

Washington Law Review

Volume 95 | Number 4

12-1-2020

Predictive Facts

Brent Ferguson
rbfergus@gmail.com

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Brent Ferguson, *Predictive Facts*, 95 Wash. L. Rev. 1621 (2020).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol95/iss4/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

PREDICTIVE FACTS

Brent Ferguson*

Abstract: A substantial portion of constitutional law rests on untested factual predictions made by the Supreme Court. Such forecasts have played a large role in a wide range of case outcomes, helping the Court decide questions such as whether corporations have the right to spend money on elections and what evidence may be used in criminal cases despite Fourth Amendment violations.

Scholars have not yet studied the frequency of such predictions, the problems they create, or the functions they serve. The literature has looked more closely at court decisions that depend on conclusions of legislative fact—facts not specific to a certain plaintiff or defendant but concerning the world more generally, such as the finding in *Brown v. Board of Education* that school segregation caused psychological harm to children. And after scholars began to recognize how important such factual conclusions were, courts increased their reliance on empirical evidence when declaring legislative facts. But this Article contends that the Supreme Court has often circumvented the pressure to rely on evidence by recharacterizing its factual conclusions as predictions. Thus, for instance, rather than concluding that a longstanding law regulating newspapers *has* discouraged political discussion, the Court has simply asserted that the law *would* discourage such discussion if it were upheld. And rather than concluding that minority viewpoints *are* sufficiently represented on juries even in states with no jury unanimity requirement, the Court has predicted that minority viewpoints *will* be heard even without the unanimity rule. By deciding cases in this manner, the Court has made predictions that operate as if they are legislative facts even when it performs no factual inquiry.

The Article first looks closely at a set of cases in which such predictive factfinding has occurred, including those in which a law has existed for decades, but the Court has not asked whether there is existing evidence that the predicted outcome has happened. While conceding that predictive judgments are necessary in many cases, the Article nonetheless insists that the Court should approach those judgments cautiously. That is because the Court's predictions are frequently incorrect, and they can create factual precedent by enshrining erroneous conclusions into law that lower courts adhere to even if facts change or the prediction is proven incorrect. Further, making unsupported predictions threatens the adversarial system because predictions are often made by amici or judges rather than the parties to a case. Finally, the prevalence of unsupported predictions may be undermining the judiciary's legitimacy.

The Court can start to remedy the problem by recognizing its existence and avoiding unnecessary predictions. When predictions are unavoidable, the Supreme Court and lower courts can try to improve the accuracy of their forecasts, consider remanding the case for more factual development, or issue a provisional decision that would encourage future litigation if a prediction turns out to be incorrect.

* Many thanks to Professors Vince Blasi, Richard Briffault, Allison Orr Larsen, Michael Coenen, and Michael Gilbert, as well as Megan DeMarco, who all provided insightful comments that helped shape this Article.

| | |
|--------------------------------------------------------------------------------------------------------|------|
| INTRODUCTION | 1622 |
| I. LEGISLATIVE FACTS AND PREDICTIVE FACTS | 1625 |
| A. The Legislative Facts Debate and the Court's Turn to Empirical Evidence | 1625 |
| B. Predictive Legislative Facts | 1629 |
| 1. A Working Definition of Predictive Legislative Facts | 1630 |
| 2. The Limited Attention to Predictive Factfinding | 1632 |
| II. THE SUPREME COURT'S PREDICTIVE JURISPRUDENCE | 1634 |
| III. DESCRIBING AND CATEGORIZING PREDICTIVE FACTFINDING | 1643 |
| A. Categorizing Predictive Factfinding | 1644 |
| 1. Predictions About Court-Made Rules Versus Predictions About Legislative or Regulatory Actions | 1644 |
| 2. Predictions That Allow Further Evidentiary Development Versus Those That Stop Experimentation | 1645 |
| 3. Standard Doctrinal Predictions Versus Predictions About Second-Order Concerns | 1647 |
| 4. Explicit Predictions Versus Implicit Predictions | 1647 |
| B. The Varied Necessity of Predictive Factfinding | 1648 |
| IV. THE PROBLEMS THAT PREDICTIVE FACTFINDING CREATES | 1651 |
| A. Courts' Predictions Are Often Wrong and Almost Always Imprecise | 1651 |
| B. Incorrect Predictions May Create Predictive Fact Precedent | 1655 |
| C. Predictive Factfinding Threatens the Adversarial System | 1658 |
| D. Finding Predictive Facts Without Citing Evidence May Undermine the Court's Legitimacy | 1660 |
| V. A MORE THOUGHTFUL PREDICTIVE JURISPRUDENCE | 1662 |
| CONCLUSION | 1672 |

INTRODUCTION

Facts about the world are central to many court cases, and the way courts determine those facts is critical to the content of American law. Recently, the Supreme Court has moved toward a more empirical, pragmatic approach to its jurisprudence—if, for instance, the Court is considering whether violent video games lead children to act aggressively, chances are it will rely on empirical evidence rather than pure intuition. Though there is plenty of criticism about how the Court uses such

evidence, scholars have approved of the Court's increased reliance on evidence when it describes how the world works.

But the Court does not always shy away from using intuition rather than evidence—this Article contends that judges often avoid citing empirical evidence by phrasing factual conclusions as predictions. And when a court makes such a prediction, although the prediction operates as a fact, the Court often fails to engage in a factual inquiry and uses only logic or speculation to reach an answer. For example, in *Miami Herald Publishing Co. v. Tornillo*,¹ the Court invalidated a law requiring newspapers to provide an opportunity for political candidates to respond to criticism, and it based that decision on a prediction that the law would discourage political discussion in newspapers.² The opinion did not address whether there was evidence that the sixty-year-old law had indeed dampened political coverage in the past. And in 2019 in *Rucho v. Common Cause*,³ the Court held that partisan gerrymandering claims are nonjusticiable based in part on a prediction that deciding such cases would lead to “unprecedented” judicial intervention into politics that “would be unlimited in scope and duration” and “would recur over and over again around the country with each new round of districting.”⁴ The Court offered no evidentiary support for its concern.

Such predictions are prevalent and will continue to form the basis for foundational parts of American jurisprudence: in *Trump v. Vance*,⁵ the President's lawyers asked the Supreme Court to stop a grand jury investigation involving the President's personal financial documents based on a prediction that such an investigation would interfere with Presidential responsibilities.⁶ The Supreme Court and the lower courts in that case based their decisions on predictions about whether “complying with state criminal subpoenas would necessarily distract the Chief Executive from his duties.”⁷

1. 418 U.S. 241 (1974).

2. *See id.* at 257.

3. 588 U.S. ___, 139 S. Ct. 2484 (2019).

4. *Id.* at 2507.

5. 591 U.S. ___, 140 S. Ct. 2412 (2020).

6. *See* Transcript of Oral Argument at 4–5, 9–10, *Trump v. Vance*, 591 U.S. ___, 140 S. Ct. 2412 (2020) (No. 19-635) [hereinafter *Trump v. Vance* Transcript of Oral Argument].

7. *Trump*, 140 S. Ct. at 2425–26; *see also* *Trump v. Vance*, 941 F.3d 631, 641 n.12 (2d Cir. 2019); *Trump v. Vance*, 395 F. Supp. 3d 283, 310 (S.D.N.Y. 2019) (“In fact, not every criminal proceeding to which a President may be subjected would raise the grim specters the DOJ Memos portray as incapacitation of the President, as impeding him from discharging official duties, or as hamstringing ‘the operation of the whole governmental apparatus.’” (quoting Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Off. Of Legal Couns. (Sept. 24, 1973), <https://fas.org/irp/agency/doj/olc/09>

While some predictions are inevitable and advisable, those that serve as a stand-in for empirically based fact-finding can lead to erroneous outcomes. And sometimes predictions create damaging factual precedents—findings of fact that most lower courts feel bound to accept without asking whether circumstances have changed or if new evidence has shed light on whether the original prediction was correct.⁸ The practice of predictive factfinding weakens the adversarial system because judges often make predictions (based on intuition or an amicus brief) even if no party has briefed the issue. Unsupported predictions may also damage the judiciary's legitimacy because it is more difficult to trust an institution that reaches verifiably incorrect conclusions, especially if observers believe that courts disguise the real reasons for their decisions.

Despite the prevalence and importance of such predictions, neither judges nor scholars have attempted to quantify or classify them, determine their level of accuracy, explore the problems they cause, or figure out how to improve them. This Article begins attempting to understand when and why the Supreme Court makes predictions the way it does, looks at some of the consequences, and makes some initial suggestions for improving the prediction process.

Part I of the Article defines legislative facts—general facts not specific to a plaintiff or defendant—and explains that courts now commonly cite empirical evidence when finding a legislative fact. Despite significant scholarly attention to legislative factfinding, scholars have not explored how some legislative facts are predictive—instead of describing the world as it is, predictive legislative facts make a forecast about what would happen if a certain law or court decision were implemented. These forecasts generate what I call findings of “predictive facts”—determinations that, though not strictly factual, nevertheless end up serving the same function as legislative facts.

Part II looks closely at four cases in which the Supreme Court has engaged in predictive factfinding, and it mentions many other cases that follow a similar pattern. Despite the centrality of some of those cases to our constitutional jurisprudence, in most cases the Court fails to ask questions or seek evidence that might be critical to ensuring the accuracy of the prediction or determining whether a prediction is necessary at all.⁹

2473.pdf [<https://perma.cc/LBP8-7QDU>] (discussing the amenability of the President to criminal prosecution while in office))).

8. For an insightful discussion of factual precedents, see Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59 (2013).

9. The Article's focus on Supreme Court cases is not intended to imply that lower court predictions are unimportant. Yet some of the practice's consequences, such as the creation of factual precedents

Part III uses that sample of cases to begin to describe and categorize the various forms of predictive factfinding. For example, it examines how some predictions are directly related to the doctrinal question at the center of the case, while other ones—such as assertions that a certain result will lead to a flood of litigation—bear less obvious relation to the issue litigated by the parties.

Part IV builds on the previous Parts to explore the problems that predictive factfinding creates. Judges' predictions are often wrong and usually lack precision, and these incorrect predictions may create factual precedent, turning erroneous assumptions into law and sometimes precluding any remedy. When judges make predictions in the absence of adequate briefing from the parties, it weakens the adversarial system by depriving litigants of a full opportunity to argue their case. And, as court-watchers observe these shortcomings, the Court's method of predictive factfinding may hurt the judiciary's legitimacy. Part V offers some initial solutions to those problems, partially drawn from *Washington v. Glucksberg*,¹⁰ a Supreme Court case about physician-assisted suicide.¹¹ At a high level, those solutions include looking more closely at predictive factfinding and its effects and using already-existing tools, such as remands, to ameliorate the problems predictive factfinding can create.

I. LEGISLATIVE FACTS AND PREDICTIVE FACTS

A. *The Legislative Facts Debate and the Court's Turn to Empirical Evidence*

Scholars and judges have long distinguished between two types of facts: adjudicative facts and legislative facts.¹² Adjudicative facts are case-specific facts that a judge or jury might determine about a certain litigant, such as whether a defendant knew that a gun was in her bag, the date on which a plaintiff was diagnosed with lung cancer, or the length of time police officers waited before breaking down a door to search a home. Well-known evidentiary rules govern how trial courts should find such facts and how appellate courts should review those findings: for example, scientific evidence relating to adjudicative facts must meet the standard

and the limitation on future legislative experimentation, are especially acute when predictive facts are found in Supreme Court opinions.

10. 521 U.S. 702 (1997).

11. *Id.* at 702.

12. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

set forth in *Daubert v. Merrell Dow Pharmaceuticals*.¹³ And appellate review of adjudicative facts is governed by Federal Rule of Civil Procedure 52(a)(6), which provides that “[f]indings of fact . . . must not be set aside unless clearly erroneous.”¹⁴

Legislative facts, despite their name, are also found by courts. However, they are generally broader in nature than adjudicative facts and are more likely to affect multiple court cases. The Supreme Court famously determined a legislative fact in *Brown v. Board of Education*¹⁵ when it found that segregation was psychologically harmful to minority students.¹⁶ And for over forty years, the Court has based its campaign finance jurisprudence on the legislative fact that an independent expenditure is less beneficial to a candidate than a direct campaign contribution.¹⁷ As Ann Woolhandler has described it, “such facts are used to create law,” often because they are intended to “show[] the general effect a legal rule will have.”¹⁸ Because legislative facts are not case-specific, the parties to any single case might not have special knowledge of the legislative facts that will control the case’s outcome.

Often, especially in recent years, courts explicitly find legislative facts based on data in the record. But dispositive findings of legislative fact are implicit in many decisions as well: as David Faigman has noted, “Chief Justice Marshall implicitly assumed [in *Marbury v. Madison*] that legislators, though they swear to discharge their duties pursuant to the Constitution, would not always remain faithful to that pledge, or at least not as faithful as judges.”¹⁹ Even more basic and fundamental legislative facts are also implicit in any court decision. For instance, a court deciding whether to suppress certain evidence in a criminal case would implicitly assume the legislative fact that police officers can see fewer details on an unlit street at midnight than they can see in broad daylight. As these examples show, broadly applicable facts are undisputedly vital in judicial opinions.

Scholars’ increased recognition of the centrality of legislative factfinding has led to vigorous debate in recent decades. The judiciary has

13. 509 U.S. 579 (1993).

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

15. 347 U.S. 483 (1954).

16. *Id.* at 494–95.

17. See *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

18. Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988).

19. David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 557 (1991) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J., dissenting)).

been praised of late for embracing an empirical pragmatism to some extent—rather than reaching conclusions of legislative fact “through reason and intuition alone,”²⁰ courts have become more willing to consult empirical data and therefore less likely to make unsupported assumptions about the world. As Seth Stoughton has explained it, “now more than ever, litigants and courts rely on empirical information to support arguments and justify opinions.”²¹

Nonetheless, the Supreme Court has come under heavy criticism because it has not yet developed a uniform process for determining legislative facts, and no standards have been put in place to control the quality of evidence supporting them.²² For example, the normal evidentiary standard for trial courts’ acceptance of scientific evidence, explicated in *Daubert*, does not apply to legislative facts.²³ Thus, if a trial court seeks to determine a question of legislative fact, it has several options: it can hear expert testimony, rely on research included in party briefs, perform its own research,²⁴ rely on legal precedent, or use some combination of these and other tools.²⁵

On appeal, there is even more uncertainty about proper procedure.²⁶

20. Laurens Walker & John Monahan, *Daubert and the Reference Manual: An Essay on the Future of Science in Law*, 82 VA. L. REV. 837, 848 (1996).

21. Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 854 (2014); see also Larsen, *supra* note 8, at 61 (“The Supreme Court is in the ‘throes of a widespread empirical turn’; consequently, its opinions are chock-full of statistics, social science studies, and other general statements of fact about the world.” (quoting Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 118 (2003))); Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—and Three Answers*, 2002 U. ILL. L. REV. 851, 853–54 (noting documented rise in citations to nonlegal, empirical sources). Legislative facts are still sometimes unsupported by empirical backing. For example, “[f]ederalism is repeatedly championed on the basis of empirical claims such as the value of states as laboratories of experimentation.” DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* 91 (2008).

22. See FAIGMAN, *supra* note 21, at 98 (“Historically, there has been no practice or tradition that reviewable facts be introduced at trial and survive the rigors of the adversarial process.”); see also *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924) (“[T]he court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law . . .”).

23. See Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC’Y REV. 515, 533 (2010) (“*Daubert* does not reach evidence on legislative facts, which judges are free to admit at their discretion.”).

24. Commentators disagree on whether judges should perform independent research. See generally Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263 (2007) (promoting broader use of independent judicial research).

