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An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good

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AN ORIGINALIST THEORY OF PRECEDENT: ORIGINALISM, NONORIGINALIST PRECEDENT, AND THE COMMON GOOD

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I. INTRODUCTION

There is substantial scholarly disagreement on whether and in what manner prior decisions of a court—especially the U.S. Supreme Court—interpreting the Constitution bind the same court[1] later in time.[2] This is despite the consensus of American legal practice that prior constitutional decisions do bind later courts.[3] At the heart of the debate surrounding precedent is the tension between our written Constitution, which is the supreme law of the land,[4] and the role of the unelected Supreme Court in exercising constitutional judicial review.[5]

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* Assistant Professor of Law, Ave Maria School of Law. I would like to thank my loving wife Elizabeth for her sacrifice to allow me to write this Article. Many thanks to Bryce Poole for his excellent research assistance on this Article. I would also like to thank the participants at the *Thomistic Understanding of Natural Law as the Foundation of Positive Law* conference at Pázmány Péter Catholic University, Faculty of Law and Political Sciences, in Budapest, Hungary (organized by Thomas International), and Howard Bromberg, Bruce Frohnen, Kevin Lee, Ed Lyons, and Steve Safranek.

1. Prior case law of the same court is known as horizontal precedent, which is the focus of this Article. This Article discusses only tangentially the effect of cases down the hierarchy of courts, which is called vertical precedent. For a thorough discussion of vertical precedent, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Courts?*, 46 STAN. L. REV. 817 (1994).

2. *Compare, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) ("[T]he practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution."), *and* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1570–82 (2000) ("Without exaggeration, *nothing* in the text, history, or structure of the Constitution...supports the proposition that the judiciary possesses an exclusive constitutional power...to prescribe a doctrine of stare decisis."), *with* Richard H. Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 579 (2001) ("[F]amiliar sources can be adduced to suggest that 'the judicial Power' was understood historically to include a power to create precedents of some degree of binding force."), *and* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 81 (2000) ("[J]udicial power [in Article III] includes a doctrine of precedent."). *See also* Thomas Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 683–84 (1999) (concluding that the Founders' understanding of precedent "seems comparable to the modern notion that only an egregious error justifies abandoning precedent," but also concluding that this understanding of precedent is inapplicable to constitutional adjudication); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 803 (2004) (arguing that there is insufficient evidence to arrive at a determinate conclusion regarding "the Framers' views of the role of precedent in judicial decision making").

3. *See, e.g.*, United States v. IBM Corp., 517 U.S. 843, 856 (1996) (stating that the Supreme Court will overrule constitutional precedent based on a "special justification"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[A] different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."); Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("[W]hen governing [constitutional] decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"); Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (stating that the Supreme Court will overrule constitutional precedent based on a "special justification"); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.").

4. U.S. CONST. art. VI, cl. 2.

5. As Keith Whittington has noted, "Postulating an interpretative method that could overcome the countermajoritarian difficulty [has] become the chief task of constitutional theory." KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 20 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION].

Further, the existence of numerous and important nonoriginalist precedents is used by critics of originalism as an argument against originalism.[6] Professor Michael Gerhardt has argued along these lines: "[F]aithful adherents to original understanding face an inescapable dilemma. They either can strive to overrule the better part of constitutional doctrine and thereby thrust the world of constitutional law into turmoil, or they must abandon original understanding in numerous substantive areas in order to stabilize constitutional law."[7]

In this Article, I will offer a theory of constitutional precedent within an originalist framework. I will argue that a limited respect is due some nonoriginalist constitutional precedent because of the larger societal and constitutional goal of effectively pursuing the common good.[8]

In Part II, I will describe the problem that precedent has posed for scholars and courts in the area of constitutional adjudication. First, I will explain what I mean by a theory of precedent. Second, I will briefly discuss the debate over the proper interpretative methodology of the Constitution. Third, I will show how, for any plausible theory of constitutional interpretation, there will be precedents that, under the methodology, are mistakes. Lastly, I will review attempts by originalist scholars to elucidate a theory of precedent in constitutional adjudication.

In Part III, I will lay out my theory of originalist precedent. First, I will describe the originalist interpretative methodology I am assuming for purposes of this Article. Central to that methodology is the concept of the common good. Next, I will argue that courts should overrule nonoriginalist constitutional precedent except when overruling the precedent would gravely[9] harm society's pursuit of the common good. I will first show that originalism grounded in the concept of the common good should and can accommodate a doctrine of precedent, unlike other forms of originalism, because it is based on the concept of the common good. I will then establish that the original meaning of "judicial Power" in Article III included significant respect for precedent. Thereafter, I will enumerate the criteria judges should employ when determining when to overrule nonoriginalist precedent. Then I will apply my originalist theory of precedent to the two modern constitutional law cases against which interpretative methodologies are—either explicitly or implicitly—judged: *Brown* and *Roe*.[10]

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6. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 3 (2001) ("As I argue at length, the originalist model departs radically from actual Supreme Court practice. As originalists themselves acknowledge, doctrines that are of central importance in contemporary constitutional law could not be justified on originalist grounds."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739 (1988) (arguing that originalism fails to adequately describe our constitutional practice and hence its proponents "cannot reasonably argue that these [nonoriginalist] transformative changes should now be judicially overthrown").

7. Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 133–34 (1991) (footnote omitted).

8. This Article leaves many issues unaddressed. I have not addressed the role of originalist precedent in constitutional adjudication. Nor have I addressed the role of stare decisis in state court adjudication of federal constitutional issues. Lastly, I have not delved deeply into the standard—"gravely harm the common good"—judges should use when determining whether to overrule nonoriginalist precedent.

9. My thought and research on this issue thus far has led me to tentatively use "gravely," although further thought and research may persuade me that another modifier, or no modifier, is appropriate. I believe that "gravely" is appropriate because, as I will explain below, nonoriginalist precedent by itself harms the common good. Thus, courts should avoid only those overrulings of nonoriginalist precedent that would gravely harm the common good.

10. *See* FALLON, *supra* note 6, at 56 (noting that *Brown* and *Roe* are the "prism through which contemporary debates about constitutional theory are often refracted").

Originalism requires judges to adhere to the meaning of the text of the Constitution as it was understood when ratified. In constitutional adjudication, therefore, judges may only apply the positive law of the Constitution and may not, generally,[11] directly apply natural law norms. By contrast, when determining whether to overrule or limit nonoriginalist precedent, judges will be relatively unconstrained and will have to make their determinations by looking to what the common good of society requires. As a result, I conclude by briefly discussing a theory of judicial virtue to account for how judges should exercise this discretion.

II. THE PROBLEM OF PRECEDENT IN CONSTITUTIONAL ADJUDICATION

A. *What Is a Theory of Precedent?*

The practice of following precedent is pervasive in our society, and not only in the legal realm.[12] To take just one example: those of us who are parents recognize that the mere fact that we decided an issue in one manner for one child will give rise to our other children asserting that they should be treated likewise in future similar situations.[13]

In the legal realm, American lawyers have, from our first law class, been inculcated in the common law method, a central aspect of which is the role of precedent or stare decisis.[14] Even as our legal system has become dominated by statutory and administrative law, the common law case method and precedent remain the central focus of our legal practice.[15]

A theory of precedent, as I will use the phrase, is a descriptive analysis of the role prior cases play in the decision-making processes of later courts and a normative argument for what that role, if any, should be.[16] A precedent is a case decided at Time 1 that is meaningfully analogous to a case that arises at Time 2. A precedent is "binding" if, at Time 2, a later court,[17] even though it disagrees with the conclusion(s) reached in the earlier case at Time 1, is obliged to follow, distinguish, or give reasons for overruling the previous case. As Frederick Schauer has argued, "Only if a rule makes relevant the result of a previous decision regardless of a

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11. Randy Barnett has argued that the Ninth Amendment and the Privileges and Immunities clauses require judges to protect individual liberty and, in doing so, may draw upon unenumerated rights. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 53–68 (2004). For an originalist critique of Barnett's book, see Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005).

12. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987).

