in other adjudicated cases, serves as precedent to guide lawyers and judges in making similar determinations in future cases.¹⁸⁶

It seems unlikely that these three identifiable ways of using premise-fact determinations in applying settled law exhaust the range of possibilities. They do serve, however, to illustrate two points. First, norm elaboration is not the only type of issue of law presented for decision as a court applies settled law to a case before the court. Second, in all these instances the court's decision as to which some fact determination is a premise for

186. See *supra* text accompanying notes 53-54.

the court's reasoning, is principled in a way that applies at least somewhat more generally than only to the case before the court and other related cases affected by claim preclusion or issue preclusion. The court's decision is thus a precedent and the fact determination on which it was premised has served a premise-fact purpose rather than an adjudicative purpose.

C. PURPOSE REVISITED

It may enhance an understanding of the distinction between adjudicative and premise facts to emphasize the nature of that distinction, articulated as the Second Principle. The inherent nature of the fact in dispute does not determine whether it is an adjudicative or a premise fact; rather, the distinction is based on the purpose for which the court uses the fact determination. A court uses a premise-fact determination as a premise for a reasoned decision of an issue of law which will be precedent. In contrast, a court uses an adjudicative-fact determination only as a premise for a decision in a particular case which determines only the outcome of that case and is not precedent. Thus, it may happen that a single dispute of fact may be treated either as an adjudicative-fact dispute or as a premise-fact dispute, depending on how the court resolves other legal issues that determine the purpose for which this fact dispute is material.

It may be suggested that, as a test for use by decision makers, the distinction I am advancing is circular, or that I am simply elaborating the implications of my definition of premise facts and the characteristic that distinguishes them from adjudicative facts.

My answer is that I am making a point of substance about the important differences between two ways of using fact determinations in decision making. One way is to decide only the case before the court—using them as adjudicative facts. The other way is to use them as premises for establishing, as law, a general norm, or for elaborating on a general norm by establishing subsidiary rules that apply not merely to deciding the case before the court but to some additional body of like cases as well (even though the number of cases expected to be within the scope of the elaboration will be far fewer than those within the scope of the more general norm). Some legal norms have very broad and general application. Other legal norms have more limited application. Every legal norm, however, applies more broadly than merely to the case before the court. A legal

norm applies for a reason (as precedent) and in a way different from the impact of a decision of one case upon others by reason of claim preclusion or issue preclusion.¹⁸⁷

187. A distinguished commentator has noted the phenomenon of a disputed fact question that may be treated either as an adjudicative-fact question or as what I have called a premise-fact question. He observed that the way the fact question is treated depends on the decision of a court of last resort on an issue of legal doctrine. The legal doctrine determines the purpose for which the fact is material. He stated:

The question what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances; and as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them. They are, however, facts of a special and peculiar function. Their only bearing is on the question, what ought to have been done or omitted under the circumstances of the case, not on what was done. Their function is to suggest a rule of conduct.

Sometimes courts are induced to lay down rules by facts of a more specific nature; as that the legislature passed a certain statute, and that the case at bar is within the fair meaning of its words; or that the practice of a specially interested class, or of the public at large, has generated a rule of conduct outside the law which it is desirable that the courts should recognize and enforce. These are matters of fact, and have sometimes been pleaded as such. But as their only importance is, that, if believed, they will induce the judges to lay down a rule of conduct, or in other words a rule of law, suggested by them, their tendency in most instances is to disappear as fast as the rules suggested by them become settled. While the facts are uncertain, as they are still only motives for decision upon the law,—grounds for legislation, so to speak,—the judges may ascertain them in any way which satisfies their conscience.

I am tempted to stop the quotation here. That would serve my immediate purpose. I continue, however, in order to disclose in candor that the particular point just stated, which is one I wish to emphasize, received less emphasis in the original. Also, to be candid, I must call attention to the fact that elsewhere in these remarks I have proposed some limits on the judge's conscience with respect to ways of ascertaining premise facts. See, e.g., the Ninth, Tenth, and Eleventh Principles, *supra* text accompanying notes 98-121. In any event, here is the remainder of the paragraph in the middle of which I interrupted the quotation:

Thus, courts recognize the statutes of the jurisdiction judicially, although the laws of other jurisdictions, with doubtful wisdom, are left to the jury. They may take judicial cognizance of a custom of merchants. In former days, at least, they might inquire about it *in pais* after a demurrer. They may act on the statement of a special jury, as in the time of Lord Mansfield and his successors, or upon the finding of a common jury based on the testimony of witnesses, as is the practice today in this country. But many instances will be found in the text-books which show that, when the facts are ascertained, they soon cease to be referred to, and give place to a rule of law.

O.W. HOLMES, JR., *supra* note 100, at 150-51 (footnotes omitted).

This theme was explored more recently, and explicitly in relation to the issues we are now considering, in the opinion of Judge Becker in *Asbestos Litigation*:

The contrast between two distinct ways of using fact determinations in the legal system is a significant fact about legal systems. Although this particular terminology need not be used, we need to recognize and consider the implications of the phenomenon. This terminology is one helpful way of communicating substantive ideas about the underlying phenomenon.

I emphasize, also, that I do not argue that substantive choices about the whole complex of associated issues regarding who decides, and how, must be decided in the same way for all the different contexts in which premise-fact disputes arise. Rather, what I present is a set of guiding principles and common practices. Even though good reason might exist for variances in particular circumstances, these principles and practices express a prevailing tendency, the understanding of which contributes materially to understanding law and the legal system.

"The history of the common law shows a constant pattern of questions once treated as fact growing into matters of law after the courts have gained knowledge and experience concerning them." Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1105 (1966). Thus, for example, the decision to admit into evidence novel scientific testimony is first tested by individual adjudications before judicial recognition eliminates the need for a preliminary foundation. See *United States v. Downing*, 753 F.2d 1224, 1234 (3d Cir. 1985). Courts have even elevated the fact finding of a single jury verdict to the position of legislative fact on which to base a rule of law. In all instances of adjudicative facts' elevation to legislative facts, the prior adjudications, with their full panoply of procedural protections, influence the court's view of reality. The legislative facts, in turn, influence the rule that is fashioned, and the due process clause does not require individualized determination or reconsideration of the legislative facts in all subsequent cases.

In re Asbestos Litigation, 829 F.2d 1233, 1250 (3d Cir. 1987) (Becker, J., concurring) (footnotes omitted), *cert. denied*, 108 S. Ct. 1586 (1988).

Two footnotes to the passage just quoted add to this theme.

[A]lthough originally a subject to be re-established by expert testimony in every case, courts long ago came to give blood-grouping tests conclusive effect in paternity suits. See, e.g., *Jordan v. Mace*, 144 Me. 351, 69 A.2d 670 (1949); see generally Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 HARV. L. REV. 466 (1958).

Id. at 1250 n.8.

See, e.g., *Commonwealth v. Sullivan*, 146 Mass. 142 (1888) (finding on basis of prior jury decision that, as matter of law, certain game was regulated "lottery"), cited in Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1104 (1966).

Id. at 1250 n.9.