25. See Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1195 (2013) (stating that district judges generally follow rules of evidence and civil procedure when determining legislative facts but noting that facts can be introduced in other ways).

26. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 45 (2011).

Federal appellate courts need not defer to trial courts' findings of legislative fact,²⁷ and they may decide to answer legislative fact questions without consulting the record, perhaps because the question was not litigated below.²⁸ The parties or amici might brief the issue, but there is no guarantee that litigants will be aware that the case will turn on a certain question of legislative fact.²⁹ Kenneth Culp Davis, who coined the term "legislative fact," lamented that when "deliberating about a case [and realizing] that it needs legislative facts it does not have," the Court has no system or rules about how it should respond.³⁰ Professor Davis identified seven options the Court has used, which include remanding the case for further factfinding (which rarely occurs), baldly asserting facts without support, and examining published sources outside the record.³¹ Yet the Court has failed to provide any coherent reasoning about how it decides which path to take.³²

This unencumbered and unpredictable process likely exacerbates other problems with legislative factfinding. For example, judges usually lack training in interpreting data; while it is better to consult data than fabricate facts, courts faced with competing studies or experts may fail to recognize prevailing scientific opinion.³³ And the Supreme Court has not consistently allocated burdens of evidentiary proof in its constitutional decisions within the various tiers of scrutiny. Thus, in a case applying rational basis review, the Court might strike down a law because the state

27. Borgmann, *supra* note 25, at 1185 (challenging the "common assumption" that Federal Rule of Civil Procedure 52(a)(6), which provides for a "clearly erroneous" standard of review, does not apply to legislative facts).

28. See Gorod, *supra* note 26, at 29–30 (discussing extra-record factfinding in *Citizens United v. FEC*, 558 U.S. 310 (2010)).

29. See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1762, 1800–02 (2014) ("Less than a third of the factual claims [in amicus briefs] credited by the Court were contested by the party briefs.").

30. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 8 (1986).

31. The other options Davis identified are (1) taking judicial notice of "common experience"; (2) "examin[ing] a published source and [finding] what is not there"; (3) ignoring the factual question at issue; and (4) putting the burden of proof on one of the parties. *Id.* at 9–11. In response to this problem, Davis repeatedly suggested improving the Court's institutional ability to find facts by creating a nonpartisan expert research agency to assist the Court. *Id.* at 8–9; see also Jeffrey M. Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236, 237 (1983) ("Throughout its history, the Court has devoted little attention to developing proper methodology to deal with constitutional facts.").

32. Davis, *supra* note 30, at 9–11.

33. See FAIGMAN, *supra* note 21, at 73 ("The Court . . . displayed a stunning lack of understanding of basic statistical methods in *Barefoot v. Estelle*."); Meares, *supra* note 21, at 854 ("[C]ourts are not capable of dealing with complicated, and sometimes conflicting, social science data. Judges are not trained to assess empirical studies, and so they may unwittingly create bad decisions.").

has not provided proof of its necessity.³⁴ In the next case, the Court might apply strict scrutiny but uphold the law because the challengers did not provide sufficient evidence calling the law's effectiveness into question.³⁵ Further, scholars have identified precedent that is nominally based on a legislative fact, but when new research or technology shows that the fact has changed or was never true to begin with, the Court nevertheless adheres to precedent.³⁶ These inconsistencies indicate that the Court sometimes picks and chooses data or decisional rules that support a preconceived outcome, leading some to contend that legislative facts are simply used as window dressing.³⁷

Of course, most of these ongoing problems only occur because of a positive development—the Court recognizes the importance of legislative facts and thus, in most instances, feels obligated to confront and analyze them.

B. *Predictive Legislative Facts*

Although some have recognized that legislative facts can be predictive,³⁸ neither scholars nor courts have explored the nature of predictive legislative factfinding as a phenomenon separate from other legislative factfinding.³⁹ Predictive legislative facts seek to describe the world not as it is today, but as the predictor believes it will be in the future (or would be under some counterfactual scenario).⁴⁰ For example, a court finds a predictive fact when it forecasts that a certain statute forbidding bribery would dissuade elected officials from interacting with constituents for fear of being prosecuted. Likewise, a court may predict that a broader

34. FAIGMAN, *supra* note 21, at 101–02 (contrasting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Burson v. Freeman*, 504 U.S. 191 (1992)); David Parker, Note, *Policing Procedure Before Substance: Reforming Judicial Review of the Factual Predicates to Legislation*, 99 VA. L. REV. 1327, 1327–28 (2013).

35. See FAIGMAN, *supra* note 21, at 101–02.

36. See *id.* at 53–56 (discussing *Roe v. Wade*, 410 U.S. 113 (1973), and progeny).

37. See Borgmann, *supra* note 25, at 1196–97 (arguing that in *Brown* and *Roe*, “the social science ‘evidence’ likely did not influence the establishment of constitutional doctrine but instead served as neutral-sounding cover for justices acutely aware of wading into a contentious social debate”); Moran, *supra* note 23, at 524 (discussing critics’ view that judges “make limited use of [empirical] evidence, primarily as a convenient post hoc justification for the results they desire”).

38. See Gorod, *supra* note 26, at 39; Dean M. Hashimoto, *Science As Mythology in Constitutional Law*, 76 OR. L. REV. 111, 130 (1997) (“When the Court uses legislative facts, they are offered as predictions about the effects of legal rules and are inherently disputable.”).

39. See Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 299 (2000) (“The Supreme Court has tended not to distinguish predictive harms from other kinds of harms, and indeed other kinds of legislative findings.”).

40. For brevity, in this Article I generally refer to predictive legislative facts as “predictive facts.” In other contexts, the term could be used to describe predictive adjudicative facts as well.

application of the exclusionary rule would lead to a flood of litigation. As explained more thoroughly below, this kind of predictive factfinding is prevalent at the Supreme Court and allows the Court to declare facts without providing the empirical support expected when a typical legislative fact is declared. Such forecasting creates a set of concerns overlapping with but distinct from those associated with legislative factfinding in general.

1. *A Working Definition of Predictive Legislative Facts*

As the name implies, predictive legislative facts are forecasts about general questions, such as whether a more defendant-friendly interpretation of the Fourth Amendment will lead to an increase in crime. Of course, such predictions are not strictly “facts” at all—they are predictions that a factual scenario will occur under certain circumstances. Yet this Article refers to these predictions as predictive facts because, as the remainder of this Article will demonstrate, the Court has used such predictions to replace standard findings of legislative fact.⁴¹ For example, if a case presents the Fourth Amendment question mentioned above, the Court would normally be expected to review evidence to determine how a limit on police activity—such as the rule that evidence must be excluded if police fail to knock and announce their presence before entering a home—generally affects conviction or crime rates. In some circumstances, however, the Court will not review any evidence and instead will simply predict the outcome of a certain rule. While the Court could engage in the same type of research when finding a predictive fact as it does when finding a legislative fact (such as reviewing studies or surveying the experience of states or lower courts), it rarely does so.⁴²

In defining the scope of predictive facts, it is important to recognize the distinctions between predictions of *legislative* fact and predictions of *adjudicative* fact. Predictions of adjudicative fact are case specific, do not directly create new legal rules, and happen all the time in trial courts.⁴³ A criminal court judge must decide whether to release a defendant on bail before trial, and that decision will hinge in part on a prediction of whether

41. The Court sometimes makes other broad predictions that do not serve as a stand-in for legislative facts. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 798–801 (2013) (Scalia, J., dissenting) (predicting that the Court would strike down same-sex marriage bans). Using the term “predictive facts” is intended to distinguish general predictions from those that operate as legislative facts.

42. *See Hudson v. Michigan*, 547 U.S. 586, 595 (2006); *McDonnell v. United States*, 579 U.S. ___, 136 S. Ct. 2355, 2372–74 (2016).

43. *See, e.g.*, *Woolhandler*, *supra* note 18, at 113–16 (discussing how courts regularly deal in adjudicative facts).

that defendant will return to court.⁴⁴ Likewise, trial courts must determine whether to grant temporary restraining orders and preliminary injunctions based on assessments of future harm. While such predictions are a vital part of the justice system, they are beyond the scope of this Article.

It is just as critical to distinguish between predictive legislative factfinding and regular (non-predictive) legislative factfinding, though the line between the two is sometimes blurry. Naturally, the principal and most obvious difference is whether a court identifies a supposedly extant fact (thus identifying a traditional legislative fact) or asserts that something will happen in the future if a certain event occurs (thus identifying a predictive legislative fact): either corporate campaign spending *does not* lead to corruption or, if corporate campaign spending is allowed in the future, it *will not* lead to corruption.⁴⁵ In each case, the court draws a conclusion about the future effect of a rule, so in both situations it is making at least an inherent prediction.⁴⁶ The difference is that in the case of non-predictive factfinding, the court claims that a certain phenomenon already exists, and the court is simply identifying it; in the case of predictive factfinding, the court does not claim that the phenomenon exists, but prophesies that it will exist under certain circumstances. Thus, as the campaign spending example illustrates, the difference between regular legislative factfinding and predictive factfinding may be based on whether a judge believes that there is existing support for making a broad factual claim; if there is, a regular legislative fact may be declared. If not, the court might make a prediction.⁴⁷

This decision—whether to state a legislative fact or make a prediction—lies at the root of many cases and can have significant consequences. As noted, the Supreme Court is now relatively likely to provide empirical support when it finds legislative facts.⁴⁸ For example, at this stage it would be quite surprising (but not unheard of) to see the Court review a case about whether violent video games are harmful to

44. Scholars have studied how judges perform on such predictions of adjudicative fact. See Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig & Sendhil Mullainathan, *Human Decisions and Machine Predictions*, 133 Q.J. ECON. 237, 241–43 (2018).

45. See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

46. See Woolhandler, *supra* note 18, at 115 (noting that legislative facts can be “defined as predictions about the effects of legal rules”).

47. Creating even more complexity, on occasion the Court’s language straddles the border between prediction and description. In *Buckley v. Valeo*, the Court invalidated a limit on independent expenditures in the Federal Election Campaign Act (FECA), stating that the expenditures “may well provide little assistance” to a candidate, and “may prove counterproductive.” 424 U.S. 1, 47 (1976). That wording does not clarify whether the Court was attempting to describe a current phenomenon or predict the future; while independent campaign spending existed on a relatively minor level before FECA was passed, it is not clear that the Court’s assessment was based on such spending.

48. See Larsen, *supra* note 8, at 61.

children without either relying on empirical support for its conclusion or faulting one party for its failure to provide sufficient data.⁴⁹ But as demonstrated in Part II, when engaging in predictive factfinding, the same pressure to provide data appears not to exist: if an event has not yet occurred, there is no data on the effects of that event, and a predicting judge could plausibly claim that the case requires her to make a best guess about the effects of a law even if there is no hard support for that conclusion. While that claim is undoubtedly correct in some circumstances, the latter Parts of this Article describe the problems such predictions may create and how those problems can be minimized.

2. *The Limited Attention to Predictive Factfinding*

In many contexts, the law recognizes the difficulty of predicting outcomes. First, the Supreme Court itself is wary of making predictions in some circumstances, and it has sporadically recognized its own comparative disadvantage at that endeavor. In *Turner Broadcasting System, Inc. v. FCC (Turner I)*,⁵⁰ the Court reviewed a congressional prediction that cable companies' increasing dominance would threaten the existence of free broadcast television.⁵¹ The Court reiterated that it "must accord substantial deference to the predictive judgments of Congress," because "Congress is far better equipped than the judiciary" to evaluate complex data and use it "to anticipate the likely impact" of future events.⁵² Other legal doctrines, such as the business judgment rule, apply a similar level of deference to defendants' actions, recognizing that non-judicial decisionmakers trying to estimate how future events will unfold have a difficult task.⁵³

Moreover, within certain doctrinal frameworks the Supreme Court has explicitly acknowledged that relying on unsupported predictions is dangerous. For example, the Court has held that certain types of facial challenges—those that are brought before a statute has been implemented, creating "ripeness-related concerns"⁵⁴—are disfavored because they "often rest on speculation" and therefore ask a court to prematurely

49. See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011).

50. 512 U.S. 622 (1994).

51. *Id.* at 665–68.

52. *Id.* at 665.

53. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 574 (1998) (describing how business judgment rule protects corporate officers from hindsight bias).

54. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 960 (2011).

determine how a law will operate before there is much of a record.⁵⁵ And by facially striking down a law through speculation, the Court may unnecessarily “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”⁵⁶ The Court has also acknowledged that First Amendment overbreadth cases essentially involve “judicial prediction[s] or assumption[s]” that statutes “cause others not before the court to refrain from constitutionally protected speech or expression.”⁵⁷ Because the doctrine is based on such predictions, facial invalidation of a statute on overbreadth grounds “has been employed by the Court sparingly and only as a last resort”—“there comes a point where . . . a prediction . . . cannot, with confidence, justify invalidating a statute on its face.”⁵⁸

Despite exercising caution when it comes to predictive factfinding in certain circumstances, the Court has not meaningfully addressed the dangers of predictive factfinding more generally, even if justices have sporadically questioned “how good [the] Court is about predicting the consequences of some of [its] decisions.”⁵⁹ Moreover, commentators have for the most part discussed predictions only when criticizing individual decisions. If a Supreme Court forecast turns out to be badly wrong, especially in a controversial case, opponents of the Court’s decision will be loath to let the mistake go unnoticed.⁶⁰ And in contexts outside the debate about legislative factfinding, scholars have acknowledged the Supreme Court’s predictions and have sometimes suggested remedies. Michael Dorf has recognized “the Court’s limited ability to evaluate empirical and predictive claims,” focusing on *Clinton v. Jones*⁶¹ and *Morrison v. Olson*,⁶² two cases in which the Court attempted to discern

55. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *see also* Catherine Gage O’Grady, *The Role of Speculation in Facial Challenges*, 53 ARIZ. L. REV. 867, 881 (2011) (examining “pure” facial challenge cases and stating that in such cases, the “decision-maker must accept hypothetical theories about human behavior that the statute’s challengers suggest would likely be triggered by the operation of the challenged statute”).

56. *Wash. State Grange*, 552 U.S. at 450 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936)).

57. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

58. *Id.* at 613, 615.

59. *Trump v. Vance* Transcript of Oral Argument, *supra* note 6, at 97 (Alito, J.).

60. For example, after the dissent in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), predicted that the decision would lead to a flood of judicial recusal motions, the error was well-documented. *See, e.g.*, Richard Briffault, *The Supreme Court, Judicial Elections, and Dark Money*, 67 DEPAUL L. REV. 281, 297 (2018) (pointing out that the flood of recusal motions predicted by the *Caperton* dissent has failed to materialize).

61. 520 U.S. 681 (1997).

62. 487 U.S. 654 (1988).

how its decision would affect the executive branch.⁶³ In response to the problem, Professor Dorf proposed a system of “provisional adjudication,” discussed more in Part V, under which the Court could reach a conclusion but later revisit that decision with the benefit of experience showing whether the Court’s prediction was correct.⁶⁴

Despite this awareness of predictions both from the Court and scholars, the robust discussion of legislative facts has mostly failed to address the distinctions between predictive legislative facts and regular legislative facts. The remainder of this Article looks at predictive factfinding broadly, as a general tool for deciding cases. Most of the cases reviewed are constitutional decisions by the Supreme Court in which the Court forecasts how a statute, a rule, or its own decision would affect interests important to the outcome of the case. The Article builds on the research discussed above and begins to study the nature of predictive facts, explore their prevalence and import, and consider ways to ameliorate the problems they create.