13. *See id.* at 572, 577 (discussing examples of the role precedent plays in parenthood).

14. *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989) (discussing the role of precedent and the common law in American legal education and American law). Stare decisis is from the Latin phrase, "*stare decisis et non quieta movere*," meaning, "to stand by things decided, and not to disturb settled points." Stare decisis is defined as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

15. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–14 (1997) (explaining the influence of the case method on American lawyers even in an era of statutory law).

16. For an early discussion of precedent, see Schauer, *supra* note 12, at 572.

17. For purposes of this Article, I am concerned only with precedents in the same court, and specifically, with Supreme Court constitutional precedent.

decisionmaker's current belief about the correctness of that decision do we have the kind of argument from precedent routinely made in law and elsewhere."[18] Or as Justice Scalia has more aphoristically stated, "The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."[19]

A later court is "bound" in an important sense by what our legal practice labels precedent when the result of a prior case, and not the reasoning supporting the result—whether good or bad—is relevant to the later court.[20] By contrast, if a later court looks to the reasoning of an earlier case, is persuaded by that reasoning, and follows it in the case at hand, it is not following the earlier case because of its status as precedent.[21] In other words, it is the status of the earlier case *as earlier*—not as well reasoned—that makes it precedential.[22]

The most prominent example of the role precedent has played in American constitutional adjudication is found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[23] where the Supreme Court declined to overrule *Roe v. Wade*[24] largely on the basis of stare decisis. In the 1973 decision of *Roe*, the Court held that a woman has a constitutional right to abortion.[25] After Presidents Ronald Reagan and George H.W. Bush appointed five (six if you count former Chief Justice Rehnquist) of the nine Supreme Court Justices, and after subsequent Court decisions limited and undermined *Roe*,[26] many expected that the Supreme Court in *Casey* would overrule *Roe*.[27]

The crucial plurality in *Casey* of three Justices—O'Connor, Kennedy, and Souter, all Republican appointees—admitted to "reservations...in reaffirming the...holding of *Roe*" but relied on "the force of *stare decisis*" to affirm *Roe*.[28] The plurality concluded that the Rule of Law[29] values advanced by stare decisis, and the Court's own legitimacy, were best served by reaffirming *Roe*.[30] Thus, despite admitted reservations about whether *Roe* correctly interpreted the Constitution, the *Casey* plurality decision followed *Roe*'s result.

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18. Schauer, *supra* note 12, at 576; *see also* Monaghan, *supra* note 6, at 755 ("In some sense, the second court must feel bound by the precedent.").

19. SCALIA, *supra* note 15, at 139.

20. Schauer, *supra* note 12, at 576.

21. *Id.*

22. *Id.* This is not to say that the precedent's reasoning has nothing to do with the degree of its binding power. A precedent whose reasoning is patently erroneous is much closer to being subject to overruling than one whose reasoning is viewed as sound. As Professor Monaghan has argued, stare decisis is a "conditional obligation: precedent binds absent a showing of substantial countervailing considerations." Monaghan, *supra* note 6, at 757.

23. 505 U.S. 833 (1992).

24. 410 U.S. 113 (1973).

25. *Id.* at 153.

26. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Maher v. Roe, 432 U.S. 464 (1977).

27. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 117 (1996) (stating that *Casey*'s outcome "was a great surprise").

28. *Casey*, 505 U.S. at 853; *see also id.* at 861 ("Within the bounds of normal *stare decisis* analysis...the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.").

29. *See infra* notes 162–172 and accompanying text (explaining Rule of Law values and how stare decisis advances those values).

30. *Casey*, 505 U.S. at 860–61, 869.

In current practice, the role of precedent in constitutional adjudication is relatively clear. As Professor Henry Monaghan has stated, in constitutional adjudication "the conventional wisdom is that stare decisis should and does have only limited application."[31] The binding power of constitutional precedents is lower than that of statutory or common law precedents because of the great difficulty of eliminating an incorrect constitutional precedent through nonjudicial means.[32] Although not always consistent, the Court's rhetoric[33] is that it will follow incorrect constitutional precedents absent a "special justification" otherwise.[34] While the exact contours of what constitutes a "special justification" are disputed by members of the Court, only Justice Thomas advocates giving little or no deference to incorrect constitutional precedent.[35]

Turning to the normative aspect of stare decisis, proponents of stare decisis have identified a number of values that it advances.[36] Here I will briefly outline them. First, proponents argue, based on different philosophical structures,[37] that the doctrine of stare decisis promotes fairness and equality by "treating like cases alike."[38] Second, proponents argue that stare decisis advances predictability by

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31. Monaghan, *supra* note 6, at 741; *see also* Lee, *supra* note 2, at 703–04 ("[O]ne point has achieved an unusual degree of consensus: that stare decisis has 'great weight...in the area of statutory construction' but 'is at its weakest' in constitutional cases."); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 2 (2001) ("[C]onventional wisdom now maintains that a purported demonstration of error is not enough to justify overruling a past decision.").

32. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting) (arguing that because "correction through legislative action is practically impossible," the Court should more readily overrule incorrect constitutional precedents), *overruled in part by* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938); *see also* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("*[S]tare decisis* concerns are at their acme in cases involving property and contract rights."); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation....").

33. *See* Lee, *supra* note 2, at 654 ("The modern Court has sent conflicting signals as to the effect of a current perception of error in a past decision.").

34. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000); United States v. IBM Corp., 517 U.S. 843, 856 (1996); *see also* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1086 (2003) ("[T]he Supreme Court treats its past decisions as neither absolutely binding nor merely persuasive."). There are many statements by the Court that take a different approach. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827–29 (1991) (listing factors the Court must weigh to determine whether to overrule a precedent); United States v. Scott, 437 U.S. 82, 101 (1978) (appealing to the "lessons of experience" to overrule a precedent) (internal quotation marks omitted).

35. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("Until this Court replaces its existing Commerce Clause Jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers."); *see also* United States v. Lopez, 514 U.S. 549, 584–85, 601 & n.8 (1995) (Thomas, J., concurring) ("Consideration of *stare decisis* and reliance interests *may* convince us that we cannot wipe the slate clean.") (second emphasis added).

36. *See* Alexander, *supra* note 14, at 9–17; James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347–48 (1986); Schauer, *supra* note 12, at 595–602.

37. *See, e.g.*, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 127 (1998) (arguing, from a "liberal conception of justice," that "the rule-of-law doctrine of precedent imposes a presumptive duty on the courts to adhere to [previously enunciated legal rules]"); CLIFFORD ANGELL BATES, JR., ARISTOTLE'S "BEST REGIME": KINGSHIP, DEMOCRACY, AND THE RULE OF LAW 163–211 (2003) (arguing that Aristotle, in Book III of his *Politics*, establishes that "democracy restrained by the rule of law is the best regime"); RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 455 (2002) ("Books IV-VI [of the *Politics*] make it clear that Aristotle accepts in large part the argument rehearsed in Book III for the rule of law."); JOHN RAWLS, A THEORY OF JUSTICE 208–09 (rev. ed. 1999) (arguing, from a conception of justice as fairness, that the Rule of Law requires "similar cases be treated similarly").

38. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 108 (2001); Schauer, *supra* note 12, at 595–97. For criticism of the claim that stare decisis advances equality, see Alexander,

"ensur[ing] that the judiciary follows known rules [and] does not make arbitrary decisions."[39] Predictability enables persons to order their lives into the future. Third, following precedent respects the reliance interests of those who have justifiably relied on precedents.[40] The fourth value of stare decisis claimed by its proponents is stability.[41] Fifth, stare decisis promotes the systemic legitimacy of the federal courts, particularly the Supreme Court, which plays a central role in our society's social order.[42] Lastly, stare decisis makes judicial decision making more efficient.[43] Because of stare decisis, "[m]any constitutional issues are so far settled that they are simply off the agenda."[44] By allowing judges (and potential and actual litigants) to concentrate on one or a handful of issues in a given case, instead of relitigating all potential issues in a case, stare decisis promotes judicial efficiency.

