Judicial Fact-Making

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Allison Orr Larsen, *Factual Precedents*, 162 **U. Pa. L. Rev. 59** (2013).

Two judicial and scholarly heavyweights squared off recently in a case challenging the constitutionality of Wisconsin's voter ID law. Writing for the Seventh Circuit panel, Judge Easterbrook reasoned that "whether a photo ID requirement promotes public confidence in the electoral system is a 'legislative fact'—a proposition about the state of the world, as opposed to a proposition about these litigants or about a single state." The Seventh Circuit was bound to accept that a photo ID requirement *did* promote public confidence in elections because "[o]n matters of legislative fact, courts accept the findings of legislatures and judges of lower courts must accept findings by the Supreme Court." Dissenting from the denial of rehearing en banc, Judge Posner responded that Easterbrook's approach "conjures up a fact-free cocoon." Posner asked: "If the Supreme Court once thought that requiring photo identification increases public confidence in elections, and experience and academic study since shows that the Court was mistaken, do we do a favor to the Court … by making the mistake a premise of our decision?"

This disagreement between Easterbrook and Posner—in the language of Allison Orr Larsen's excellent article—is about Factual Precedents: whether the Supreme Court's statements about legislative facts should receive "separate precedential force, distinct from the precedential force of whatever legal conclusions they contributed to originally." (P. 63.) As Larsen explains, such "facts" are everywhere in judicial opinions—facts like "partial birth abortions are never medically necessary, fleeing from the police in a car leads to fatalities, and violent video games affect the neurological development of a child's brain." (P. 71.) To support such claims, Supreme Court Justices regularly invoke authorities that have never been made part of the evidentiary record or subjected to adversarial challenge by the parties to the case. Yet—as the Easterbrook opinion suggests—lower-court judges often treat factual propositions as precedent that they are bound to accept as a matter of stare decisis. Larsen convincingly argues that this is a mistake. Rather, "generalized factual claims from the Supreme Court should not receive any precedential value separate and apart from the legal rules they helped to create." (P. 99.)

To tackle this issue, Larsen begins by confronting how to distinguish "law" and "fact" in the first place. This is a trickier problem than one might think, and she recognizes the line of scholarly argument that the distinction is unworkable. While conceding that the boundary between fact and law is not "airtight," she defines the sort of facts that might give rise to troubling factual precedents this way: "any claim that can be theoretically falsified and is followed by citation to some sort of evidence (not a case and not a statute)." (PP. 72-73.) A "factual precedent" is "a lower court's reliance on the Supreme Court's assertion of legislative fact—a general factual claim—as authority to prove that the observation is indeed true." (P. 73.)

After laying this conceptual foundation, Larsen provides a typology of five different kinds of factual precedents. While recognizing that the categories are neither exhaustive nor mutually exclusive, she identifies: (1) "imported" facts that are transplanted from one context to another; (2) "strategic" facts that are used to supplement the record for a calculated purpose; (3) "aftermath" facts that appear in a landmark opinion and are used to answer residual questions; (4) "historical" facts about the state of the world at an earlier time; and (5) "premise" facts that form the premise of a legal rule.

Larsen then makes her normative case against factual precedent. Factual claims made in Supreme Court decisions should not be binding on lower courts. Such factual claims should not even be treated as persuasive by lower courts under a *Skidmore*-style standard of deference. Larsen's argument is rich and multi-faceted, so I will only hit a few of

the highlights here.

First, she rejects the idea that the Supreme Court is better positioned than lower courts to resolve important questions of fact because of their lighter caseload and the frequent filing of amicus briefs offering insights on such empirical issues. These qualities do not enhance the reliability of such factual findings, because such facts are often chosen not for their accuracy but rather for their ability "to build arguments and to tell a story." (P. 101.)

Second, Larsen doubts whether factual claims (and their empirical support) are truly vetted by all of the Justices who join a particular opinion: "While we can be sure that a legal holding that garners five votes at the Court is debated by all of the Justices, the same assumption cannot be made about the factual claims that pepper the footnotes." (P. 102.)

Third, Larsen argues that the Supreme Court lacks the competence to evaluate conflicting evidence as to particular factual claims. Unlike a specialized federal agency—which might justifiably deserve deference for its expertise and the process it must follow when issuing regulations—factual claims in Supreme Court opinions lack any assurance that competing authorities were carefully evaluated and inspected. If the authorities *themselves* are persuasive to lower courts, then the lower court should rely directly on those authorities. There should be no "extra persuasive bump" because they are cited in a Supreme Court opinion. (P. 107.)

Larsen's article concludes by addressing a problem presented by the category of factual precedents she calls "premise facts." One of several illustrations Larsen uses is the Supreme Court's decision in *Citizens United*, which struck down a federal statute prohibiting certain political expenditures by corporations. The majority's decision was based on the factual premise that corporate expenditures do not create corruption. After *Citizens United*, however, the Montana Supreme Court upheld a Montana statute forbidding political expenditures by corporations, based on a factual record showing that—at least in Montana—such expenditures corrupted the political process. Larsen observes that if such factual claims "are up for debate in any lower court in subsequent litigation, then we run the risk of chaos or at least a serious weak spot in the Supreme Court's authority." (P. 108.) Indeed, the Supreme Court promptly reversed the Montana Supreme Court in per curiam decision.

As to these situations, Larsen proposes a clear statement rule: "If the Supreme Court is clear that its factual statements are part of a legal rule, then the statements are authoritative due to their legal component. Absent such a clear label, a lower court should assume that the factual dispute is open for debate." (PP. 111-12.) This is a thoughtful solution, but I wonder whether it is necessary to create this exception to what would otherwise be a strict no-factual-precedents approach. *Citizens United*, Larsen recognizes, might be understood as choosing a bright-line rule that "corporate election spending is protected," rather than a more flexible standard that "corporate election expenditures are protected by the First Amendment when it is reasonably doubtful they will corrupt." (PP. 109-10.) One can explain the Supreme Court's treatment of the Montana decision, therefore, in terms of the law created by *Citizens United*, without having to allow situations where facts alone have precedential force.

As the saying goes, the Supreme Court is not final because it is infallible; it is infallible because it is final. It is crucial, therefore, to think carefully about when stare decisis should obligate lower courts to replicate potentially fallible features of Supreme Court opinions solely because of that Court's place atop the judicial pyramid. By diagnosing and analyzing the problem of factual precedents—and showing us how the likelihood of fallibility is heightened when it comes to the factual claims Justices use in their opinions—Larsen makes a must-read contribution to this important line of inquiry.

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