II. THE SUPREME COURT’S PREDICTIVE JURISPRUDENCE

Part II examines several Supreme Court predictions in order to demonstrate how the Court uses predictive phrasing to make factual pronouncements without acknowledging a lack of reliance on empirical evidence. As explained more in Part V, my criticism of the Court’s jurisprudence should not be taken as a call for elimination of predictive factfinding, foremost because predictions are inevitable and often advisable. Rather, this Part looks at how the Court has used predictive factfinding as a stand-in for legislative factfinding in order to make evidence-free claims. This Part also points out questions the Court failed to ask when reaching its conclusions.

In *McDonnell v. United States*,⁶⁵ the Supreme Court unanimously reversed the corruption convictions of former Virginia Governor Bob McDonnell.⁶⁶ McDonnell had been convicted of honest services fraud for accepting about \$175,000 worth of money and gifts in exchange for performing favors for a Virginia businessman, Jonnie Williams.⁶⁷ Williams’s company produced a dietary pill made from tobacco.⁶⁸

63. Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 75 (1998).

64. *Id.* at 9, 60–69.

65. 579 U.S. ___, 136 S. Ct. 2355 (2016).

66. *Id.* at 2375.

67. *Id.* at 2361.

68. *Id.* at 2362.

Evidence at trial showed that McDonnell held events promoting the pill and told the head of the state's health insurance plan that the pill was working well for him and would be good for state employees. McDonnell was convicted under a federal statute that prohibited government officials from accepting a thing of value in exchange for "being 'influenced in the performance of any official act.'"⁶⁹

The first part of the Court's opinion reversing McDonnell's conviction was purely focused on statutory interpretation and concluded that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'"⁷⁰ Because the trial court had not limited the definition of "official act" in its jury instructions, McDonnell's conviction could not stand.

The opinion could have ended there, but the Court went on to explain that a broader reading of "'official act' would raise significant constitutional concerns."⁷¹ That was because anything a government official accepted from a constituent, such as a contribution or a free lunch, could count as a quid in a quid pro quo deal.⁷² If the quo was simply setting up a meeting, dire consequences could result, because "conscientious public officials arrange meetings for constituents . . . all the time."⁷³ A broad corruption law "could cast a pall of potential prosecution" over elected officials, and they "might wonder whether they could respond to even the most commonplace requests for assistance."⁷⁴ Regular citizens "might shrink from participating in democratic discourse."⁷⁵

The citations in the Court's opinion revealed that its concern over elected officials' freedom was not manufactured by the justices themselves, but was taken from three amicus briefs submitted on behalf of former federal and state officials, none of which cited empirical evidence.⁷⁶ And while that concern should be taken seriously and might

69. *Id.* at 2365 (citing 18 U.S.C. § 201(b)(3)).

70. *Id.* at 2368.

71. *Id.* at 2372; see Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 556–57 (2019) (noting that *McDonnell* discussed constitutional concerns "almost as an afterthought" and "as a secondary justification" for its reading of the text).

72. *McDonnell*, 136 S. Ct. at 2372.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (first citing Brief for Former Fed. Offs. as Amici Curiae Supporting Petitioner at 6, *McDonnell*, 136 S. Ct. 2355 (No. 15-474); then citing Brief for Former Va. Att'y's Gen. as Amici Curiae Supporting Petitioner at 1–2, 16, *McDonnell*, 136 S. Ct. 2355 (No. 15-474); and then citing Brief for 77 Former State Att'y's Gen. (Non–Virginia) as Amici Curiae Supporting Petitioner Robert F. McDonnell at 1–2, *McDonnell*, 136 S. Ct. 2355 (No. 15-474)). All three briefs relied principally

even be dispositive, the Court's approach to its prediction is instructive. The Court did not (at least explicitly) perform or refer to any research on questions that could have informed its prediction. Most obviously, the Court did not ask whether there had been any federal prosecutions for the types of innocuous actions listed in the opinion, how long federal prosecutors had used the unacceptably broad definition of "official act," or whether that definition had been accepted by appellate courts.⁷⁷ The Court therefore had no way to determine whether officials subject to that definition had hesitated before responding to constituent requests or if constituents had been led to "shrink from participating in democratic discourse."⁷⁸ Also unexamined was whether there were state laws that had previously used the same broad definition of "official act" that had led to the Court's feared results, and if so, how many people that definition affected.

If the Court had sought to answer any of those questions, it would have presumably needed to ask whether any damage caused by the expansive definition would have been outweighed by the benefits of reduced corruption.⁷⁹ And though the Court's holding on the constitutionality of the statute is unclear, it is most likely the last word on any similar state statute, meaning that no broad interpretation of "official act" will be sanctioned unless the Court revisits its holding.⁸⁰

The *McDonnell* opinion was surprising because it was unanimous, not because it contained an unsupported predictive fact. In sharply divided

on case law, and one listed examples of government officials explicitly offering access in exchange for donations. See Brief for Former Fed. Offs. as Amici Curiae Supporting Petitioner at 12, 19–20, *McDonnell*, 136 S. Ct. 2355 (No. 15-474).

77. The Court may not have found all of that information even if it had searched. As discussed in more detail in Part V, there are better solutions to the problem than declaring an unsupported predictive fact. See *infra* Part V. Aside from avoiding making predictions in dicta, the Court could remand the case, adopt a provisional ruling, or, more generally, create decisional rules clarifying which party has the burden to prove or disprove questions of predictive fact.

78. *McDonnell*, 136 S. Ct. at 2372. For a list of questions courts should ask when reviewing the constitutionality of a statute and the necessity of finding legislative facts when answering those questions, see Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 666 (1988) (quoting Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 84 (1960)).

79. See FAIGMAN, *supra* note 21, at 68–69 (discussing *United States v. Salerno*, 481 U.S. 739 (1987), and arguing that if government's test for pretrial detention could "identif[y] forty percent of those who would be violent if released," the Court should explicitly discuss whether that "outweigh[s] the individual's liberty interest").

80. See, e.g., *United States v. Skelos*, 707 F. App'x 733, 736–37 (2d Cir. 2017) (holding that court was "obliged to identify error" in jury instructions because of *McDonnell*'s conclusion that instructions "raise[d] 'significant constitutional concerns'"); *Nelson v. United States*, No. 3:16-cv-1434-J-32JBT, 2019 WL 1763226, at *4 n.10 (M.D. Fla. Apr. 22, 2019) (explaining that definition of "official acts" was "cabined by the constitutional concerns identified in *McDonnell*").

cases, the majority and dissent often bitterly dispute predictive facts, usually without relying on much evidence. In *Caperton v. A.T. Massey Coal Co.*,⁸¹ for example, the five-justice majority held that in “extreme” circumstances, the Due Process Clause requires a judge to recuse from a case if it involves a litigant who provided significant financial support to the judge’s campaign.⁸² Justice Kennedy’s opinion for the Court focused principally on the facts of the case and the difficulty of proving actual bias, but it also concluded that the decision would not cause “a flood of recusal motions” because “[t]he parties [had] point[ed] to no other instance involving judicial campaign contributions that present[ed] a potential for bias comparable to the” case at bar.⁸³ The Court also noted that past recusal decisions had not led to floods of litigation.⁸⁴

In contrast to the majority opinion, Chief Justice Roberts’s dissent was centered around predictions about the decision’s consequences for the judicial system. The opening portion of the opinion surmised that the new rule would “inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.”⁸⁵ The dissent then characterized the majority’s assertion that the case would not lead to a flood of litigation as “so much whistling past the graveyard.”⁸⁶ In the dissenters’ view, each claim of judicial bias would “bring[] the judge and the judicial system into disrepute,” with “all future litigants [asserting] that their case is *really* the most extreme thus far.”⁸⁷

Unlike the *McDonnell* Court, the dissenting justices in *Caperton* did attempt to support their claim to a limited degree—the opinion discussed a 1989 case, *United States v. Halper*,⁸⁸ which applied the Double Jeopardy clause to civil cases.⁸⁹ Though the *Halper* Court said that its rule would

81. 556 U.S. 868 (2009).

82. *Id.* at 886.

83. *Id.* at 887. Litigants now often try to persuade the Court that a certain decision would lead to a flood of litigation. *See, e.g.*, Transcript of Oral Argument at 35, *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2019) (No. 18-422) (attorney for appellants arguing that “if you get in the business of adjudicating these cases, these cases will come, they will come in large numbers. And once you get into the political thicket, you will not get out and you will tarnish the image of this Court”). In *Rucho*, the Court accepted that argument. *See* 139 S. Ct. at 2507.

84. *Caperton*, 556 U.S. at 888.

85. *Id.* at 891 (Roberts, C.J., dissenting).

86. *Id.* at 899.

87. *Id.*

88. 490 U.S. 435 (1989).

89. *Id.* at 448–49.

only apply to “the rare case,”⁹⁰ claims based on *Halper* “turned out not to be so ‘rare’ after all,” and the Court abandoned the rule eight years later.⁹¹ Though the *Caperton* dissent said that “[t]he déjà vu is enough to make one swoon,” it did not explain why *Caperton* and *Halper* were analogous.⁹² Nor did it purport to examine whether other “rare case” predictions had been correct. Neither the majority nor the dissent looked at whether any states had already adopted *Caperton*-type rules, and if so, whether they suffered from a sharp increase in recusal motions that had brought “the judicial system into disrepute.”⁹³ Nor did the dissent explain how many *Caperton* claims would render the rule intolerable under the proposed standard or weigh that number of claims against the due process rights of a litigant whose judge may be biased because of political spending.

The most perplexing passage of the *Caperton* dissent was the last paragraph. After opening the opinion by stating that the decision would “inevitably” lead to an increase in recusal motions that would “erode public confidence,” the opinion ended with resignation and uncertainty: “I believe that opening the door to recusal claims . . . will itself bring our judicial system into undeserved disrepute, and diminish” Americans’ confidence in the courts.⁹⁴ But, the Chief Justice concluded, “I hope I am wrong.”⁹⁵

He was wrong. The accuracy of the main prediction in *Caperton*, unlike many others discussed here, could be measured with precision several years later by simply counting the number of subsequent recusal motions. Bradley Smith, a prominent supporter of Chief Justice Roberts’s *Caperton* dissent conceded the point succinctly: “[D]id the floodgates open? No!”⁹⁶

90. *Id.* at 449.

91. *Caperton*, 556 U.S. at 900 (Roberts, C.J., dissenting).

92. *Id.*

93. *Id.* at 899. In at least two cases, the Court’s majority has responded to the dissent’s “flood of litigation” concern with reference to the experience of states or lower courts. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (“Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horrors respondent and the dissent predict.”); *see also Skinner v. Switzer*, 562 U.S. 521, 535 (2011) (rejecting floodgates argument because in the circuit courts there had been no “litigation flood or even rainfall”).

94. *Caperton*, 556 U.S. at 891, 902 (Roberts, C.J., dissenting).

95. *Id.* at 902.

96. N.Y.U. Sch. of L., *Courts, Campaigns, and Corruption: Judicial Recusal Five Years After Caperton, Panel 1: Caperton and the Courts: Did the Floodgates Open?*, YOUTUBE (Nov. 18, 2014), <https://www.youtube.com/watch?v=Xt4pqd5iAGw> (comments of Bradley Smith at 33:00); *see also* Adam Liptak, Keith Swisher, James Sample & Bradley A. Smith, *Caperton and the Courts: Did the Floodgates Open?*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 481, 491 (2015) (transcript of the panel);

And just a few months after that assessment was made, the same issue arose in *Williams-Yulee v. Florida Bar*.⁹⁷ There, the plaintiff challenged a Florida rule barring judicial candidates from directly soliciting campaign contributions, which was intended to preserve public confidence in the integrity of the judiciary. This time, Chief Justice Roberts wrote for the five-justice majority that upheld the restriction. *Williams-Yulee* conceded that face-to-face solicitation could “create[] a problem,” but she argued that a request made by phone or text message would not raise any corruption concern.⁹⁸ The majority refused to “wade into th[e] swamp” of predicting the effects of such rules, because the state was not obligated to perfectly tailor its regulations.⁹⁹ However, when the plaintiff suggested that the rule was unnecessary because the state’s goal could be achieved through judicial recusal rules and campaign contribution limits, the majority cited the *Caperton* dissent to conclude that such rules would cause “a flood of postelection recusal motions [that] could ‘erode public confidence in judicial impartiality.’”¹⁰⁰ Further, a rule requiring recusal in every case involving a campaign contribution “would disable many jurisdictions.”¹⁰¹

The *Williams-Yulee* majority made even less of an effort than the *Caperton* dissenters to support its findings of predictive fact. While the *Caperton* dissent discussed *Halper*, the *Williams-Yulee* majority relied solely on the dissenting opinion’s prediction made in *Caperton* six years prior.¹⁰² By that time, the Court could have asked whether the *Caperton* flood of litigation had occurred. It could have also asked the type of questions that were unanswered by the *Caperton* opinions: whether there were states with the recusal rules proposed by the plaintiff, whether any states that had such a rule saw a flood of post-election recusal motions,

Briffault, *supra* note 60, at 297 (“Although Chief Justice Roberts viewed with alarm ‘the inherently boundless nature’ of *Caperton*’s ‘rule’ and predicted that the courts would soon be ‘forced to deal with a wide variety of *Caperton* motions,’ it appears that few such motions have followed and the case has had little direct impact on the recusal of elected judges.” (quoting *Caperton*, 556 U.S. at 899–900 (Roberts, C.J., dissenting))).

97. 575 U.S. 433 (2015).

98. *Id.* at 454.

99. *Id.*

100. *Id.* at 455 (quoting *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting)).

101. *Id.* The Court also worried that a recusal rule “could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of peremptory strike against a judge that would enable transparent forum shopping.” *Id.*

102. Justices Ginsburg and Breyer were part of the majority in both *Caperton* and in *Williams-Yulee*, calling into question whether they agreed with the predictions made in the latter case.

and whether any such jurisdictions had been “disable[d]” by such a rule.¹⁰³

The inaccuracy of the prediction made by the *Caperton* dissent and reissued by the *Williams-Yulee* majority is troubling on its own because such predictions often govern large swaths of American jurisprudence. But perhaps more remarkable is the *Caperton* dissent’s recognition that the accuracy of its prediction was in real doubt. It is hard to imagine any member of the Court basing an opinion on a regular legislative fact that is both so uncertain and so unsupported by evidence unless there were no other ways to decide the case. Yet in *Caperton*, rather than study the issue further or ask how certain one should be before basing an opinion on a finding of predictive fact, the dissenting justices sought to implement a rule that would foreclose a whole class of constitutional claims because of a “belie[f]” that it could lead to undesirable consequences.¹⁰⁴ Then, when six years had passed and there was a strong reason to believe that the prediction was incorrect, the majority in *Williams-Yulee* relied on it once more.

The Court’s criminal procedure jurisprudence has relied on predictive factfinding as well. In *Hudson v. Michigan*,¹⁰⁵ the Court decided whether to apply the exclusionary rule to violations of the “knock-and-announce” requirement, which holds that police officers executing a search warrant must knock and wait a reasonable amount of time before forcibly entering a home.¹⁰⁶ The Court declined to suppress the evidence at issue, reasoning that applying the exclusionary rule would lead police to wait longer than they needed to before entering homes, “producing preventable violence against officers in some cases, and the destruction of evidence in many others.”¹⁰⁷ Further, allowing suppression claims “would generate a constant flood of alleged failures to observe the rule” and “[c]ourts would experience as never before” that the exclusionary rule would require extensive litigation.¹⁰⁸ As with the cases discussed above, the Court did not cite evidence to support its predictions. Nor did it acknowledge that states such as Florida, Colorado, and New Mexico had long applied the exclusionary rule to knock-and-announce violations based on state law

103. *Williams-Yulee*, 575 U.S. at 455. Justice Scalia’s dissent did not respond to the majority’s predictions about the problems with recusal rules. He did fault the majority for making the “happy forecast” that banning requests for contributions would improve public trust in judges without “identif[y]ing] the slightest evidence” in support. *Id.* at 466–67 (Scalia, J., dissenting).