Many of these values are often seen as components of the larger cluster of values that comprise the Rule of Law. Of course, the extent to which these related Rule of Law values are advanced depends on the constraining force of precedent. And to the extent these Rule of Law values are advanced, other contrary values, such as flexibility, are often sacrificed.

B. The Division Over the Proper Method of Constitutional Interpretation in the United States

The United States has the oldest binding, written, national constitution. Until recently, the power of constitutional judicial review exercised by federal courts was also a unique American institution.[45] Constitutional judicial review is the authority of federal courts[46] to nullify acts of the elected branches[47] of government because those acts are not in accord with the Constitution.

The combination of an authoritative, written constitution and the power of constitutional judicial review has sparked a continuing debate over the methodology federal courts should use to interpret the Constitution. There are, generally speaking, two camps in American judicial and scholarly discourse. On one end are

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supra note 14, at 9–13. Professor Alexander argues: "[T]here is no intertemporal equality value of sufficient weight to support precedential constraint." *Id.* at 10.

39. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 169; *see* Healy, *supra* note 38, at 108.

40. Paulsen, *supra* note 2, at 1553–56; Schauer, *supra* note 12, at 599. Persons inevitably order their lives based on the legal rules enunciated in previous cases and could suffer harm if those rules are regularly or lightly changed.

41. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 169; Lee, *supra* note 2, at 652–53. Stability is the value of limited change. Stability does not require change to cease—it requires only that change be gradual, allowing social life to accommodate the change.

42. Monaghan, *supra* note 6, at 749–54.

43. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 169; Healy, *supra* note 38, at 108–09.

44. Monaghan, *supra* note 6, at 744; *see* Lee, *supra* note 2, at 652. *But see* Paulsen, *supra* note 2, at 1544–45 (questioning the efficiency gains brought about by any form of stare decisis that is less than absolute).

45. Keith E. Whittington, *An "Indispensable Feature"? Constitutionalism and Judicial Review*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 21, 22 (2003).

46. And state courts, but in this Article I will concentrate on federal courts exercising constitutional judicial review.

47. For purposes of this Article, I will concentrate on the paradigm situation of federal courts reviewing the constitutionality of a federal statute, duly enacted and signed by the President.

those commonly labeled originalists; on the other end are nonoriginalists. I will discuss each in turn.

1. Originalism

Originalists argue that the authoritative and binding meaning of the Constitution—the meaning that federal courts may legitimately use to nullify acts of the elected branches—is the publicly understood meaning of the text of the Constitution when the text was ratified. Originalists have advanced many, at times conflicting, reasons why the original meaning of the text of the Constitution is authoritative, which I have discussed elsewhere.[48]

For example, the Commerce Clause is a modern locus of debate over the meaning of the Constitution, and it provides a convenient vehicle to examine an originalist approach to constitutional interpretation. The original Constitution, ratified 1787–1789, contained the Commerce Clause, which gave Congress the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[49] The Clause was enacted to give the federal government the authority to prevent the interstate (and international) squabbles over commerce that had threatened to tear apart the Union under the Articles of Confederation, which had failed to give Congress such authority.[50]

An originalist judge, when faced with a challenge to a statute passed by Congress pursuant to its Commerce Clause power, will ask himself, is this statute regulating "Commerce" as that term was understood in 1789?[51] To answer the question, the originalist judge will look to the text and structure of the Constitution; for example, how is "Commerce" used elsewhere in the Constitution? If that does not resolve the constitutional question in the case, the judge will look to historical evidence of how that term was understood by the Framers and Ratifiers of the Constitution in 1787–1789.[52] Such evidence may include the literature that accumulated during the ratification debates, such as the *Federalist Papers*; usage in private correspondence discussing the Constitution; contemporary dictionaries; and usage in other areas of life. Through this essentially historical inquiry, the originalist judge will also seek

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48. Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism and the Aristotelian Tradition*, 2 GEO. J.L. & PUB. POL'Y 523, 523–24, 574–98 (2004) [hereinafter Strang, *Aristotelian Tradition*]; Lee J. Strang, *Originalism and Legitimacy*, 11 KANSAS J.L. & PUB. POL'Y 657, 658 (2002) [hereinafter Strang, *Legitimacy*].

49. U.S. CONST. art. I, § 8, cl. 3.

50. THE FEDERALIST NO. 7 (Alexander Hamilton).

> The few simple words of the Commerce Clause...reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

51. *See* United States v. Morrison, 529 U.S. 528, 627 (2000) (Thomas, J., concurring) (urging a return to the original meaning of the Commerce Clause); United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (urging the same).

52. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2229–30 (2005) (Thomas, J., dissenting) ("The Clause's text, structure, and history all indicate that, at the time of the founding, the term 'commerce' consisted of selling, buying, and bartering, as well as transporting....") (internal quotation marks omitted).

to become aware of the purpose for which the Commerce Clause was ratified.[53] This purpose aids the judge in determining the contours of the meaning of the Clause.

If the originalist judge finds that the original meaning of the Commerce Clause is determinate in the case before him—that is, the original meaning of the Clause determines the outcome of the case—the judge must rule based upon that meaning. However, despite the best efforts of the originalist judge, it is possible that the original meaning of the term "Commerce" is underdetermined on the point before the court. Perhaps the challenged statute is regulating an activity that is not determinately included in or excluded from the original meaning of "Commerce." In other words, there is a range of possible legal outcomes *consistent with, but not determined by*, the original meaning. Those originalist scholars who have recognized that the original meaning may be underdetermined[54] have arrived at different conclusions regarding the duty of a judge when faced with underdeterminacy.[55]

Most originalists, including myself, argue that judges may not exercise the power of constitutional judicial review to rule that a federal statute is unconstitutional based upon anything other than the original meaning of the text of the Constitution. Consequently, when the original meaning determines the outcome of a constitutional case, judges may not directly appeal to or rule based upon natural law norms.[56]

For example, Justice Scalia, the most prominent originalist jurist, has argued that originalist judges should not interpret the Constitution to mean "what it *ought* to mean" in light of philosophy and justice.[57] Instead, because the Constitution is a "democratically adopted text," it must be understood as it was by the Framers and Ratifiers who gave the Constitution its authority.[58] More recently, Keith Whittington has argued that judges directly applying natural law norms "cannot fit with the experience of possessing a constitution at all."[59] More fundamentally, Whittington finds that the "recommendation to pursue a dimly perceived [natural law] truth...erases the distinction between the legal and the political realm and once

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53. For an example of this methodology in action regarding the Commerce Clause, see Justice Thomas's concurrence in *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

54. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (providing a discussion of the nature and extent of underdeterminacy).

55. *See, e.g.*, BARNETT, *supra* note 11, at 118–30 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–19 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION]; WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 34–212. My thoughts on this subject are discussed in Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48 (2006) [hereinafter Strang, *Role of the Common Good*].

56. This Article argues that judges may directly exercise their prudential judgment on what the natural law requires in a particular case—what the common good requires—in the context of nonoriginalist precedent.

57. SCALIA, *supra* note 15, at 39. Robert Bork, another prominent originalist, agrees with Justice Scalia: "I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 66 (1990).

58. SCALIA, *supra* note 15, at 40; *see also id.* at 133 ("[W]hether life-tenured judges are free to revise statutes and constitutions adopted by the people and their representatives is...[a] question utterly central to the existence of democratic government.").

59. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 31.

again calls into question the authority of the jurist when opposed to the judgments of more representative political agents."[60]

In sum, originalists argue that federal courts are justified in striking down the acts of the elected branches only when such acts conflict with the determinate original meaning of the Constitution. Judges may not rule, when the original meaning is determinate, based upon norms outside of the original meaning.

2. Nonoriginalism

Although a large and varied group, nonoriginalists generally agree that values other than (or in addition to) the original meaning should enter into a judge's interpretative calculus when deciding whether to declare an act of the elected branches unconstitutional. However, there is a broad range of views in the nonoriginalist camp on what role, if any, the original meaning should play.