104. *Caperton*, 556 U.S. at 902 (Roberts, C.J., dissenting).

105. 547 U.S. 586 (2006).

106. *Id.* at 588–89.

107. *Id.* at 595.

108. *Id.*; see also John D. Castiglione, *Hudson and Samson: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 96 (2007) (disputing the Court’s prediction that enforcement of exclusionary rule would lead to a flood of litigation).

grounds,¹⁰⁹ let alone ask whether those jurisdictions had faced the problems predicted.¹¹⁰

While the Court has, on rare occasions, more fully considered its predictive jurisprudence,¹¹¹ cases like *McDonnell*, *Caperton*, *Williams-Yulee*, and *Hudson* typify the Court's recent treatment of predictive facts. Countless cases follow the same pattern. For instance, in *California Democratic Party v. Jones*,¹¹² the Court invalidated California's blanket primary system.¹¹³ Under that system, all primary voters received the same ballot and could vote for any candidate, regardless of party; however, the top vote-getter from each party nevertheless became that party's nominee in the general election.¹¹⁴ The Court struck down the law based largely on the prediction that "a single election in which the party nominee is selected by nonparty members could be enough to destroy the party," or at least "severely transform it."¹¹⁵ Eight years later, in

109. See *People v. Lujan*, 484 P.2d 1238, 1242 (Colo. 1971); *Benefield v. State*, 160 So. 2d 706, 711 (Fla. 1964); *State v. Jean-Paul*, 295 P.3d 1072, 1076–77 (N.M. Ct. App. 2013) (noting that 1994 New Mexico Supreme Court case "states that suppression is the appropriate remedy under Article II, Section 10 of the New Mexico Constitution for the failure to follow the knock-and-announce rule"); see also *State v. Cable*, 51 So. 3d 434, 435 (Fla. 2010) (noting that in *Benefield* the Court "held that a violation of Florida's knock-and-announce statute vitiated the ensuing arrest and required the suppression of the evidence obtained in connection with the arrest"); Castiglione, *supra* note 108, at 96 ("Given that, until *Hudson*, it had been assumed by most courts that an exclusionary remedy existed for knock-and-announce violations, and given that the criminal courts have not been suffering from a deluge of knock-and-announce suppression motions, Justice Scalia is clearly overstating the threat to judicial economy posed by allowing exclusion.").

110. Other criminal procedure decisions rest on predictive facts as well. See *United States v. Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring) ("Moreover, a constitutional rule permitting felony arrests only with a warrant or in exigent circumstances could severely hamper effective law enforcement."). In *Apodaca v. Oregon*, the Court declined to extend the Sixth Amendment jury unanimity requirement to the states. 406 U.S. 404 (1972). The defendants argued that unanimity was necessary in order to enforce the rule that juries represent a cross-section of the community. *Id.* at 413. The plurality rejected that argument, predicting that even in states without the unanimity requirement, minority jurors' "views [would] be heard." *Id.* The plurality also refused to "assume . . . that a majority [would] deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal." *Id.* Subsequent studies have called those predictions into question, and the Court overruled *Apodaca* in *Ramos v. Louisiana*. 590 U.S. ___, 140 S. Ct. 1390 (2020). At least one brief in support of the defendant in *Ramos* cited empirical data to argue that *Apodaca*'s prediction was incorrect. See, e.g., Brief for L. Professors & Soc. Scientists as Amici Curiae Supporting Petitioner, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

111. See *infra* Part V.

112. 530 U.S. 567 (2000). The Court did not address whether the challenge to California's law was facial.

113. *Id.* at 577.

114. *Id.* at 570–71.

115. *Id.* at 579. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 312 (2001) (noting "the limited empirical evidence of fundamental incapacitation of parties in the California blanket primary experiment").

Washington State Grange v. Washington State Republican Party,¹¹⁶ the Court predicted that voters would not be confused by ballots that listed a candidate's "party preference," even though that candidate would not necessarily be endorsed by her preferred party.¹¹⁷ The majority first noted that the challengers' argument was "disfavored" since it was a facial challenge.¹¹⁸ Recognizing that the challengers had a high burden to meet, the Court called the voter-confusion concern "sheer speculation" and rejected it.¹¹⁹ The Court also explained that its precedent "reflect[ed] a greater faith in the ability of individual voters to inform themselves about campaign issues."¹²⁰

Just over ten years earlier, in *Clinton v. Jones*, the Court decided whether "the Constitution requires federal courts to defer" civil suits against the President until the end of his term.¹²¹ President Clinton asserted that allowing Paula Jones's lawsuit to continue would "hamper the performance of his official duties."¹²² The Court rejected that argument, concluding that "if the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency. As for the case at hand, if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time."¹²³ That prediction has already been relied upon in *Trump v. Vance*, a case in which the Supreme Court decided that the President does not have absolute immunity that would allow him to refuse to comply with a state prosecutor's grand jury subpoena seeking his tax returns.¹²⁴

The Court's common practice of predictive factfinding did not begin in the past couple of decades. In 1974, the justices decided *Miami Herald Publishing Co. v. Tornillo*, which invalidated a state law requiring

116. 552 U.S. 442 (2008).

117. *Id.* at 444.

118. *Id.* at 450.

119. *Id.* at 454.

120. *Id.* The Chief Justice, concurring, wrote that certain ballot designs would have been permissible, but that others would not survive a First Amendment challenge. *Id.* at 459–62 (Roberts, C.J., concurring).

121. *Clinton v. Jones*, 520 U.S. 681, 684 (1997).

122. *Id.* at 701.

123. *Id.* at 702. That forecast was later heavily criticized. See, e.g., Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 826 n.354 (2012) (calling the prediction in *Clinton v. Jones* "embarrassingly poor").

124. *Trump v. Vance*, 591 U.S. ___, 140 S. Ct. 2412, 2420–21, 2426 (2020); see also Brief in Opposition on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Trump*, 140 S. Ct. 2412 (No. 19-635) ("[T]his Court has rejected the contention that subjecting a sitting President to judicial process necessarily 'impose[s] an unacceptable burden on the President's time and energy, and thereby impair[s] the effective performance of his office.'" (quoting *Clinton*, 520 U.S. at 702)).

newspapers to provide political candidates with space to reply to criticism.¹²⁵ The majority opinion stated that because of the potential penalties, newspaper editors “might well conclude that the safe course is to avoid controversy,” and “political and electoral coverage would be blunted or reduced.”¹²⁶ Though the Court acknowledged that the statute in question was enacted in 1913, it did not ask whether, in the sixty years before the decision, there was any indication that Florida newspapers had avoided political controversy, leading to “blunted” electoral coverage. And significantly, at the end of the opinion the Court concluded that even if the law did not lead to increased costs or lead editors to “forgo publication of news or opinion,” it was unconstitutional anyway “because of its intrusion into the function of editors.”¹²⁷

This Part has not attempted to exhaustively document significant Supreme Court cases that have relied on predictive factfinding. There are many additional examples, including both high-profile and less significant cases involving constitutional rights,¹²⁸ agency adjudication and rulemaking,¹²⁹ and more.¹³⁰ But these cases provide examples of how the Court has made predictions, demonstrate that the practice is at least somewhat prevalent, and raise some questions about what the Court has left unsaid. Part III will refer to these cases in an attempt to better understand the nature of predictive factfinding.

III. DESCRIBING AND CATEGORIZING PREDICTIVE FACTFINDING

This Part identifies discrete categories of predictive facts, such as predictions about legislative actions versus predictions about court-made

125. *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

126. *Id.* at 257.

127. *Id.* at 258.

128. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015) (predicting that recognition of same-sex marriages would not lead to decrease in opposite-sex marriages); *Citizens United v. FEC*, 558 U.S. 310, 360 (2010) (predicting that the appearance of influence or access caused by unlimited corporate spending in elections would “not cause the electorate to lose faith in our democracy”); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (predicting that “[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner” of a shopping center).

129. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618 (2013) (disagreeing with “dissent’s forecast” that decision would “depriv[e] local governments of the ability to charge reasonable permitting fees”); *Johnson v. Transp. Agency*, 480 U.S. 616, 641 n.17 (1987) (upholding state agency’s affirmative action plan and discussing dissent’s prediction that the decision would “loose a flood of ‘less qualified’ minorities and women upon the work force”).

130. *See Hernandez v. Mesa*, 589 U.S. ___, 140 S. Ct. 735, 747 (2020) (refusing to allow *Bivens* claim in case involving cross-border shooting based in part on prediction that such a claim could “risk . . . undermining border security”).

rules, and so forth. Having done so, the discussion then proceeds to show why courts must sometimes engage in predictive factfinding to reach a defensible conclusion, but in other cases need not do so.

A. *Categorizing Predictive Factfinding*

1. *Predictions About Court-Made Rules Versus Predictions About Legislative or Regulatory Actions*

In many cases, the justices debate the potential effects of a new court-made rule, such as a rule recognizing a constitutional right to physician-assisted suicide.¹³¹ In others, the Court makes a prediction about an existing law, rule, or government practice, such as a requirement that newspapers print political candidates' responses to criticism.¹³² Though most relevant cases involve a law and an intertwined potential court rule, the focus of the Court's predictive factfinding may be on only one of the two. For example, in *Glucksberg*, the Court decided whether to strike down a law banning physician-assisted suicide in Washington¹³³—if it did, it would create a new constitutional rule. The Court's predictive analysis focused on the potential effects of the proposed constitutional rule, not the existing law.¹³⁴

The Court has not distinguished between these types of predictive factfinding, and both types may raise some of the same problems. However, the distinction is worth noting because a reviewing court's method of arriving at legislative facts, including predictive facts, should differ in the two types of cases. If a court is reviewing a law or agency rule, it may be able to refer to some evidence relied upon by the legislature or agency when making its decision; if the law is not brand new, the court could also review evidence about its application and ask whether the potential predicted effects have thus far occurred. And the Supreme Court has made clear that when the legislature has made an explicit prediction, it is entitled to some deference.¹³⁵ A judicial minimalist might even argue that courts should presume that legislatures have implicitly determined that statutes will not have an unconstitutional effect and therefore should be invalidated only if there is a very strong reason to believe that the

131. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

132. Here, I refer to laws that do not contain an explicit predictive judgment by a legislature or agency. See *infra* section III.B (distinguishing between laws with explicit predictive judgments and those without).

133. *Glucksberg*, 521 U.S. at 705–07.

134. *Id.* at 731–35.

135. See *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997).

court's own contrary prediction will come true.¹³⁶

A court predicting the effect of its own rule is on somewhat different ground. In such cases, such as when the Court decides whether to apply the exclusionary rule in a Fourth Amendment case, it is likely that no legislature or agency will have weighed in on the potential effects of the rule; the court's analysis must simply determine whether the rule will carry out the mandate of a constitutional provision. The court may be more likely to lack sufficient information to make predictions (or regular findings of legislative fact) when it is considering a new court-made rule, although it might have the option of looking to state courts and asking whether a similar rule has been adopted.¹³⁷ As discussed further in Part V, a court creating a new rule with thin or nonexistent evidentiary support should consider writing an opinion acknowledging some uncertainty and preserving the possibility that new information could lead to a different result in the future.

2. *Predictions That Allow Further Evidentiary Development Versus Those That Stop Experimentation*

Some predictive facts that become precedent are also essentially immunized from evidentiary testing because of the Supreme Court's holding. If the prediction is made in the majority opinion, it often addresses what *would* happen if the Court made a different decision.¹³⁸ If the decision holds that a certain practice is unconstitutional, it might be illegal nationwide to engage in the disputed activity, therefore preventing empirical testing.¹³⁹ In *McDonnell*, for instance, the Court's opinion strongly suggested that any attempt to read federal corruption law broadly should be invalidated because of the Court's prediction about political consequences,¹⁴⁰ and courts have understood its constitutional analysis as controlling.¹⁴¹ It is therefore likely that any lower court would prevent a

136. See generally Richard M. Re, "Equal Right to the Poor," 84 U. CHI. L. REV. 1149, 1216 (2017) (arguing for recognition of equal right principle but noting that "federal courts' institutional limitations might still warrant judicial restraint or deference to the political branches, particularly when equal protection claims depend on predictions or contestable empirics").

137. *Glucksberg*, 521 U.S. at 734–35.

138. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 276 (1999) (noting that some doctrine hinges on the "world we can expect under a particular legal regime").

139. Cass Sunstein has called this practice "maximalist invalidation." CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 30 (1999).

140. *McDonnell v. United States*, 579 U.S. ___, 136 S. Ct. 2355, 2372 (2016).

141. See *United States v. Skelos*, 707 F. App'x 733, 736–37 (2d Cir. 2017) (holding that the court was "obliged to identify error" in jury instructions because of *McDonnell*'s conclusion that

prosecutor from applying a state or federal corruption law in the manner the prosecutors did in *McDonnell*, thereby making it impossible to even gather new data to assess whether the Court's predictive factfinding was correct. Likewise, in striking down the right-of-reply statute in *Tornillo*, the Court effectively prevented any state from enacting a similar law and foreclosed any test of whether such a law would in fact reduce political coverage in newspapers.¹⁴² In other words, in a single case, the Court can make a prediction that raises a new factual question but simultaneously thwarts any effort to test whether the prediction will come true.¹⁴³

Conversely, some decisions, often those that refuse to recognize a constitutional right, allow for further factual development that could eventually change the Court's decision. Many cases fall within this category, and some, like *Washington v. Glucksberg* and *United States v. Leon*,¹⁴⁴ discussed further in Part V, even explicitly recognize that future evidence may lead the Court to change its opinion.¹⁴⁵

The distinction between these two types of cases may be important when the Court is considering whether a prediction is necessary or advisable, because an incorrect decision that forecloses future factual development will be more difficult to revisit. The Court has acknowledged a similar phenomenon in explaining its reluctance to accept predictions made in facial challenges, noting that such forecasts "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution."¹⁴⁶ A court that recognizes a risk of indefinitely foreclosing experimentation may have the tools to reach the same result without making a prediction.¹⁴⁷

instructions "raise[d] 'significant constitutional concerns'"); *Nelson v. United States*, No. 3:16-cv-1434-J-32JBT, 2019 WL 1763226, at *4 n.10 (M.D. Fla. Apr. 22, 2019) (explaining that definition of "official acts" was "cabined by the constitutional concerns identified in *McDonnell*").

142. *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

143. A similar problem occurs when the Court refuses to recognize a constitutional right because it might lead to a flood of litigation—lower courts would also refuse to recognize that right, and the Court's prediction would be difficult to disprove. In such cases, a state could subsequently recognize the right that the Court refused to recognize and then its experience would create data on whether the flood of litigation occurred. Thus, there is at least a theoretical chance that the Supreme Court would overrule its decision on that basis.

144. 468 U.S. 897 (1984).

145. *Id.* at 928 (Blackmun, J., concurring); see *Washington v. Glucksberg*, 521 U.S. 702 (1997).

146. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

147. See *infra* Part V.

3. *Standard Doctrinal Predictions Versus Predictions About Second-Order Concerns*

Many predictions discussed herein are central to the doctrinal questions raised by the parties, like the Fourth Amendment analysis in *Hudson v. Michigan*.¹⁴⁸ But the Court's predictive factfinding is sometimes less obviously tethered to the principal questions presented by the case. In other words, the prediction centers on second-order concerns, or ones that are not directly or necessarily raised by the constitutional or statutory question at issue. These predictions, such as the prevalent "flood of litigation" forecasts in cases like *Caperton* and *Williams-Yulee*, often raise worries about the functioning of the Court itself or the judiciary as a whole. There is some debate about whether the Court should take such considerations into account when formulating constitutional rights;¹⁴⁹ if one believes that those considerations are improper or less important, that is reason to argue that any predictions about them are unnecessary.¹⁵⁰ But putting to one side the merits of that debate, one can at least recognize that if the Court decides a case relying on a prediction relating to a second-order concern, the parties may never get a chance to litigate the question.¹⁵¹ However, the Court understandably has a special concern for how its legal decisions will affect the judiciary; unlike a prediction about the effect of a statute, it may be that no other body has seriously considered how a proposed rule would affect the court system. These considerations are important to keep in mind when assessing the problems with predictive factfinding and contemplating solutions.

4. *Explicit Predictions Versus Implicit Predictions*

The cases discussed in Part II all contained explicit discussions about the future. But it is important to recognize that other cases, including some of the most influential decisions in recent history, rest on significant implicit predictive facts. In *Miranda v. Arizona*,¹⁵² the Court "essentially made a 'predictive' factual determination that in future cases courts would have a difficult time discovering whether a confession was voluntarily communicated."¹⁵³ Similarly, the exclusionary rule extended to the states

148. 547 U.S. 586, 595 (2006).

149. See Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1056 (2013).

150. See *infra* section III.B.

151. See *infra* section IV.C.

152. 384 U.S. 436 (1966).

153. Michael Edmund O'Neill, *Undoing Miranda*, 2000 BYU L. REV. 185, 281.

in *Mapp v. Ohio*¹⁵⁴ was implicitly based, at least in part, on the prediction that potential suppression of evidence would lead police to more diligently follow the commands of the Fourth Amendment.¹⁵⁵ And in *Shelby County v. Holder*,¹⁵⁶ the case in which the Court struck down the preclearance provision of the Voting Rights Act, the majority implicitly projected that if the law was invalidated, previously-covered jurisdictions would not use their newfound freedom to pass laws to prevent Black Americans from voting.¹⁵⁷

It may be less likely that a court making an implicit prediction is attempting to avoid the appearance of reaching a conclusion of legislative fact without supporting evidence. However, implicit predictions may be incorrect, just like explicit ones. While the following Parts do not focus on implicit predictions, their existence is important to remember because any solution to predictive factfinding will fail if it simply pushes courts to make predictions implicit.

B. *The Varied Necessity of Predictive Factfinding*

It is critical to acknowledge that courts must predict legislative facts quite often.¹⁵⁸ Unremarkable predictions exist in almost any case involving legislative facts, because any time a court relies on data to find a regular legislative fact it is implicitly assuming that the data still accurately describe the world and will continue to do so into the immediate future.¹⁵⁹ Similarly, courts often review legislation intended to

154. 367 U.S. 643 (1961).

155. Anders Walker, “*To Corral and Control the Ghetto*”: *Stop, Frisk, and the Geography of Freedom*, 48 U. RICH. L. REV. 1223, 1240 (2014) (“Rather than predict police corruption, the Court seemed convinced that *Mapp* would diminish it.”); Stoughton, *supra* note 21, at 860 (explaining that with regard to the exclusionary rule, “the Court has adopted the view, at least implicitly, that officers will respond if courts reduce or eliminate the possibility of conviction”).

156. 570 U.S. 529 (2013).

157. *See id.* at 547–50. As discussed above, any court decision will contain some implicit predictions, such as the inherent prediction that a problem the government is trying to solve will continue if no action is taken to solve the problem. The implicit predictions discussed here are more controversial and less certain.

158. Even more obviously, courts must frequently make predictions of adjudicative fact. For example, a judge deciding whether to release a defendant before trial or keep him in jail is predicting whether that defendant will return to court, and, perhaps, whether he will commit a serious crime before trial. Certainly, study of judges’ methods for making predictions about such questions of adjudicative fact is vital, but such predictions are not the focus of this Article. *See generally* Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197 (2003) (discussing how a judge considering whether to grant preliminary injunction must consider likelihood of irreparable harm to plaintiff).

159. *See* Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 830 (2005) (“Legislative facts involve generalizations, usually predictive, about human behavior.”).

ameliorate a societal harm, and in most cases the court will assume that the harm would not disappear on its own without the legislation.¹⁶⁰ Such predictions are worth thinking about, but they are not the subject of this Article.

Courts also sometimes engage in predictive factfinding because the statute or rule at issue is itself based on an explicit prediction, and the court needs to determine whether that prediction is acceptable. Lawmakers must attempt to solve incipient problems, and courts unavoidably play a role in reviewing the predictions that legislatures make. In *Turner Broadcasting System, Inc. v. FCC (Turner II)*,¹⁶¹ for instance, the Court twice reviewed a federal law requiring cable companies to carry some local broadcast channels.¹⁶² That law was based on an explicit predictive judgment that cable dominance would threaten the existence of free broadcast television absent an intervention by Congress. In some cases of this type, a legislative body makes a forecast and the reviewing court is simply obligated to determine whether the lawmakers “had substantial evidence” to support it.¹⁶³ In such cases, at least nominally, the court’s task is not to “reweigh the evidence *de novo*, or to replace Congress’ factual predictions with [its] own.”¹⁶⁴

This Article is primarily concerned with the cases that do not fall into the two categories just mentioned. Instead, it addresses those that involve an explicit court prediction that does *not* relate to an explicitly predictive legislative judgment—for example, whether a broad understanding of a corruption law will reduce interaction between elected officials and citizens. In many of these cases, despite the absence of a legislative prediction, a primary issue in the case turns on a question of predictive

160. For example, if the Court accepts the uncontroversial legislative fact that the threat of potential imprisonment deters speech, it is inherently predicting that the same will hold true after its decision is made, at least in the short term. See Benjamin, *supra* note 39, at 304; see also Wistrich, *supra* note 123, at 751 (“[A] statute may be future-oriented in the sense that it is based on a prediction about what will be most conducive to future societal welfare but, paradoxically, may lock in that future-oriented rule for a long period of time so that the rule stays in effect even when the prediction about the future on which it is based becomes obsolete.”).

161. 520 U.S. 180 (1997).

162. *Id.*; *Turner I*, 512 U.S. 622 (1994).

163. *Turner II*, 520 U.S. at 208.

164. *Id.* at 211 (citing *Turner I*, 512 U.S. at 666); see Benjamin, *supra* note 39, at 301–02 (discussing *Turner I*). In other cases, such as antitrust cases, the court is called upon to “assess competing economic theories and predictive judgments” without applying the same level of deference. *Turner II*, 520 U.S. at 207. As demonstrated in *Turner II*, courts reviewing legislative predictions can consult the legislative record and may defer to the legislature’s assessment of empirical evidence. Courts making freestanding predictive judgments cannot apply deference, and they may rely on their own research or facts presented by litigants when making forecasts.

fact.¹⁶⁵ In constitutional cases in this class, the court's decision about the government's interest supporting a law or government practice will depend on its own prediction about how the law might serve that interest.¹⁶⁶ In certain criminal cases, for example, a court may need to predict whether extension of the exclusionary rule would encourage police to better adhere to the Fourth Amendment.¹⁶⁷

As discussed in section I.B, cases involving challenges to laws that have not yet been implemented may directly present issues of predictive fact most often. In *Washington State Grange v. Washington State Republican Party*, for instance, political parties facially challenged a state law that allowed a candidate to list a "party preference" on the ballot, with the challengers positing that voters would incorrectly believe that the party had endorsed that candidate.¹⁶⁸ Thus, if the Court was to decide the case before an election occurred, it had little choice but to engage in some kind of prediction about how voters would interpret the messages on the ballots, even if the only task was to gauge the likelihood of the plaintiffs' prediction.¹⁶⁹ *Washington State Grange* and similar cases could be compared to cases involving review of an explicit legislative prediction, since in both situations the Court is being called upon to review the prediction of another entity. Of course, while a legislature's prediction is owed deference,¹⁷⁰ a plaintiff's prediction in a facial challenge that a statute will have unconstitutional effects is often disfavored.¹⁷¹

As indicated in Part II, in other cases predictions are not as clearly necessary, either because the Court has not established that it lacks evidence to state a regular legislative fact or because the prediction is made in dicta, when the Court could have rendered its holding without the

165. See Merrill, *supra* note 159, at 830 (stating that analysis of many constitutional provisions requires "making predictive generalizations about future behavior" and that "[t]he Court has always deferred to Congress in making such predictions").

166. See Hashimoto, *supra* note 38, at 130 ("When the Court uses legislative facts, they are offered as predictions about the effects of legal rules and are inherently disputable.").

167. See, e.g., *United States v. Leon*, 468 U.S. 897, 927–28 (1984) (Blackmun, J., concurring) ("[S]ee[ing] no way to avoid making an empirical judgment.").

168. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008).

169. The majority in *Washington State Grange* expressed a refusal to accept the plaintiffs' "factual assumptions" about voter confusion, which were no more than "sheer speculation." *Id.* at 454–57. While the Court commendably set a high evidentiary bar before accepting the plaintiffs' prediction of voter confusion, its own rejection of the plaintiffs' argument unavoidably contained a forecast in itself, and that forecast was based largely on case law. See *id.* at 454 ("[O]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.").

170. See *Turner I*, 512 U.S. 622, 665 (1994).

171. See, e.g., *Leon*, 468 U.S. at 927–28 (Blackmun, J., concurring) (agreeing with the holding while noting the "provisional nature [of the Court's] decisions"); see also *Wash. State Grange*, 552 U.S. at 455.

prediction.¹⁷² In *Citizens United v. FEC*,¹⁷³ for example, the Court invalidated a federal ban on corporate spending in elections and declared that the appearance of influence or access would “not cause the electorate to lose faith in our democracy.”¹⁷⁴ The Court did not ask whether there was evidence that citizens of states without bans on corporate election spending had less faith in democracy, thus failing to establish whether it could have stated a regular legislative fact or made a prediction with evidentiary support.

The question of necessity will be central to any effort to ameliorate the negative effects of predictive factfinding. If a prediction is unavoidable, a court may try to make a higher quality prediction or acknowledge its uncertainty and encourage further factual development after the decision. Yet if it is unnecessary, recognizing that even high-quality predictions are fraught, the court may avoid engaging in forecasting altogether.

IV. THE PROBLEMS THAT PREDICTIVE FACTFINDING CREATES

While some predictive factfinding is necessary, the Court’s method of predictive factfinding leads to serious jurisprudential problems. Most obviously, judges, like other human beings, are not especially adept at predicting the future, so court predictions are often both wrong and imprecise. Compounding that problem, incorrect predictions might become factual precedents, such that lower courts feel bound to accept them even if later developments indicate that they are incorrect. And the adversarial model is weakened when appellate courts base their decisions on predictive factfinding that did not occur at the trial court level, cutting litigants out of the process and depriving courts of an important source of information that should help them make the best decision possible. Finally, the Supreme Court’s willingness to frequently engage in predictive factfinding without citing evidence or acknowledging the practice’s prevalence might damage the legitimacy of the judiciary.

A. *Courts’ Predictions Are Often Wrong and Almost Always Imprecise*

Human beings are poor predictors of the future.¹⁷⁵ This ineptitude does

172. Separately, section III.A.3 addresses predictions about second-order concerns, such as flood of litigation predictions, that some would argue are unnecessary. *See supra* section III.A.3.

173. 558 U.S. 310 (2010).

174. *Id.* at 360.

175. *See, e.g.,* Wistrich, *supra* note 123, at 802 n.354 (gathering sources for proposition that humans, including justices of the Supreme Court, are bad at predicting the future).

not only apply to laypeople: since 1990, “the track record of expert forecasters—in science, in economics, in politics—is as dismal as ever.”¹⁷⁶ In one famous study that asked experts to predict geopolitical events, researcher Philip Tetlock found that their assessments were usually no better than those of “dart-throwing chimps.”¹⁷⁷ Tetlock and others have found that prediction accuracy can be improved with some effort.¹⁷⁸ First, it is important to set specific probabilities that a given event will occur. It is also vital to avoid making predictions based on mere hunches, to which experts are especially susceptible, and spurn all-encompassing theories about a problem in favor of asking many narrow factual questions about it.¹⁷⁹

Realizing that the government has erred badly in making vital predictions about foreign policy, federal agencies have begun to sponsor efforts to better understand how specific methods can improve their predictions.¹⁸⁰ However, based on the cases discussed above, there is no indication that judges engage in any efforts to improve their own assessments of the future. Further, when social scientists have studied certain judicial predictions of adjudicative fact, such as bail determinations, judges have not performed particularly well. One recent paper finds that judges regularly “mis-rank[] defendants,” releasing 48.5% of defendants in the riskiest group, over half of which will fail to appear for court.¹⁸¹

All of this suggests that judges are probably not especially good at making predictions of legislative fact. Though no one has thoroughly studied the Supreme Court’s record on that front, and many predictions

176. David Epstein, *The Particular Blindness of Experts*, THE ATL. (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/how-to-predict-the-future/588040/> [<https://perma.cc/BG7B-WKMX>].

177. PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* 20 (Princeton Univ. Press course book ed. 2009).

178. PHILIP TETLOCK & DAN GARDNER, *SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION* 217–24 (2015).

179. *Id.*; see also David Brooks, *Opinion, Forecasting Fox*, N.Y. TIMES (Mar. 21, 2013), <https://www.nytimes.com/2013/03/22/opinion/brooks-forecasting-fox.html?searchResultPosition=1> [<https://perma.cc/7KRE-VK6L>].

180. See Steve LeVine, *A Contest to Beat Geopolitical “Superforecasters,”* AXIOS (May 14, 2019), <https://www.axios.com/geopolitical-forecasters-director-national-intelligence-563c45a4-8045-4efd-88d6-3d4d836e3ef7.html> [<https://perma.cc/5XVW-YUL6>]; TETLOCK & GARDNER, *supra* note 178, at 229–30.

181. Kleinberg et al., *supra* note 44, at 4–5. Moreover, as discussed in section I.A, it is difficult for judges to properly interpret empirical evidence in the first place, even if that data does not involve a prediction. See *supra* section I.A.

would be difficult to test,¹⁸² reviewing a few cases that involve testable claims shows that justices have no extraordinary power to see the future. In *Clinton v. Jones*, the Court decided that requiring a president to answer to civil litigation while in office would be “highly unlikely to occupy any substantial amount of [his] time.”¹⁸³ As is well-known, a deposition in the *Clinton* litigation led to an independent counsel investigation of President Clinton’s extramarital affair, and the charge that he lied in the resulting deposition served as a basis for his impeachment.¹⁸⁴ Unsurprisingly, commentators, including a judge, later denounced the prediction, calling it “embarrassingly poor”¹⁸⁵ and “epically incorrect.”¹⁸⁶

The *Caperton* and *Williams-Yulee* opinions provide further evidence that the Court’s forecasting ability is suspect. First, as the dissenting opinion in *Caperton* noted, the *United States v. Halper* Court incorrectly posited that its new rule applying the Double Jeopardy clause to civil cases would be invoked rarely.¹⁸⁷ And the *Caperton* majority itself was correct that its decision would not lead to a flood of litigation, but the dissent, which focused much more attention on predicting the decision’s effects, was wrong. Despite that error becoming fairly obvious a few years after *Caperton* was decided,¹⁸⁸ the *Williams-Yulee* majority relied on the *Caperton* dissent’s prediction as a reason to reject the petitioner’s claim that judicial recusal rules could substitute for campaign solicitation

182. For example, determining whether *Mapp*’s exclusionary rule has led to stricter adherence to the Fourth Amendment is the subject of ongoing debate. See, e.g., Walker, *supra* note 155, at 1224 (arguing that *Mapp* “encourag[ed] police to develop creative means of stopping suspects, including techniques that involved intimidation and violence”). And the question of whether voters were confused by the ballots in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), would require targeted study. Because of the imprecise nature of those predictions, even a clear answer to those questions might not shed much light on whether the prediction was accurate. If, after *Washington State Grange*, a study showed that 10% of voters were somewhat confused by the ballot design, there would be no way to determine whether that figure was above or below the threshold the Court had in mind. See *supra* section IV.A.