Some nonoriginalist scholars and judges argue that the original meaning should play no role; rather, the morally correct set of values should comprise our Constitution and should guide constitutional judicial review. Richard Epstein, who has argued for a Constitution that embodies Lockean principles in its text and presupposes a Lockean theory of the state, articulates an example of this line of thinking.[61] Another example is Samuel Freeman,[62] who believes that the only legitimate government is based on "public reasons," meaning that judges must interpret the Constitution to embody "the terms of our social agreement, terms to which all as 'free and equal sovereign citizens' would reasonably agree."[63]

On the other end of the spectrum are nonoriginalists for whom the original meaning of the Constitution plays a role. Perhaps the most prominent example is Ronald Dworkin.[64] For Dworkin, any interpretation of the Constitution must "fit" our constitutional practice, the central component of which is a written constitution.[65] Thus, any interpretative methodology that fails to account for appeals to and decisions based upon the Constitution will also fail to "fit" our constitutional practice and should be excluded as a possible interpretative methodology. However, since more than one interpretative methodology will fit the data of our constitutional practice, Dworkin argues that we, both as individuals and as a society, must choose the morally best methodology, which is the one that does the most credit to our society.[66] This choice is relatively unconstrained and judges must utilize moral norms in making those decisions. Dworkin argues that it is his "moral reading" of the Constitution that both fits and does the most credit to our

60. *Id.* at 32.

61. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For Epstein, the Takings Clause of the Fifth Amendment takes on enormous importance relative to the other portions of the Constitution. *Id.* at 3.

62. Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3 (1992).

63. Strang, *Legitimacy*, *supra* note 48, at 664 (quoting Freeman, *supra* note 62, at 14).

64. For what is arguably Dworkin's best discussion of interpretation of human practices, see RONALD DWORKIN, LAW'S EMPIRE 52–53, 228–32 (1986).

65. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 106 ("[Hercules' interpretation of the Constitution] must be a scheme that fits the particular rules of this constitution, of course.").

66. *Id.* at 107.

constitutional practice.[67] The "moral reading" commits judges to ensuring that our nation treats all citizens with "equal status and with equal concern" as required by the Bill of Rights—especially the Equal Protection Clause.[68]

In sum, nonoriginalists are a diverse group of scholars and judges who reject originalism and argue that judges should utilize values instead of or in addition to the original meaning during constitutional judicial review.

C. For Any Plausible Theory of Constitutional Interpretation, There Will Be Precedents That, Under the Methodology, Are Mistakes

1. Why There Are Always Mistakes

Every plausible[69] constitutional interpretative methodology must account for what, on that methodology's understanding, are mistaken precedents. I will briefly discuss some of the reasons for the existence of mistaken constitutional precedent.

The practice of constitutional judicial review in the United States is old, deep, and rich. For over 200 years, the Supreme Court has been ruling statutes unconstitutional.[70] This vast span of time presents great difficulties for any institution that requires the exercise of fallible human judgment for its functioning. Over time, mistakes will inevitably occur regardless of one's interpretative methodology.

Relatedly, the central institution in the practice of constitutional judicial review is the Supreme Court. The Court has periodic changes in personnel, appointed and approved by political actors whose jurisprudential views have varied over the vast span of the Court's existence. These personnel changes bring new views on the correctness of past precedents, which in turn were based on different understandings of the nature of the Constitution. For example, between 1948 and 2000, the party affiliation of the president changed seven times. Each change brought with it

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67. DWORKIN, *supra* note 31, at 2.

68. *Id.* at 10. For an argument that the text and history of the Constitution play a role only when convenient for Dworkin, see Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

69. The only possible (though not plausible) method of interpreting the Constitution that does not have a difficulty with mistaken precedent would be one that identified the Constitution entirely with what the Supreme Court says about the Constitution. Of course, if one's interpretative methodology is "whatever the Supreme Court rules is correct," then mistakes will not occur. I am aware of no judge or scholar who holds this view. As Randy Barnett has argued, scholars and judges are unwilling to argue (admit?) that Supreme Court pronouncements are the Constitution. BARNETT, *supra* note 11, at 1–2. Scholars and judges continue to assert in their writings and opinions that it is the Constitution that is authoritative, and not solely the Supreme Court's pronouncements regarding the Constitution. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 440 (2000) (stating that "*Miranda* is constitutionally based"); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (stating that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," including a "zone of privacy"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88–101 (1980) (arguing that the Constitution's text supports a "representation-reinforcing approach to judicial review"); Ronald Dworkin, *Comment*, *in* SCALIA, *supra* note 15, at 115, 119–20 (stating that a semantic originalist would look to the "best understanding" of the Cruel and Unusual Punishment Clause as laying down "an abstract principle forbidding whatever punishments are in fact cruel and unusual"). Further, an interpretative methodology that completely identified the Constitution with Supreme Court precedent could not account for the persistent arguments in the precedents themselves to the written Constitution, its original meaning, and other constitutional values. In other words, such an interpretative methodology would fail to adequately fit our constitutional practice.

70. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

presidents with different views on the nature of the Constitution and the role of the Supreme Court.[71] In turn, the presidents attempted to appoint justices in line with their views.[72] The result is a slow change in the jurisprudential views of members of the Court.

Additionally, the general current of legal thought has changed over the course of the Court's history.[73] Judges were first lawyers who came of age in a particular jurisprudential climate. As young law students (or, in an earlier era, legal apprentices), they imbibed the understanding of law presented to them.[74] Accordingly, as new judges replace old, the legal views of the judges—especially with respect to past cases—change as well.

Further, what Alexis de Tocqueville wrote in 1835 is more pertinent than ever: "There is almost no political question in the United States that is not resolved sooner or later into a judicial question."[75] For a substantial period of its history, the Supreme Court has waded into the most contentious issues in our social life including racial issues, economic issues, abortion, euthanasia, and religion in public life. These issues cause emotions to run high and implicate our most deeply held beliefs. This could impair the judgment of judges as to whether and/or how the Constitution is implicated. Some may be tempted to rule in a manner they know is

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71. This statement depends on the political affiliation of the presidents guiding their choice of Supreme Court nominees and the political affiliation of the presidents having different views of the nature of the Constitution and the role of the Supreme Court.

72. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 210 (2001) ("[T]he fact is that chief executives who have been sensible of the broad powers they possessed, and who have been willing to exercise those powers, have all but invariably tried to have some influence on the philosophy of the Court through their appointments to that body."). Perhaps the most important battle over the ability of a president to influence the makeup of the Court was President Roosevelt's court-packing plan. *See id.* at 116–33 (describing Roosevelt's failed attempts to deliberately alter the makeup of the Court to ensure implementation of the New Deal); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 285 (3d ed. 2005) (noting that the Supreme Court's reversal of itself in the *Legal Tender Cases* as a result of presidential appointments "shows how much control a president could exercise over the Supreme Court").

73. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992) (describing the transformation from legal formalism to legal realism in American legal thought).

74. One of the most prominent examples of this phenomenon occurred at the turn of the twentieth century. Legal thought at the end of the nineteenth century was exemplified by Dean Langdell of Harvard who sought to remake legal education and practice into a science based on empirical study of case law. C.C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS (1871). Langdell stated, "Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer." *Id.* at vi. This understanding of law is commonly called "Legal Formalism." For example, at Harvard Law School in 2002–2003, at least three courses labeled the predominant strain of American legal thought in the late nineteenth and early twentieth centuries legal formalism. *See* HARVARD LAW SCHOOL CATALOG 2002–2003, at 103, 162, 194 (2002). Beginning, however, around the time of Oliver Wendell Holmes, a new movement in the American law schools called "Legal Realism" emerged. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). *See generally* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997) (providing a broad overview of the legal realist movement). Over time, students who came of age under the tutelage of realists became judges who replaced formalist judges. The result was a large repudiation of past case law beginning, at least symbolically, in 1937. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (beginning the sea change of Commerce Clause jurisprudence).

75. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (Harvey C. Mansfield & Delba Winthrop eds., trans., Univ. of Chi. 2000) (1840).

not in accord with what the Constitution requires. Others may unknowingly be swayed. In either case, mistaken precedent is created.