183. *Clinton v. Jones*, 520 U.S. 681, 702 (1997).

184. See Bill Barnhart, *Justice Stevens and the News Media: An Exercise in Exposition*, 106 NW. U. L. REV. 657, 689 (2012).

185. Wistrich, *supra* note 123, at 802 n.354.

186. Barnhart, *supra* note 184, at 690 (quoting JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 118 (2007)).

187. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 900 (2009) (Roberts, C.J., dissenting) (citing *United States v. Halper*, 490 U.S. 435 (1989)).

188. N.Y.U. Sch. of L., *supra* note 96 (comments of Bradley Smith at 33:00).

bans.¹⁸⁹ These are just a handful of examples;¹⁹⁰ a focused attempt to document the Court's predictions and gauge their accuracy might help persuade the Court to more carefully examine how it makes predictions in the future.

Even predictions that are not verifiably incorrect can be problematic because they are usually imprecise, providing parties and the public with little useful information about predictive facts' exact role in the jurisprudence. If the Court finds a predictive fact, it typically will not attempt to discern how likely it is that the event in question will happen; instead, it asserts that the result "might," "would," or "will" occur.¹⁹¹ Moreover, the Court often does not address the intertwined question of the magnitude of the problem that could arise, or it simply worries that the problem will occur "often" or in "some" or "many" cases.¹⁹² For example, in *Hudson v. Michigan*, the majority did not endeavor to determine the likelihood that application of the exclusionary rule would lead to police hesitation and a resulting increase in destruction of evidence.¹⁹³ Did the justices believe that the result was inevitable, or that there was a 90% chance it would occur, or maybe only a 60% chance? Assuming that the Court was correct that evidence destruction would have increased some amount, how much of an increase was necessary to justify using that increase as a basis for a constitutional decision? And which party had the responsibility to establish that an increase or lack of increase was likely? If the state showed that fifty criminal cases would be dropped nationwide each year if the exclusionary rule were applied to knock-and-announce violations, would that be enough to justify the rule the Court decided

189. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455 (2015) ("And a flood of postelection recusal motions could 'erode public confidence in judicial impartiality' and thereby exacerbate the very appearance problem the State is trying to solve." (quoting *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting))); *see also Caperton*, 556 U.S. at 900 (Roberts, C.J., dissenting) (discussing the incorrect prediction in *Halper*).

190. The Court also appears to have erred when predicting in *Apodaca v. Oregon*, that minority viewpoints would be heard during jury deliberations even without a unanimity requirement. 406 U.S. 404, 413 (1972); *see Kim Taylor-Thompson, Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1311 (2000) (explaining that studies after *Apodaca* "indicate that nonunanimous voting schemes are likely to chill participation by the precise groups whose exclusion the Court has proscribed in other contexts").

191. *See, e.g., McDonnell v. United States*, 579 U.S. ___, 136 S. Ct. 2355, 2372 (2016) (worrying that citizens "might shrink from participating in democratic discourse"); *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (predicting that "political and electoral coverage would be blunted or reduced" if law were upheld); *Apodaca*, 406 U.S. at 413 (predicting that minority jurors' "views will be heard").

192. *See, e.g., Caperton*, 556 U.S. at 891 (predicting unspecified "increase" in recusal motions); *Tornillo*, 418 U.S. at 257 (suggesting that political coverage "would be blunted or reduced").

193. *Hudson v. Michigan*, 547 U.S. 586, 595 (2006).

upon?¹⁹⁴ The opinion provides no hint at the answer.¹⁹⁵

Thus, the Court's analysis almost always omits two fundamental parts of any high-quality prediction: the likelihood that a predicted result will occur and, if applicable, the predicted magnitude of the problem.¹⁹⁶ To be sure, few would argue that the Court should attach a percentage likelihood to its predictions. It probably refuses to do so because such precision is often almost impossible, and the justices may worry that if a precise prediction were later disproven, it could lead to uncertainty in the law. However, attempting to set specific probabilities is an important part of developing accurate predictions¹⁹⁷ and may deserve a role in courts' decisionmaking processes, if not their opinions. In any event, the difficulty of making precise forecasts does not necessarily mean that making imprecise ones is the answer; rather, if a prediction cannot be made with reliable accuracy, perhaps predictions should not be a principal basis of law.

B. *Incorrect Predictions May Create Predictive Fact Precedent*

Regardless of its accuracy or precision, a significant predictive fact that provides the basis for a Supreme Court decision may become precedential even if it is phrased as case-specific and even if it lacks evidentiary support. As Allison Orr Larsen has explained, some legislative facts take on precedential value, and courts may be unlikely to revisit holdings even if facts change in the future.¹⁹⁸ For example, in *Nken v. Holder*,¹⁹⁹ the Court's opinion included a factual description about how immigration officials handled post-deportation appeals decided in a noncitizen's favor.²⁰⁰ Though that legislative fact was later questioned, lower courts frequently cited it as if it were precedent.²⁰¹ This practice creates a problem, both because facts may change and it might be later proven that

194. The lack of precision is not unique to predictions, and if the court announces an unsupported finding of legislative fact, that will also leave unanswered questions about the nature of the fact stated. But if a court supports a legislative fact with underlying data, that data will likely provide some answers about the scope of the phenomenon described.

195. See Levy, *supra* note 149, at 1075 (maintaining that if a justice makes a flood of litigation argument, "then that justice should make that case, presumably based on context-specific information, such as how much time these cases consume and ultimately the extent to which they tend to prevent law enforcement officials from performing their jobs").

196. See TETLOCK & GARDNER, *supra* note 178, at 217–22.

197. *Id.*

198. See Larsen, *supra* note 8, at 102.

199. 556 U.S. 418 (2009).

200. *Id.* at 435; Larsen, *supra* note 8, at 63–64 (discussing *Nken*, 556 U.S. at 435).

201. Larsen, *supra* note 8, at 63–64; see also Pine, *supra* note 78, at 696.

the fact was wrong in the first place.²⁰²

Some of the cases discussed in Part II have created predictive fact precedent. After *Tornillo*, one might expect that a court reviewing a different state's right-of-reply statute would need to determine whether *Tornillo*'s conclusion about discouraging political speech was contestable based on empirical evidence specific to the jurisdiction in question.²⁰³ However, courts have simply cited *Tornillo* as controlling precedent for decades without reviewing, or even mentioning, its predictive nature or lack of empirical support.²⁰⁴ Similarly, in *Buckley v. Valeo*,²⁰⁵ the Court invalidated limits on independent campaign spending in part because "such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive," thus "alleviat[ing] the danger that expenditures will be given as a *quid pro quo*."²⁰⁶ While that prediction has been heavily criticized and is perhaps not even believable to the Court's current members who adhere to *Buckley*,²⁰⁷ it has served as a foundational legislative fact in campaign finance law for over forty years without any subsequent empirical testing by the Supreme Court.²⁰⁸

The factual precedent problem is often exacerbated when predictive facts become precedential, as it is more difficult to anticipate the future than to assess current evidence,²⁰⁹ and in some circumstances there has never been an opportunity to present empirical evidence to a court. This

202. See Benjamin, *supra* note 138, at 278–79 (discussing factual precedent created by *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

203. See *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

204. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 284 (2003) (Thomas, J., concurring in the judgment in part and dissenting in part) (worrying that "longstanding and heretofore unchallenged opinions such as" *Tornillo* were "in peril"); *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 959 (9th Cir. 2010) (citing *Tornillo* for the proposition that "[i]t is clear that the First Amendment erects a barrier against government interference with a newspaper's exercise of editorial control over its content").

205. 424 U.S. 1 (1976).

206. *Id.* at 47, 49.

207. In *McCutcheon v. FEC*, the plurality found it unlikely that a donor would contribute to various political action committees (PACs) to funnel money to a candidate because "[t]hat same donor, meanwhile, could have spent unlimited funds on independent expenditures." 572 U.S. 185, 214 (2014). The opinion acknowledged that previous decisions had concluded that independent spending was less valuable, "[b]ut probably not by 95 percent." *Id.*

208. See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) ("The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." (quoting *Buckley*, 424 U.S. at 47)).

209. See Benjamin, *supra* note 39, at 336 ("Predictive harms are not simply a matter of gathering facts; one must attempt to move from what we currently know into a guess about future events."); see also *supra* section IV.A.

phenomenon led one critic of *Miranda* to argue that if the Court has engaged in predictive factfinding, “Congress may rely on its own institutional superiority for fact-gathering to reject the Court’s assessment of predictive facts and to modify the Court’s anticipatory remedy”²¹⁰

But even if Congress has the power to overrule the Court’s predictive facts, it may decide not to do so, leaving the issue to the judiciary. However, the Court has shown no inclination to reconsider issues of predictive fact, even if there are reasons to believe it may be wrong. *Williams-Yulee* is an obvious example, where the majority adopted a prediction made in *Caperton* even after it was clear that the prediction was incorrect.²¹¹ And *Clinton v. Jones* has not been reconsidered despite its controversial aftermath.²¹² In fact, though the Court has consistently recognized that its holdings should change if underlying facts have shifted, according to Stuart Minor Benjamin, as of 2000 the Court had “never squarely reconsidered one of its cases on this basis.”²¹³

Some may argue that adhering to predictive factual precedent is a price worth paying for stability in the law—in the face of unknown facts, sometimes the judiciary should choose a course of action and stick with it.²¹⁴ The same type of argument could be made as part of any broader criticism of the use of empirical evidence in the law, and this Article is not the place for a full-throated defense of the use of empiricism in judicial decision making.²¹⁵ Certainly, the stability concern counsels against

210. O’Neill, *supra* note 153, at 188.

211. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455 (2015). *But see Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 900 (2009) (Roberts, C.J., dissenting) (discussing the Court’s decision to overrule *United States v. Halper*, 490 U.S. 435 (1989), because its prediction was incorrect).

212. See Michael C. Dorf, *How Damaging Is Clinton v. Jones to Trump’s Defense Against Various Lawsuits?*, TAKE CARE BLOG (May 1, 2017), <https://takecareblog.com/blog/how-damaging-is-clinton-v-jones-to-trump-s-defense-against-various-lawsuits> [<https://perma.cc/8CA9-W5D5>] (noting that President Trump could challenge *Clinton* “on the ground that its underlying assumptions have proven false,” but arguing that “it is not obvious that *Clinton v. Jones* was actually wrongly decided” since Presidents Bush and Obama were not distracted by civil lawsuits).

213. Benjamin, *supra* note 39, at 319 n.146.

214. See, e.g., Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1172 (2005) (“The rule of law depends on stability and thus willingly suffers the perpetuation of some incorrect rulings in exchange for the benefit of stability and predictability of outcomes.”). For example, in *Apodaca v. Oregon*, the Court affirmed two state convictions based on nonunanimous jury verdicts. 406 U.S. 404, 404 (1972). Though empirical evidence since that decision shows such rules may discourage participation by minority and women jurors, the Court did not overrule *Apodaca* until 2020, see *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020), perhaps because the justices believe that “[i]mportant policy considerations of stability and coherence arguably favor such deference to precedent.” Taylor-Thompson, *supra* note 190, at 1311 (arguing that *Apodaca* should be reconsidered).

215. See generally Meares, *supra* note 21 (responding to three criticisms to the use of empiricism in criminal law and procedure).

creating new precedent each time a novel scientific study is published. Yet this Article principally argues that predictive factfinding is often unnecessary, either because holdings rest on other grounds or the Court has failed to examine available data. And reducing predictions will likely enhance stability of law, at least in cases that are decided on more purely legal grounds—if the Court more readily acknowledges that its rule should be followed regardless of how the facts turn out, that rule will more likely be followed and may be more difficult to change.²¹⁶ However, in the smaller set of cases that unavoidably turn on a prediction of legislative fact,²¹⁷ the interest in stability may be outweighed by the need to reach the right conclusion; it is “difficult to defend” the position that decisions should not be reconsidered “even if their factual underpinnings have been undermined.”²¹⁸ In any event, the Court can make that decision on a case-by-case basis, just as it does when deciding whether to overrule any precedent.

C. *Predictive Factfinding Threatens the Adversarial System*

Article III of the Constitution envisions an adversarial system in which federal courts decide only cases and controversies.²¹⁹ Under this system, advocates are supposed to present courts with the factual and legal information they need to best reach the correct outcome. However, Brianne Gorod has convincingly argued that in cases involving questions of legislative fact, “appellate courts often look outside the record the parties develop before the trial court, turning instead to their own independent research and to amicus briefs, even though the resulting factual findings will not have been thoroughly tested by the adversarial process.”²²⁰ For example, in *Citizens United* the Supreme Court declared, without any reference to the record, that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”²²¹ And in some instances, the importance of such facts may not be readily apparent at the trial level, meaning that the

216. See Larsen, *supra* note 8, at 109 (positing that the “factual finding” in *Citizens United v. FEC*, 558 U.S. 310 (2010), was really a legal rule); see also *infra* Part V.

217. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 732–35 (1997) (discussing state’s fear that legalizing physician-assisted suicide would lead to involuntary euthanasia).

218. Benjamin, *supra* note 138, at 272.

219. U.S. CONST. art. III, § 2.

220. See Gorod, *supra* note 26, at 4; see also Borgmann, *supra* note 25, at 1242 (“Finally, because social facts are broad in nature and affect more than just the parties to a litigation, the parties may not present all of the facts needed to resolve a question of social fact.”).

221. Gorod, *supra* note 26, at 29–30 (quoting *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)).

parties have not even contested them.²²²

Predictive factfinding can be especially detrimental to the adversarial system, completely cutting litigants out of the factfinding process, especially when the prediction at issue has not been litigated below.²²³ As demonstrated by the cases discussed above, Supreme Court predictive factfinding often involves broad questions about the judicial or political system that were not mentioned in the trial court's decision. In *McDonnell*, for instance, the lower courts were concerned principally with statutory interpretation and more case-specific issues about Governor McDonnell's criminal trial, such as evidentiary rulings.²²⁴ The government had little warning at the factfinding stage that it should attempt to develop empirical evidence concerning whether its interpretation of federal corruption law would chill political activity. The issue was addressed at length in amicus briefs to the Supreme Court filed in support of McDonnell,²²⁵ and any evidence-based response to those arguments could not have been fully developed through the adversarial process because of the government's short timeframe (unless the Court had decided to remand the case or provided time for further briefing).²²⁶ Similarly, in cases like *Caperton* that involve the predicted court-centered effects of a certain rule, litigants may not know until they see an amicus brief submitted to the Supreme Court that they could lose based on an assertion that recognition of their claim would lead to a flood of lawsuits.²²⁷

One might respond by arguing that in cases involving important questions of predictive fact that may affect the whole nation, there is no reason for the outcome to hinge on the quality of the litigants. Certainly, there is a strong case to be made that the adversarial system is not ideal to

222. Larsen, *supra* note 29, at 1762, 1800–02 (“Less than a third of the factual claims [in amicus briefs] credited by the Court were contested by the party briefs.”).

223. This will not occur in cases like *Washington v. Glucksberg* where the predictions about coerced suicide served as the basis for the government's purported interest in banning assisted suicide. 521 U.S. 702, 782–83 (1997).

224. See *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015), *vacated*, 579 U.S. ___, 136 S. Ct. 2355 (2016).

225. See, e.g., Brief for Former Fed. Offs. as Amici Curiae Supporting Petitioner at 18, *McDonnell*, 136 S. Ct. 2355 (No. 15-474) (arguing that affirming the conviction would “cast[] a cloud over activities that are fundamental to the operation of a representative democracy”).

226. See Larsen, *supra* note 29, at 1801–02 (discussing the difficult position of litigants who have short time and few words to respond to amicus briefs raising factual issues not already briefed).

227. See *Caperton v. A.T. Massey Coal Co.*, 223 W. Va. 624, 693–710, 679 S.E.2d 223 (2008) (Benjamin, C.J., concurring) (discussing reasons for rejecting plaintiffs' recusal motion without raising flood of litigation concern).

determine broad legislative questions, predictive or otherwise.²²⁸ Nonetheless, in a system that seeks to provide litigants the opportunity to vigorously argue their cases, the deprivation of that chance is cause for concern. If such vital issues are to be determined by court battles, having two or more litigants' perspective is better than one-sided briefing.

More broadly, the Court has not typically explained who bears the burden of proving a predictive fact, creating confusion for litigants. As discussed in Part I, scholars criticize the Court's legislative factfinding jurisprudence for inconsistently assigning burdens of proof regarding legislative facts.²²⁹ And consistent with its pattern of letting predictions operate as facts without performing true factual inquiries, the Court has for the most part omitted any discussion of which party must prove an issue of predictive fact,²³⁰ except in certain cases involving facial challenges.²³¹ This is unsurprising in some cases, because such a discussion could highlight the parties' unawareness that a certain predictive fact was a central issue in the case. Yet it creates an obstacle to litigants who must address an issue of predictive fact, perhaps because it was raised in an amicus brief.²³² Again using *McDonnell* as an example, if an amicus brief predicts that a broad interpretation of a corruption law will lead to less political interaction, the lack of clarity about who bears the predictive burden means that the opposing party will not know whether to rely on the lack of evidence supporting that claim or make a last-ditch effort to demonstrate the claim's falsehood.

D. Finding Predictive Facts Without Citing Evidence May Undermine the Court's Legitimacy

A review of the case law discussed in Part II raises a concern that the Court uses predictive factfinding in some circumstances when it seeks to state a legislative fact but does not have the evidence to support that fact. Even if the Court has not engaged in that practice consciously, its predictive jurisprudence may damage its legitimacy if onlookers believe

228. See, e.g., Bryan L. Adamson, *Federal Rule of Civil Procedure 52(A) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1084 (2007) (arguing that the "validity, reliability, and predictability" of legislative facts "can often be distorted in the adversarial context").

229. See FAIGMAN, *supra* note 21, at 101–02.

230. See, e.g., *Caperton*, 556 U.S. at 887–90 (discussing defendant's prediction of flood of litigation and dismissing it without addressing burden of proof).

231. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008) (plurality opinion) (noting that the petitioners had a "heavy burden").

232. An issue of predictive fact could also arise simply because a case has some overlap with a previous Supreme Court decision that relied on a predictive fact, as occurred in *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454–55 (2015) (relying on a predictive fact from the *Caperton* dissent).

that the Court has “disguise[d] the rationales” for its decisions.²³³ And every prediction that is disproven adds weight to that concern.²³⁴ If a Supreme Court justice has staked a constitutional right on his or her own evidence-free prediction that turns out to be incorrect, that inspires little confidence in the quality of decisionmaking.²³⁵ As Sanford Levinson and Jack M. Balkin put it, “[i]f we think that judges are not particularly good at predicting the future consequences of their decisions, we might think twice about placing such confidence in their ability to exercise the powers of judicial review fairly and wisely.”²³⁶ This same legitimacy concern also arises with regular legislative factfinding,²³⁷ but probably not to the same degree, since courts finding regular legislative facts are now presented with more data and feel more obligated to use it.²³⁸ An opinion that states a critical legislative fact (not phrased as a prediction) without any support will almost certainly be a target of criticism;²³⁹ thus far, the same does not appear to be true for a predictive fact. And if an opinion citing to a regular legislative fact seems to manipulate evidence to reach a preconceived result, that at least allows commentators to cite that same evidence when analyzing the Court’s decision.

Similarly, the Court’s willingness to rely on predictions of dubious accuracy, and the haphazard manner in which they are made, give the

233. Kathryn Judge, *Judges and Judgment: In Praise of Instigators*, 86 U. CHI. L. REV. 1077, 1095 n.57 (2019) (arguing that judicial avoidance combined with a tendency to mask the true reason for that avoidance could contribute to a decrease in trust of the judiciary (citing LAWRENCE LESSIG, AMERICA, COMPROMISED 1–3 (2018))).

234. This effect is likely magnified if the Court’s disproven prediction was made with unabashed confidence and without an assessment of the prediction’s necessity. If the Court acknowledges uncertainty but has a good reason to make a prediction anyway, as in *Washington v. Glucksberg*, 521 U.S. 702 (1997), or *United States v. Leon*, 468 U.S. 897 (1984), there is less reason to question the Court’s methodology.

235. See Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 237–38 (2010) (“In the end, whatever the likelihood that the dissents’ predictions [in *Caperton*] will come true, one might question the wisdom of making bold predictions that may be disproved over time, given concern about how the public perceives the Court’s legitimacy.”).

236. Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 281 n.74 (2003).

237. See Hashimoto, *supra* note 38, at 128 (“Scholars have written voluminously about the Court’s careless and result-oriented use of scientific information in constitutional opinions.”).

238. See Larsen, *supra* note 8, at 61 (“The Supreme Court is in the ‘throes of a widespread empirical turn’; consequently, its opinions are chock-full of statistics, social science studies, and other general statements of fact about the world.” (quoting Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 118 (2003))).

239. For example, the Court was pilloried after declaring without evidence that corporate independent expenditures “do not give rise to corruption or the appearance of corruption.” *Citizens United v. FEC*, 558 U.S. 310, 357 (2010); see Gorod, *supra* note 26, at 29–30; see also Alicia Bannon, *Judicial Elections After Citizens United*, 67 DEPAUL L. REV. 169, 175 (2018) (noting that Court’s declaration was made “without any supportive facts in the record”).

impression that many predictions are gratuitous.²⁴⁰ In other words, it appears likely the Court has made up its mind on an issue and engages in predictive factfinding as a post hoc rationalization for its decision.²⁴¹ There are several reasons onlookers might draw this conclusion. First, even if an opinion does not acknowledge uncertainty, Supreme Court justices are undoubtedly aware that predictions are often wrong. If a justice is truly undecided about a case and the decision turns on the accuracy of a prediction, he or she would likely devote significant study and discussion to that prediction. Without that time and attention, it is hard to believe that a prediction is actually playing a role in the outcome.²⁴² This is most easily seen in the numerous cases in which predictions are made despite the fact that the holding rests on an independent ground, such as in *McDonnell* or *Tornillo*.²⁴³ Part V discusses some ways in which a court that is serious about making correct predictions might proceed.

V. A MORE THOUGHTFUL PREDICTIVE JURISPRUDENCE

Predictive factfinding is unavoidable, but, as discussed, it can create problems, especially when the Court uses it as a means to find legislative facts without citing empirical evidence. However, in outlier cases like *Washington v. Glucksberg*, discussed below, the Court has demonstrated that predictive factfinding can be limited and tailored such that it will do less damage to the Court, the judicial system, and those who must live under the laws created by the courts. The suggestions made here are drawn from the Court's own jurisprudential tools, although some of those tools

240. Issacharoff, *supra* note 115, at 311–12 (asking whether judicial intervention in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), was legitimate and noting lack of evidence for claim that parties would be incapacitated by the law).

241. Green, *supra* note 235, at 238 (arguing that if predictions are incorrect, “future readers may come away with the impression that constitutional decision making has devolved into a game in which Supreme Court justices make whatever contested predictions and unsubstantiated empirical assumptions support their policy preferences”). Some scholars have argued that the Court’s decisionmaking generally flows in the direction of public opinion, and, therefore, “the Court’s reputation may depend, to a significant degree, on the justices’ skill at predicting the future.” Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1756 (2001).

242. In *Brown v. Board of Education*, a case often cited for its use of an empirical study (showing the psychological effects of segregation on Black children), scholars have convincingly argued that the Court’s cursory citation to the study shows that its decision was not truly based on the study’s findings. 347 U.S. 483, 493–94 (1954); see Faigman, *supra* note 19, at 566 (concluding that “it seems clear that the studies were not necessary to the holding” in *Brown*).

243. As noted, the *McDonnell* Court’s holding was based on an interpretation of the federal statute at issue, and its constitutional discussion and predictions were made in dicta. See 579 U.S. ___, 136 S. Ct. 2355, 2372 (2016). In *Tornillo*, the Court made a prediction and then concluded that its decision would hold regardless of whether that prediction was correct. See 418 U.S. 241, 258 (1974).

are rarely used. Importantly, any change will rely on judges and litigants recognizing the pervasive use of predictive factfinding and its flaws. Such recognition may persuade the Supreme Court to engage in less predictive factfinding, help bolster the Court's legitimacy, lead to more just results, and provide a fuller opportunity for parties to address issues of legislative fact.

The best example of thoughtful predictive jurisprudence is found in Justice Souter's opinion in *Glucksberg*, a case in which the Court reviewed a claim that Washington's ban on physician-assisted suicide violated the plaintiffs' substantive due process rights.²⁴⁴ Writing for the majority, Chief Justice Rehnquist recognized an issue of predictive fact: whether recognizing a right to physician-assisted suicide would threaten vulnerable groups, such as "the poor, the elderly, and disabled persons" who might succumb to outside pressure to end their lives.²⁴⁵ Because no states allowed physician-assisted suicide at the time (except Oregon, which had only recently legalized the practice), the Court referred to the experience of the Netherlands, citing a Dutch government study finding that euthanasia without explicit consent occurred relatively frequently.²⁴⁶ Based in part on the concern that the same problem would occur in the United States if all citizens had a constitutional right to physician-assisted suicide, the Court rejected the plaintiffs' claim.²⁴⁷

Justice Souter, in a quite lengthy opinion concurring in the judgment, expanded on the Chief Justice's predictive-fact analysis.²⁴⁸ He recognized that a significant part of the state's argument was that "any attempt to confine a right of physician assistance to the circumstances presented by these doctors is likely to fail."²⁴⁹ In response to the plaintiffs' contention that "regulation with teeth" could prevent that result, Justice Souter concluded that "at least at this moment there are reasons for caution in predicting the effectiveness of the teeth proposed."²⁵⁰ Like the majority, he referred to the Netherlands, "the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence

244. *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997).

245. *Id.* at 731.

246. *Id.* at 734.

247. *Id.* at 735–36.

248. See Charles L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655, 671–72 (2018) (arguing that Justice "Souter offered his most explicit articulation of the common law method in his separate opinion in *Washington v. Glucksberg*" and discussing Souter's method of "proceed[ing] slowly and carefully").

249. *Glucksberg*, 521 U.S. at 754 (Souter, J., concurring in the judgment).

250. *Id.* at 785.

about how such regulations might affect actual practice.”²⁵¹ Though Justice Souter recognized that the evidence was “contested,” and that “[t]he day may come when we can say with some assurance which side is right,” the uncertainty of the matter had to be resolved in favor of the state.²⁵²

Justice Souter then addressed the more general question of how to decide cases in which the “facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation.”²⁵³ Although many such issues can be decided before a trial court, that was not true of the question presented in *Glucksberg*.²⁵⁴ And Justice Souter “question[ed] whether an independent front-line investigation into the facts of a foreign country’s legal administration [could] be soundly undertaken through American courtroom litigation.”²⁵⁵ Then, importantly, he concluded that either way the Court ruled, “events could overtake its assumptions.”²⁵⁶ Because legislatures are more adept than courts at answering such questions, experimentation should be allowed and the Court should wait before taking action, but in the future, with the benefit of more study, the plaintiffs could prevail.

As Part II demonstrates, Justice Souter’s opinion was a departure from the Court’s typical predictive jurisprudence.²⁵⁷ Part of the reason may be that the predictive fact at issue in *Glucksberg* was central to the case, and the parties debated the issue and provided supportive empirical research.²⁵⁸ But the considerations taken into account are instructive for any attempt to build a more coherent and cautious predictive jurisprudence, as discussed below.

The first step toward a more thoughtful predictive jurisprudence is an

251. *Id.*

252. *Id.* at 786–87.

253. *Id.*

254. *Id.* at 787.

255. *Id.*

256. *Id.*

257. See *supra* Part II. *Glucksberg* is not the only case in which a justice has considered how the Court should handle predictions about the effect of a rule. In *United States v. Leon*, the Court declined to apply the exclusionary rule when police relied on a warrant that later turned out to be defective. 468 U.S. 897, 926 (1984). In a concurrence, Justice Blackmun recognized that the Court was making an unavoidable empirical judgment, lamented the Court’s limited ability to discern legislative facts, and concluded that “[i]f it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.” *Id.* at 927–28 (Blackmun, J., concurring).

258. See *supra* section III.A.3. The same is true of cases in which a legislature makes an explicit predictive judgment and the Court must review that judgment. See *Turner I*, 512 U.S. 622 (1994).

awareness of the phenomenon of predictive factfinding and its potential drawbacks. Though it is easy to find criticisms of individual instances of Court speculation,²⁵⁹ neither the Court nor scholars have thoroughly examined predictive factfinding as a phenomenon separate from legislative factfinding; and while Justice Souter in *Glucksberg* recognized the drawbacks of relying on unsupported predictions, neither his concurrence nor any similar opinion has been used as a model in subsequent cases. This Article tries to start filling that void, but it is also necessary to more exhaustively document how often the Court relies on predictions, how often those predictions lack empirical support, and the circumstances in which the Court is likely to make predictions, among other things. Increased awareness and criticism of predictive factfinding would likely lead the Court to treat such factfinding differently, both by avoiding unnecessary predictions and expending more effort to make accurate predictions; simply applying more effort produces better results in some contexts.²⁶⁰

There is no guarantee that justices who are aware of the problems of predictive factfinding will respond to it, but there are several reasons to believe they may.²⁶¹ First, the Court has already expressed a general desire to avoid certain facial challenges because they “often rest on speculation,”²⁶² and it has applied similar reasoning when explaining why successful overbreadth claims should be rare.²⁶³ Revealing how many additional cases rest on the same speculative foundation may persuade the Court to curb its forecasting. Moreover, a similar change has happened in the recent past, after academics began to seriously study legislative factfinding and the use of empirical data. While the Court for centuries made pronouncements of legislative fact without much pressure to provide any support for those facts, sustained criticism of that practice in the middle of the twentieth century appears to have led to greater reliance

259. See, e.g., Wistrich, *supra* note 123, at 802 n.354 (noting that predictions often fail and pointing to specific instances of incorrect Supreme Court predictions).

260. See Elizabeth Creyer & William T. Ross, Jr., *Hindsight Bias and Inferences in Choice: The Mediating Effect of Cognitive Effort*, 55 ORG. BEHAV. & HUM. DECISION PROCESSES 61, 71–75 (1993) (finding that hindsight bias was weakest when subjects tried hardest).