Lastly, the interpretative issues faced by the Supreme Court are not easy. Judges must both identify the pertinent constitutional meaning and then determine whether the government action in question contravenes that meaning. Well-intentioned, intelligent judges can err in making these determinations and thereby create a mistaken precedent.

2. The Problem of Mistaken Nonoriginalist Precedent

A common criticism lodged by nonoriginalists against originalism is that adoption of originalism would require the overruling of cases that are both just and widely accepted by society. The paradigm example of such a case is *Brown v. Board of Education*.[76] In this vein, Professor Michael Gerhardt has argued that "[u]nitary theories," like originalism, "face an inescapable dilemma." Originalists "have to choose between rejecting most of [the Supreme Court's] precedents, thereby precipitating constitutional turmoil, or rejecting or seriously modifying the proposed unitary theory to ensure stability or continuity in constitutional decision-making."[77] This dilemma comes from originalism's single, unifying principle: the "original meaning" coming into conflict with cases decided based upon reasons other than the original meaning.[78]

For originalists, the list of nonoriginalist precedents and constitutional law doctrines built on these precedents is long and presents a strong challenge to originalism. Additionally, these nonoriginalist precedents remain some of the most controversial Supreme Court decisions in our nation's history. Nonoriginalist precedents that have been criticized on originalist grounds include *Brown v. Board of Education*,[79] which held that racially segregated public schools violated the Equal Protection Clause; *Roe v. Wade*[80] (and its progeny), which held that laws prohibiting abortion violated the Due Process Clause; *Everson v. Board of Education*,[81] which held that the Establishment Clause incorporated a principle of strong separation between church and state; free speech cases;[82] *Wickard v. Filburn*,[83] which held that Congress's Commerce Clause power extended to wheat grown and consumed on a farm; nondelegation doctrine cases;[84] and the incorporation doctrine,[85] among many

76. 347 U.S. 483 (1954).
77. Gerhardt, *supra* note 7, at 132.
78. *Id.* at 131–34.
79. 374 U.S. 483 (1954).
80. 410 U.S. 113 (1973).
81. 330 U.S. 1 (1947).
82. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding that burning the United States flag was constitutionally protected from prosecution); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that attorneys have a constitutional right to advertise their services); Cohen v. California, 403 U.S. 15 (1971) (reversing, on First Amendment grounds, the conviction of defendant who wore a "F[***] the Draft" shirt in a county courthouse in violation of a state statute which forbade "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person [by] offensive conduct"); Stanley v. Georgia, 394 U.S. 557 (1969) (holding that states may not criminalize private possession of obscene materials).
83. 317 U.S. 111 (1942).
84. *See* United States v. Frank, 864 F.2d 992, 1010–11 (3d Cir. 1988) (listing cases).
85. The Incorporation Doctrine holds that some rights protected by the original Bill of Rights have been incorporated against the states through the Fourteenth Amendment.

others. This list of nonoriginalist precedents and doctrines, though not close to exhaustive, shows that, if the originalist account of constitutional interpretation is to be plausible, originalists must explain the status of these precedents and doctrines. In other words, "the central problem for originalism is whether the cost of embracing stare decisis is too high—whether, in the end, the embrace destroys originalism[]."[86] Unfortunately, few originalists have directly faced the issue and many have simply asserted that some/many/all nonoriginalist doctrines and precedents should not or cannot be overturned.[87]

Further, some forms of originalism are especially subject to criticism based on the existence of pervasive nonoriginalist precedent. Richard Kay, an early proponent of originalism, argued that originalism was the best mode of constitutional interpretation because it was the "most likely to produce relatively clear and stable rules for lawful government activity."[88] For Kay, originalism protected Rule of Law values better than alternative interpretative methodologies.[89]

But if stability is the justification for originalism, then nonoriginalist precedent presents a quandary. On the one hand, an originalist judge that overrules all nonoriginalist precedent will gravely harm the Rule of Law values upon which originalism is based (according to Kay). On the other hand, the originalist judge that fails to overrule any nonoriginalist precedent and instead rules consistently with such precedent is an originalist in name only. However, the originalist judge who decides to overrule some but not all nonoriginalist precedent is, from Kay's perspective, the worst of all because of the dramatic instability and unpredictability introduced by a judge deciding case-by-case and doctrine-by-doctrine when to abide by, or overrule, nonoriginalist precedent.

Similarly, Justice Scalia has argued that originalism is the proper interpretative methodology because, among other reasons, it is more objective than any alternative: one may in principle determine the original meaning of the Constitution through historical study.[90] Admitting that there "is plenty of room for disagreement as to what [the] original meaning was," Scalia finds that "the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of [nonoriginalism]."[91]

Justice Scalia's defense of originalism based on its objectivity founders, however, on the shoals of pervasive nonoriginalist precedent; that is, unless the originalist judge is willing to "wipe the slate clean" of nonoriginalist precedent, which few, if any, judges have expressed a willingness to do. If the originalist judge is going to decide on a case-by-case or doctrine-by-doctrine basis whether to overrule nonoriginalist precedent, the criticisms lodged by Scalia against nonoriginalism —that it is not objective—apply to originalism as well.

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86. Monaghan, *supra* note 6, at 767.

87. *See infra* Part II.D. (discussing current originalist approaches to nonoriginalist precedent).

88. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 288 (1988).

89. *See id.* at 287–91.

90. SCALIA, *supra* note 15, at 44–47; *see also* BORK, *supra* note 57, at 143–53 (arguing that originalism is superior because with it judges can neutrally derive, define, and apply constitutional norms).

91. SCALIA, *supra* note 15, at 45.

While there is much nonoriginalist precedent, I do not want to overstate the problem of nonoriginalist precedent for originalists.[92] First, most cases decided by federal courts are not constitutional cases and hence would not be impacted by the overruling of nonoriginalist constitutional precedent. Second, there are many instances when the original meaning of the text of the Constitution will be underdetermined; that is, two or more results are consistent with the original meaning. In these situations, the Supreme Court has no authority to strike down a statute in the first instance, so a shift by the Court away from nonoriginalist precedent may not impact existing constitutional constructions.[93] "Thus, an originalist judiciary... would not strike down every government action that cannot be justified in originalist terms but only those that are inconsistent with known constitutional requirements."[94]

Third, instead of simply overruling a nonoriginalist case, the Supreme Court can initially limit the case, employ an originalist methodology that will further limit the nonoriginalist case, and eventually, once the jurisprudential landscape has changed, overrule the case.[95] As Keith Whittington has argued, this process protects reliance interests, allows society to slowly move with the Court, and prepares individuals and social institutions for the eventual overruling of the nonoriginalist case or doctrine.[96]

Randy Barnett has offered two further possible ways in which the nonoriginalist precedent critique is limited: (1) the "epistemic" role precedent plays for later judges, and (2) "original ambiguities" where early precedent may fix "indeterminacy of original meaning."[97] The first permits the "Court to give its past decisions a rebuttable presumption of correctness."[98] The second would permit an early decision to "rectif[y] an initial indeterminacy in original meaning" that later courts could not trump.[99]

While nonoriginalists often use the existence of nonoriginalist precedent as a club against originalists,[100] each interpretative methodology is faced with the problem of mistaken precedent. Nonoriginalist theories of constitutional interpretation also must account for precedents and doctrines that are justified by the original meaning of the Constitution but not by the nonoriginalist's methodology. The list of originalist precedents often criticized by nonoriginalists includes *Alden v. Maine*,[101] which held that Congress could not abrogate state immunity from suit in

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92. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 168–74; *see also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 23 CONST. COMMENT. (forthcoming 2006) (providing a persuasive argument about the limits of the common critique lodged by nonoriginalists based on the existence of pervasive and deeply entrenched nonoriginalist precedent).

93. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 171–73.

94. *Id.* at 172.

95. *Id.* at 169–70.

96. *Id.* at 170.

97. Barnett, *supra* note 92 (manuscript at 10–11, on file with author).

98. *Id.* (manuscript at 10, on file with author) (citing Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 81 (2000)).

99. *Id.* (manuscript at 11, on file with author) (citing Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–53 (2003)).

100. *See supra* note 6 (citing such instances).

101. 527 U.S. 706 (1999).

state court, and *United States v. Lopez*,[102] which held that Congress's Commerce Clause power did not extend to noneconomic activity. And then there is the pervasive aspect of our legal practice of making arguments based on the original meaning of the Constitution.[103] Consequently, the problem of "mistaken precedent" is one for both originalists and nonoriginalists.

D. Some Current Originalist Approaches to Mistaken Nonoriginalist Precedent

1. Originalist Theories of Precedent

In this subsection I will discuss some of the theories of precedent offered by originalists. There are few attempts among originalists to address nonoriginalist precedent and, of those that do, most provide little support for their respective claims. The positions advanced by originalists cover the entire range of possibilities from essentially following the current practice regarding precedent to overruling all nonoriginalist precedent.

a. Justice Scalia

Justice Scalia has a strong concept of precedent. He has stated that for those nonoriginalist areas of constitutional law where "the Court has developed long-standing and well-accepted principles...that are effectively irreversible," he will abide by nonoriginalist precedent, but not extend them.[104] To justify his acceptance of nonoriginalist precedent, Justice Scalia believes that for originalism to be practical, it "must accommodate the doctrine of *stare decisis*."[105] Therefore, according to Justice Scalia, the basis for stare decisis, and thus for originalism's accommodation of mistaken nonoriginalist precedent, is stability.[106] Overturning all nonoriginalist precedent would be "so disruptive of the established state of things" that it would disqualify originalism "as a workable prescription for judicial governance."[107]

In short, Justice Scalia carves out of his originalist methodology an exception[108] for some, but not all, nonoriginalist precedent. In doing so, he appeals to stability, but fails to offer any reason why stare decisis should be an exception to originalism.

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102. 514 U.S. 549 (1995).

103. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947) ("The meaning and scope of the First Amendment, preventing establishment of religion...[is construed] in light of its history and the evils it was designed forever to suppress...."); *see also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees."). None other than Justice Brennan has relied on and claimed consistency with the historical understanding of the Establishment Clause. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

104. SCALIA, *supra* note 6, at 138.

105. *Id.* at 139.

106. *Id.* He further argues that this concession is not a unique flaw of originalism, since, like all interpretive methods, it must compromise with "mistaken" precedent. *Id.*

107. *Id.* at 139.

108. *Id.* at 140 ("[*S*]*tare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it.").

Nor does he explain how an originalist judge should approach nonoriginalist precedent, namely, when the judge should overrule, limit, distinguish, or affirm.

b. Robert Bork

After Justice Scalia, Robert Bork is likely the second most known originalist. In his book, *The Tempting of America*, Bork responded to criticism that originalism is fatally flawed because of the prevalence of nonoriginalist precedent.[109] Bork argued that originalist judges should "not attempt to undo all mistakes of the past."[110] When faced with nonoriginalist precedent that a judge prudentially determines not to overrule, Bork asserted that the judge should generally limit the precedent and extend it no further.[111]

Bork justified originalist judges limiting or overruling nonoriginalist precedent by citing to the Court's practice of overruling decisions later determined to be incorrect.[112] Bork found that this practice is appropriate because of the difficulty of amending the Constitution to overrule erroneous Supreme Court decisions.[113] He also appealed to the values that stare decisis is typically said to uphold: protection of reliance interests and stability.[114]

However, Bork went further than offering only prudential reasons for stare decisis. He also *briefly* noted that "[a]t the time of the ratification, judicial power was known to be to some degree confined by an obligation to respect precedent."[115] This originalist "hook" allowed Bork to avoid some of the criticisms lodged against Scalia.

c. *Anastasoff v. United States*

In *Anastasoff v. United States*,[116] a panel of the Eighth Circuit held that the circuit's rule that opinions designated as unpublished were not of precedential value violated Article III.[117] *Anastasoff*, written by Judge Richard Arnold, employed an originalist methodology to determine that, at the time of the framing and ratification of Article III, a doctrine of binding precedent was "well established" and derived "from the nature of judicial power delegated to the courts by Article III."[118]

To reach this conclusion, Judge Arnold reviewed the historical context of 1789 to arrive at the Framers' and Ratifiers' understanding of the nature of judicial power.[119] The court in *Anastasoff* concluded that, "as the Framers intended, the doctrine of precedent limits the 'judicial Power' delegated to courts in Article III."[120] The doctrine of precedent, as understood by the Framers and Ratifiers, was

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109. BORK, *supra* note 57, at 155–59.
110. *Id.* at 155.
111. *Id.* at 158.
112. *Id.* at 156.
113. *Id.*
114. *Id.* at 157–58.
115. *Id.* at 157.
116. 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000).
117. *Id.* at 899.
118. *Id.* at 900.
119. *Id.* at 900–03.
120. *Id.* at 903. *Anastasoff* caused a firestorm of debate in the courts and academic community. The most prominent judicial response to *Anastasoff* came from the Ninth Circuit in *Hart v. Massanari*, 266 F.3d 1155 (9th

not, however, "some rigid doctrine of eternal adherence to precedents," and courts may, for good reason(s), overrule past decisions.[121]

In the context of constitutional adjudication, *Anastasoff*'s conclusion that "judicial Power" in Article III incorporated the doctrine of precedent would lead to the result that courts should not overrule all nonoriginalist precedent. However, the court failed to give reasons why and guidance as to when mistaken nonoriginalist precedent should and should not be overruled.

d. Gary Lawson

In a provocative 1994 article entitled *The Constitutional Case Against Precedent*, Gary Lawson argued that in the context of constitutional adjudication, "the practice of treating prior judicial decisions as legally authoritative merely by virtue of their status as prior judicial decisions" was unconstitutional.[122] Lawson's was the first article by an originalist to directly address (and attack) the bindingness of nonoriginalist constitutional precedent.

Lawson first discussed the *Marbury v. Madison*[123] justification for constitutional judicial review: in a case involving the constitutionality of a statute, the Court must prefer the Constitution—the supreme law of the land—to the statute.[124] This same reasoning applies, argued Lawson, to a conflict between the Constitution and a prior Supreme Court case: "Is there any doubt that, under the reasoning of *Marbury*, the court must choose the Constitution over the prior decision?"[125]

Lawson thereafter explicitly rejected the argument that "judicial Power" in Article III included the power of later federal courts to give "legal effect to prior...decisions."[126] He stated that "'[t]he judicial Power' is fundamentally the case-deciding power" requiring that judges know the "hierarchical order of [legal] sources in the event of a conflict."[127] Lawson concluded that for the same reasons the Constitution trumps statutes or executive action, the Constitution also trumps prior judicial decisions.[128] Contrary to Lawson, I will show that some nonoriginalist precedent should not be overruled because of the normative justification

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Cir. 2001). Judge Kozinski found that the "more plausible view [of Article III] is that when federal courts rule on cases...and generally comply with the specific constitutional commands applicable to judicial proceedings, they have ipso facto exercised the judicial power of the United States." *Id.* at 1161. The court questioned the wisdom of binding modern courts to eighteenth century understandings of judicial power and was skeptical of the ability of judges to accurately discern those understandings, as opposed to enforcing the judge's own policy preferences. *Id.* at 1163. In this vein, the court argued that "our concept of precedent today is far stricter than that which prevailed at the time of the Framing." *Id.*; *see also id.* at 1163–70 (surveying the status of stare decisis prior to and during the Ratification to conclude that the Framers did not have a "rigid form" of precedent as do courts today).

121. *Anastasoff*, 223 F.3d at 904.

122. Lawson, *supra* note 2, at 25.

123. 5 U.S. (1 Cranch) 137 (1803).

124. Lawson, *supra* note 2, at 25–27.

125. *Id.* at 27. The structure of Lawson's argument is simple: (1) the Constitution is the supreme law of the land, (2) the Court must prefer the Constitution to other sources of law contrary to the Constitution, and (3) the Court must prefer the Constitution to contrary precedents. *Id.* at 27–28.