261. Academic criticism and commentary has influenced the Court to varying degrees over time. See Neal Kumar Katyal, *Foreword: Academic Influence on the Court*, 98 VA. L. REV. 1189, 1193 (2012) (providing examples “of academics influencing the Court by dint of their writing”); Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 404, 406–07 (2012) (finding that 37.1% of Supreme Court cases included at least one citation to a law review article in first decade of 2000s and that the rate of such citations had “declined significantly”).

262. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

263. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973).

on empirical evidence.²⁶⁴

Likewise, if scholars, litigants, lower courts,²⁶⁵ and dissenting judges persistently point to opinions in which courts make unsupported or incorrect predictions, individual justices may take up the cause as well if they want to write a particularly strong dissent. For example, if the next time the Court majority makes a prediction that a holding would lead to unmanageable levels of litigation, the dissenting justices might not only counter the majority's argument about the merits of that prediction, they may also highlight the more general problematic nature of basing American law on unsupported predictions that often turn out to be wrong.²⁶⁶

A Supreme Court more cognizant of the drawbacks of predictive factfinding may be motivated to employ a version of judicial minimalism to reduce its reliance on broad predictions. In Cass Sunstein's view, a judicial minimalist takes account of her cognitive limitations, including her inability to predict the consequences of her decisions.²⁶⁷ A minimalist judge might issue a narrow ruling because she knows that she lacks sufficient information to forecast what will happen because of that decision and hopes to reduce the negative decision costs of an unnecessarily broad ruling.²⁶⁸ In the simpler cases, this boils down to refraining from making predictions in dicta. So in some cases, the path toward minimalism is clear: in *McDonnell*, the principal part of the Court's decision reversed Governor McDonnell's conviction on statutory interpretation grounds, fully deciding the question at issue.²⁶⁹ The Court then went on to raise questions about the constitutionality of the government's interpretation of the statute, stating concerns based largely on an unsupported prediction that overzealous prosecution could lead to

264. See Stoughton, *supra* note 21, at 854.

265. Some scholars have argued that lower courts should be more willing to depart from Supreme Court precedent if new factual information is presented. See Pine, *supra* note 78, at 712–13; see also Larsen, *supra* note 8, at 62.

266. Often, when one Court faction criticizes the other for making a prediction, it questions the validity of the prediction itself but not the practice of making predictions. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009) (“Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horrors respondent and the dissent predict.”). But see *Molina-Martinez v. United States*, 578 U.S. ___, 136 S. Ct. 1338, 1349 (2016) (Alito, J., concurring in part and concurring in the judgment) (“We should not make predictions about the future effects of Guidelines errors, particularly since some may misunderstand those predictions as veiled directives.”).

267. SUNSTEIN, *supra* note 139, at 46–47.

268. *Id.*

269. *McDonnell v. United States*, 579 U.S. ___, 136 S. Ct. 2355, 2368 (2016).

diminished healthy political activity.²⁷⁰ In *Tornillo*, too, the Court first predicted that the right-of-reply statute might discourage controversial coverage, but then concluded that “[e]ven if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply,” the law would still violate the First Amendment.²⁷¹ In both of these cases, the Court could have reached its holding without making a prediction at all.

In other cases, such as *Hudson*, courts may not be able to avoid predictions altogether but may be able to rely on fewer predictions in their decisions. There, the Court weighed the costs and benefits of applying the exclusionary rule to knock-and-announce cases, a project that called for predictive factfinding, or at the very least regular legislative factfinding. The Court based its decision on three predictions: that extending the rule would (1) lead to excessive constitutional litigation by defendants; (2) increase “preventable violence” against police; and (3) lead to the destruction of evidence in “many” cases.²⁷² Because the Court was balancing costs against benefits of extending the rule, it is possible that all three of those predictions were necessary in order to reach the result. But more likely, the Court could have reached the same result on the basis of just one or two of the perceived costs of the rule. By minimizing the number of predictions they make, courts could create the same legal rules while reducing the risk to judicial legitimacy and the risk of creating factual precedent based on an inaccurate forecast.

A court could curtail predictions not just by reducing the number of issues it discusses, but by seeking empirical evidence when it otherwise would have relied on an unsupported prediction, as it did in *Glucksberg* and typically does in cases involving regular legislative factfinding. Currently, predictions are often made on the implicit assumption that a forecast is necessary because existing empirical evidence does not answer a key question in the case. In *Tornillo*, the Court predicted the consequences of the Florida right-of-reply statute even though it had been in place for sixty years.²⁷³ Conversely, in *Skinner v. Switzer*,²⁷⁴ the Court rejected a “floodgates” argument by looking to experience in the circuit courts, where there was no “litigation flood or even rainfall.”²⁷⁵ In at least

270. *Id.* at 2372.

271. *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

272. *Hudson v. Michigan*, 547 U.S. 586, 595 (2006).

273. *See Tornillo*, 418 U.S. at 247.

274. 562 U.S. 521 (2011).

275. *Id.* at 535; *see also* Levy, *supra* note 149, at 1074–75 (mentioning cases in which justices have

some cases, asking the question of whether data exists will absolve the court of the necessity of making any prediction. At times, that may require requests for additional briefing, delaying a decision, but the inconvenience of delay will often be outweighed by increased accuracy; courts can make case-by-case decisions about whether the prospect of better information outweighs the cost of delay.

If a court looks for data in an attempt to answer a question and fails to find that data, it can still respond in ways that avoid some of the pitfalls of predictive factfinding. First, the Supreme Court could place a higher burden on all arguments relying on predictive facts, as it has done in cases involving “speculat[ive]” facial claims, like *Washington State Grange*.²⁷⁶ This would weigh the scales against formulating law based on unsupported predictive facts while still recognizing that predictions are sometimes necessary and can be valid bases for decisions if they are especially persuasive.

In cases in which a court must answer a predictive empirical question, there is also room for improvement. First, as a long-term goal, judges may be able to increase the accuracy of their predictions through training and education. Other parts of the federal government believe that sustained study of forecasting is helpful,²⁷⁷ and considering the significance of predictions to American law, the judiciary may be inclined to agree.

When appellate courts confront a question of predictive fact that has not been litigated, they should consider remanding to the trial court for further factual development.²⁷⁸ Though that tool is rarely used, the Court has long recognized it as an option when the parties have not addressed an issue that will decide a case of national importance.²⁷⁹ The Court used a version of this option in *Turner I*, a case in which it was asked to decide whether a federal law requiring cable companies to carry local broadcast

considered “past experience with the same kind of claims” when discussing potential flood of litigation).

276. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008); *see also* *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008) (plurality opinion).

277. *See, e.g.,* LeVine, *supra* note 180 (discussing forecasting competitions run by the United States intelligence services).

278. *See* Borgmann, *supra* note 25, at 1242 (arguing that when parties have not briefed an issue but an appellate court may decide an issue of legislative fact, “they should remand the issue if possible and at the very least allow both parties the opportunity to brief the issue fully”).

279. *See* *Borden’s Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 208, 213 (1934) (challenging price controls on milk, remanding to district court to determine “particular trade conditions in the city of New York”); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548–49 (1924) (remanding to D.C. court to determine whether there was exigency justifying rent control); *see also* Borgmann, *supra* note 25, at 1244 (discussing remand in *Borden’s Farm Products*).

stations violated the First Amendment.²⁸⁰ The Court applied intermediate scrutiny and accepted that the government's goal of helping broadcast stations survive was important.²⁸¹ However, it remanded the case to the district court, concluding that it lacked sufficient record material to demonstrate whether Congress's conclusion that broadcast television was truly in jeopardy was well-supported.²⁸² While the Court was criticized for requiring too much on-the-record congressional factfinding, if one were to accept that standard, use of a remand to ensure thorough review might be the only acceptable option. And applying that tool to predictive judgments discussed in this Article would serve the goals promoted herein by allowing the Court to acknowledge its uncertainty and preserve its legitimacy while also letting litigants address questions of predictive fact before receiving a final decision.²⁸³

The remand envisioned here would differ from that in *Turner*, since the *Turner* Court was reviewing an explicit predictive judgment by Congress. In cases like *Caperton* and *Hudson*, which addressed the potential effects of a court-made rule,²⁸⁴ the Court arrived at its own prediction without the benefit of any legislative record. Thus, remand would be even more useful, perhaps providing a first empirical look at a question of fundamental importance. While unnecessary delay may counsel against remand in some cases, many cases come to the Court after years of application of a certain legal regime; as noted, the law in *Tornillo* had applied for sixty years.²⁸⁵ And any Supreme Court decision will create precedent for years to come, meaning that sometimes a delay of two or three more years may be justified if it helps the Court reach the right answer and preserve its own legitimacy.

If remand is not an option or has already happened and an appellate court is compelled to make a prediction, it should recognize the uncertainty inherent in predictive factfinding when issuing its opinion—a carefully-phrased opinion may reduce factual precedent and shape future litigation that is more likely to reach the right result. In *Citizens United*, the Court predicted that the appearance of influence or access would “not

280. *Turner I*, 512 U.S. 622 (1994); see A. Christopher Bryant, *The Empirical Judiciary*, 25 CONST. COMMENT. 467, 478–80 (2009) (reviewing FAIGMAN, *supra* note 21 (discussing remand in *Turner I*)); see also *Ashcroft v. ACLU*, 535 U.S. 564, 598–99 (2002) (Kennedy, J., concurring in the judgment) (“When a key issue has ‘no evidence’ on one side and ‘no reason to believe’ the other, it is a good indication that we should vacate for further consideration.”).

281. *Turner I*, 512 U.S. at 662–63.

282. *Id.* at 668.

283. See Benjamin, *supra* note 138, at 327–28.

284. See *supra* section III.A.1.

285. *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 247 (1974).

cause the electorate to lose faith in our democracy.”²⁸⁶ That statement not only garnered widespread criticism,²⁸⁷ but it also engenders significant confusion about the precedential status of the Court’s statement.²⁸⁸ Assuming that the Court did not possess evidence from states that already allowed unlimited corporate spending, it could have reached the same conclusion by stating that “on the current record, there is no significant support for the conclusion that the appearance of influence or access will cause the electorate to lose faith in our democracy.” Such phrasing could protect the Court’s legitimacy by avoiding the very real possibility that the prediction would be proven wrong. And, at least nominally, it would leave the issue open to relitigation if evidence of lost faith in democracy arose in the intervening years.²⁸⁹ However, if the Court had sought to create a precedent that would not depend on whether corporate election spending actually led to decreased faith in democracy, it could have omitted the prediction from its opinion and reached the same conclusion without relying on a predictive fact.

Similarly, in some cases—only those in which a court believes that the interest in stability is outweighed by the need to reach a correct conclusion²⁹⁰—the court could go further and invite future litigation by stating that its opinion might change if new evidence is developed.²⁹¹ The concurring opinions in *Glucksberg* and *Leon* followed that model, frankly acknowledging the Court’s uncertainty about a predictive question and recognizing that new information could change the Court’s opinion.²⁹² In

286. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

287. *See id.* at 450 n.64 (Stevens, J., concurring in part and dissenting in part) (responding that “[t]he electorate itself has consistently indicated otherwise, both in opinion polls . . . and in the laws its representatives have passed . . .”).

288. *See* Larsen, *supra* note 8, at 109 (“Perhaps the ‘factual finding’ in *Citizens United* about corporate election expenditures was not actually a finding of fact but, instead, was just part of the Court’s legal rule.”).

289. *See* FAIGMAN, *supra* note 21, at 97 (stating that reviewable facts are “likely to be the subject of sustained empirical attention from social scientists. As they become better understood, courts should be willing to revisit precedent that was based on outmoded empirical beliefs.”).

290. *See supra* section IV.B.

291. Though courts do not often invite litigants to bring cases identical to the case just decided, they do often invite future as-applied challenges when reviewing facial constitutional challenges. *See, e.g.,* *Buckley v. Valeo*, 424 U.S. 1, 97 n.131 (1976) (“In rejecting appellants’ arguments, we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the public financing system invidiously discriminates against nonmajor parties.”).

292. *See* Bryant, *supra* note 280, at 481 (“Souter’s opinion [in *Glucksberg*] raises [the question of] whether, and, if so, when it is appropriate for a court to defer a constitutional ruling in a justiciable case because of the sort of factual uncertainty that proved dispositive to Souter in *Glucksberg*.”); Barzun, *supra* note 248, at 674–75 (contending that in light of Justice Souter’s understanding of common law, “we should not be surprised that [he] refused to decide the constitutional question posed

Leon, Justice Blackmun concluded that “[i]f it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.”²⁹³ Similarly, in *Maine v. Taylor*,²⁹⁴ a case in which the Court decided whether Maine’s ban on importation of live baitfish violated the Commerce clause, the Court first affirmed the district court’s finding that no procedure existed to determine whether imported baitfish contained parasites. The Court then noted that “if and when such procedures are developed, Maine no longer may be able to justify its import ban.”²⁹⁵

Michael Dorf has suggested a formalized version of this practice in which “the Court could expressly designate some of its decisions . . . as subject to experiment” or “designate some doctrines or decisions as provisional, promising to revisit these matters at some future date.”²⁹⁶ By making such statements explicit, the Court could help ensure that lower courts engage in their own factfinding and do not simply adhere to factual precedent.²⁹⁷ Provisional adjudication would have been particularly appropriate in *Rucho v. Common Cause*, a 2019 case in which the Court held that partisan gerrymandering claims were nonjusticiable based on a prediction that if courts could consider such claims, judicial “intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting.”²⁹⁸ But just after it made that prediction, the Court acknowledged that some state

by assisted suicide once and for all,” even though the state’s interest was sufficient at the time of the decision).

293. *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

294. 477 U.S. 131 (1986).

295. *Id.* at 147. The Court has consistently recognized that legal rules may change if the facts on which they are based have changed. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (“Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”). But as noted above, as of 2000, the Court had “never squarely reconsidered one of its cases on this basis.” Benjamin, *supra* note 39, at 319 n.146.

296. Dorf, *supra* note 63, at 73.

297. More generally, the judiciary would benefit from standardized decisional rules about predictive factfinding and legislative factfinding more generally. The Court has not adopted such standards, and it has been inconsistent about which party has the burden to prove legislative facts. *See* sources cited *supra* note 34 and accompanying text. The same is true of predictive facts, and guidance about which party has the burden to establish a predictive fact would assist litigants and perhaps reduce the fear that predictive factfinding is sometimes used to disguise the Court’s true rationale for decisions.

298. *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484, 2507 (2019).

courts had begun to strike down partisan gerrymanders on state law grounds.²⁹⁹ Rather than risk being proven wrong, the Court could have refused to consider partisan gerrymandering claims in the short term but acknowledged the necessity of reconsidering the issue in future decades when states' experiences could be reviewed.³⁰⁰

CONCLUSION

The Supreme Court has frequently relied on broad predictions in its opinions. These predictions are not facts themselves, but they have served as stand-ins for legislative facts. However, the Court has often failed to cite evidence or perform a sustained inquiry before basing a decision on a prediction. This phenomenon causes significant problems but has largely gone unnoticed. Further recognition and study of the practice may help courts reduce reliance on evidence-free predictions and encourage them to remand more cases or take other necessary measures before enshrining an untested prediction into law. In the end, such a practice could help courts reach more accurate results and preserve the judiciary's legitimacy.

299. *Id.* (citing *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015)).

300. Famously, Justice Kennedy took a similar approach in *Vieth v. Jubelirer*, yet he did not specifically refer to the possibility that state court experience could help determine whether partisan gerrymandering litigation would lead to unending litigation and judicial intervention into politics. 541 U.S. 267, 317 (2004) (Kennedy, J., concurring in the judgment) ("If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.").