126. *Id.* at 29–30.

127. *Id.* at 29.

128. *Id.* at 30; *see also* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 682–86 (1995).

undergirding a proper originalist methodology and the original meaning of judicial power.

e. Randy Barnett

Randy Barnett argues in a forthcoming article that originalists must reject nonoriginalist precedent, but that such a rejection is "not as radical as it sounds."[129] Barnett first describes those situations where the "doctrine of precedent" is "inconsistent with originalism": when the Court interprets the Constitution in a manner contradicting the original meaning of the Constitution and that "mistake was entrenched by the doctrine of precedent."[130] Then he shows, correctly in my view, how rejecting the doctrine of precedent does not lead to unacceptably harmful consequences.[131]

Central to Barnett's rejection of the doctrine of precedent is his normative case for originalism itself.[132] Barnett has argued elsewhere that originalism serves the "writtenness" of the Constitution, which in turn serves four functions: evidentiary, cautionary, channeling, and clarifying.[133] Given his normative justification for originalism, which is based on the beneficial effects of the Constitution's writtenness, Barnett's normative justification cannot accommodate the doctrine of precedent, which would undermine those effects and which would undermine the four functions of the Constitution's "writtenness."[134]

My understanding of the normative justification for originalism, unlike Barnett's,[135] since it is rooted in the common good, makes it possible—and normatively attractive—for originalism to incorporate a doctrine of precedent. Below I set forth my argument why.

III. WHERE NATURAL LAW AND POSITIVE LAW MEET IN AMERICAN CONSTITUTIONAL ADJUDICATION: AN ORIGINALIST THEORY OF PRECEDENT

Assuming the originalist interpretative methodology I describe below, judges should overrule nonoriginalist constitutional precedent unless doing so would gravely harm society's pursuit of the common good. I will begin by describing the form of and justification for originalism I have in mind. Then I will offer two interrelated arguments for why nonoriginalist constitutional precedent should be

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129. Barnett, *supra* note 92 (manuscript at 1, on file with author).

130. *Id.* (manuscript at 3, on file with author).

131. *Id.* (manuscript at 6–13, on file with author).

132. *See id.* (manuscript at 3, on file with author) ("In sum, if the normative case for originalism is compelling, then it provides a normative argument for rejecting the doctrine of precedent, where precedent conflicts with original meaning.").

133. BARNETT, *supra* note 11, at 100–01. The Constitution's writtenness also ensures that lawmaking and application processes are just—hence, legitimate. *Id.* at 109–11.

134. *See id.* at 104 (discussing nonoriginalism and stating that it would "undermin[e] the function of its writtenness").

135. I have elsewhere utilized Barnett's persuasive arguments regarding the writtenness of the Constitution to support my justification for originalism. *See* Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909, 979–80 (2005) [hereinafter Strang, *Central Western Philosophical Tradition*].

overruled. First, I will show that, given the role of federal judges as guardians of the constitutional prudential social ordering[136] embodied in the Constitution—which is designed to secure the common good—and given that stare decisis advances Rule of Law values, a normatively attractive originalism will provide that judges should overrule nonoriginalist precedent except when doing so would gravely harm society's pursuit of the common good.[137]

Second, I will argue that originalism does in fact incorporate constitutional stare decisis and hence is normatively attractive. I will show that the original meaning of judicial power in Article III included the practice and understanding of judges following precedent.[138]

Finally, I will offer guidance on when such precedent should be overruled. Because the judicial decision of when to overrule[139] nonoriginalist precedent is underdetermined, I will briefly describe a theory of judicial virtue necessary to my theory of precedent.

A. Originalism Grounded in the Aristotelian Tradition

The purpose of this Article is to defend a theory of precedent within originalism. Here, I briefly outline a form of originalism within which a defense of an originalist theory of precedent is both possible and attractive: an originalism grounded in the concept of the common good.

I have argued elsewhere that judges, and indeed all members of our society, are bound by the original meaning of the text of the Constitution.[140] My argument was grounded in the Aristotelian tradition and its understanding of the nature of man and society. In *Originalism Grounded in the Central Western Philosophical Tradition,* I made two arguments relevant to a theory of originalist precedent. The first is prerogative of authority and the second is jurisdiction. Both arguments are grounded on the common good making incorporation of a theory of originalist precedent both possible and normatively attractive. I lay them out here in abbreviated form.

Here is the first argument: At its most basic, I believe that American society, understood as a moral[141] entity pursuing the common good through time, ratified the Constitution and agreed to bind itself and its members to the original meaning of the text of the Constitution. Human beings have ends, which we all strive to achieve. Humans cannot reach their ends outside of society and thus are members of society in order to reach their ends. Society enables its members to reach their ends by

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136. By "constitutional prudential social ordering," I mean the legal ordering of persons and institutions in our society effected by the Constitution and that the ordering was the result of our society's prudential judgment about how best, under the circumstances, to pursue the common good. *See id.* at 936–81 (describing how any society may, and how our society chose to order itself toward effective pursuit of the common good).

137. *See* Nelson, *supra* note 31, at 54–73 (discussing the costs and benefits of a relatively weak conception of stare decisis, such as the one I offer regarding mistaken nonoriginalist precedents).

138. In this Article I do not discuss the many implications of this conclusion. I will note, however, that many of the dire predictions made by Judge Kozinski in *Hart v. Massanari*, 266 F.3d 1155, 1176 (9th Cir. 2001) do not necessarily follow. For example, even if federal courts are bound by precedent, it does not follow that courts cannot issue summary dispositions of cases.

139. And, by implication, when a judge should limit or distinguish a mistaken precedent.

140. *See* Strang, *Central Western Philosophical Tradition*, *supra* note 135.

141. Moral in the context of a society means that society can correctly pursue its end, the common good, or it can err and incorrectly pursue (or fail entirely to pursue) the common good.

securing the common good. But society can only do so through making an authoritative, prudential decision to order society in a particular manner conducive to the societal pursuit of the common good. Society can only achieve the common good if members of the society abide by the authoritative, prudential ordering decision. Since members of society are members for the purpose of achieving happiness—which requires their adherence to the social ordering decision—they must, to be rational, abide by the societal prudential ordering decision.

An authoritative determination of which path a society shall take to secure the common good is necessary because, although all societies (purport to) pursue the common good, what actually constitutes the common good in concrete circumstances is elusive, and, depending on the circumstances in which a society finds itself, the paths to the common good are unclear and numerous. Both what good constitutes the common good for a particular society and what are the most appropriate means to the common good are rationally underdetermined: there is no demonstrable principle of reason by which one can, a priori, order a society to the common good and determine which means the society will utilize to achieve the common good. As a result, an authoritative determination on social ordering is required.

Our society made an authoritative prudential social ordering decision when it ratified the Constitution. An essential part of that decision was that the original meaning of the text of the Constitution would be binding. That constitutional decision has enabled our society to effectively pursue the common good, which in turn has enabled members of our society to achieve their ends, including members today. Thus, individuals today are bound by the original meaning of the Constitution.

My second argument is related to the first. Within the Aristotelian tradition,[142] how authority to govern a society is divided, and who is going to make the natural law effective, is a prudential question settled by positive law or tradition. In our society the constitutional settlement of 1787–1789 determined that primary law-making responsibilities would devolve to the legislature while the judiciary would have "secondary" law-making authority. Thus, under the binding constitutional settlement chosen by our society to enable us to pursue the common good, the judiciary does not have the authority to "make law" in the primary sense, but can only interpret and apply the positive law, which includes the Constitution.

The traditional justification for the exercise of constitutional judicial review, found prominently in *Federalist 78*, fits well with these two arguments. There, Alexander Hamilton argued that constitutional judicial review was not undemocratic because the courts, in exercising that authority, acted as the agent of the People, enforcing the People's previously enunciated constitutional limitations on the legislature.[143] Constitutional judicial review, on this reading, was *democracy enhancing*: it enabled the People to order its social life and constrain its government

142. By "Aristotelian tradition" I mean the philosophical tradition that has its roots in Aristotle, was synthesized with Christianity by St. Thomas Aquinas, and continues today. *See* Strang, *Role of the Common Good*, *supra* note 55, at 49 (describing the tradition).

143. THE FEDERALIST NO. 78, at 403–04 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001).

agents into the future.[144] As Hamilton stated, "[T]he courts were designed to be an intermediate body between the people and the legislature, in order...to keep the latter within the limits assigned to their authority."[145]

The concept of the common good is central to both of the arguments I offered as to why the original meaning of the Constitution is binding. In the first argument, the authoritative, prudential, social ordering decision of our society to make the original meaning binding was a central part of our society's attempt to order itself to effective pursuit of the common good. In the second argument, the separation of offices in the federal government is essential to effective pursuit of the common good and would be thwarted if officers exceeded the prescribed authority of their offices. The theory of precedent I offer below builds on the centrality of the effective pursuit of the common good to originalism.

Given this justification for originalism, when the original meaning of the Constitution is determinate, judges will have no discretion and will instead be bound by that meaning. For example, in a case challenging Congress's Commerce Clause authority to regulate shipment of agricultural products across state lines, a judge is bound to rule that Congress has the Commerce Clause authority to enact the statute, even if the judge presiding over the case believes that the statute in question is bad policy.

However, like all language, the original meaning of the Constitution has limits. When, as often occurs in constitutional cases, the Constitution's text and original meaning does not provide sufficient guidance, that is, when a case is *underdetermined*[146] by the original meaning, the court's warrant to strike down acts of the elected branches has reached its limit. In the constitutional context, the court must defer to the legislature's determination—or what, following other scholars, I call a constitutional *construction*[147]—when the original meaning of the text of the Constitution is underdetermined. Here is why: when the text of the Constitution and its original meaning do not provide a determinate answer to a question—that is, when there are two or more answers *consistent* with the original meaning—the originalist defense of constitutional judicial review found in *Federalist 78* is inapplicable. Then, our constitutional social ordering, through Article I, gives to Congress the authority to determine how best to order our society toward the common good.[148]

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144. In the Aristotelian tradition, "democracy" is understood as a society governing and ordering itself *through time* to achieve the common good. Society is "transtemporal." It is an entity existing through time and acting for a purpose.

145. THE FEDERALIST NO. 78, *supra* note 143, at 404. This justification was utilized by Chief Justice Marshall in *Marbury v. Madison* to establish the propriety of constitutional judicial review. Marshall echoed Hamilton stating, "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected." 5 U.S. (1 Cranch) 137, 176 (1803).

146. I explain the causes for legal underdeterminacy and the duty of courts in such circumstances more fully in *The Role of the Common Good in Legal and Constitutional Interpretation*. *See* Strang, *Role of the Common Good*, *supra* note 55.

147. *See, e.g.*, BARNETT, *supra* note 11, at 118–30; WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 55, at 1–19; WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 5–14.

148. This argument draws on the distinction between constitutional interpretation and constitutional construction. Here, I follow the lead of Professors Whittington and Barnett and their thoughtful discussions. In

The Aristotelian tradition's concept of the common good offers guidance to courts when they are faced with the underdeterminacy of legal materials. When the law is underdetermined, the pertinent legal materials can be organized and brought to bear in different ways in a case such that two or more outcomes are possible. The court faced with legal underdeterminacy—with the question of "what is the law"—must exercise its discretion in a manner that best enables society to effectively pursue the common good. A court must choose that legal justificatory framework for the legal materials that would make the area of law best able to order society toward the common good.[149]

Judges determining what the law is—deciding a case in the face of legal underdeterminacy—must exercise the judicial virtues of justice as lawfulness and practical wisdom (among others).[150] I further explain my understanding of judicial virtue below.[151]

My understanding of originalism, as detailed above, is distinct in many ways. Most importantly for purposes of a theory of precedent is the central role accorded the common good. Other originalists argue that originalism advances values including Rule of Law values,[152] popular sovereignty,[153] protection of natural rights,[154] and the "writtenness" of our Constitution.[155] Because the values advanced by these versions of originalism are in conflict or in tension with the values advanced by stare decisis, originalists have struggled to formulate a coherent theory of precedent. For example, above I discussed Randy Barnett's argument that the writtenness of the Constitution requires originalism to reject nonoriginalist precedent.[156] I show in the next section that originalism grounded in the Aristotelian tradition and its concept of the common good permits—and makes normatively

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constitutional interpretation, the interpreter is drawing forth the meaning of the Constitution. Constitutional construction, by contrast, goes beyond the meaning of the Constitution. Constitutional construction takes up where interpretation has left off. This occurs when there are two or more possible answers consistent with the original meaning of the Constitution, even after all the tools of interpretation have been utilized. For this reason, constitutional constructions are not completely indeterminate. On the contrary, the constructor is constrained by the meaning of the Constitution uncovered through interpretation, underdetermined though it is. BARNETT, *supra* note 11, at 118–30; WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 5–14.

As explained above, the only warrant possessed by the judiciary to overrule Congress is the Constitution itself. But if the original meaning of the Constitution has been exhausted and there is no determinate answer to a question, then Congress's determination of what the common good requires—its constitutional construction—should prevail over a contrary judgment by the judiciary. This is true for a number of reasons, which I discuss in Strang, *Role of the Common Good*, *supra* note 55.

149. By "justificatory framework" I am referring to Dworkinian structures of the law. *See, e.g.*, DWORKIN, *supra* note 65, at 116–17 ("[The judge] must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.").

150. The virtue of justice as lawfulness will enable the judge to respectfully determine whether the judge has discretion regarding the legal materials, and practical wisdom will enable the judge to choose that justificatory legal framework that best advances the common good.

In this paragraph I am describing the discretion judges retain in constitutional adjudication to order the pertinent legal materials in different ways. Strang, *Role of the Commong Good*, *supra* note 55, at 72–74. I hope to describe this more fully in future work on the role of originalist precedent.

151. *See infra* Part III.B.4.

152. Kay, *supra* note 88, at 285–88.

153. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 34–46.

154. BARNETT, *supra* note 11, at 32–88.

155. *Id.* at 89–117.

156. *See supra* notes 129–135 and accompanying text.

attractive—the incorporation of a theory of precedent into originalist constitutional interpretation.

Second, my understanding of originalism recognizes the need for judicial virtue to navigate the underdeterminacies of constitutional adjudication. Unlike other originalists who shun the notion of discretion in constitutional interpretation and hence have no concept of judicial virtue, my understanding of originalism comes ready-made for the discretion that addressing mistaken nonoriginalist precedents requires.

B. Courts Should Follow Nonoriginalist Precedent Only When Overruling Nonoriginalist Precedent Would Gravely Harm the Common Good

1. Where Natural Law and Positive Law Meet in American Constitutional Adjudication

a. The Nature of the Constitution as an Instrument to Enable Society to Effectively Pursue the Common Good Requires That Originalism Accommodate the Values Advanced by Stare Decisis

i. The Constitution, the Office of Federal Judge, and the Common Good

The Constitution is the document that orders much of our national social life. It grants, divides, and limits the federal government's authority. It is a purposive instrument, the nature of which is to order society to an effective pursuit of the common good.[157]

The Preamble to the Constitution identifies that a more effective pursuit of the common good was the People's purpose behind ratifying the Constitution. The People recognized that the Union under the Articles of Confederation was incomplete and sought to make it "more perfect." The People sought to re-order society to achieve justice, domestic peace, external defense, and the general welfare of the members of our society.[158] This is the essence of common good. The People recognized that the common good, and thus the individual goods of its members, was not being achieved under the Articles and sought to use the Constitution to re-order society to achieve those ends.[159]

The federal judge has an important role to play in our constitutional system—one that is essential to ensuring our society's effective pursuit of the common good. The federal judge's most important role is as protector of the constitutional social ordering. The Framers and Ratifiers feared the centralizing power of Congress and believed that in order to keep Congress within its prescribed constitutional bounds,

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157. For a discussion of the purposive nature of the Constitution, that is, the Constitution as the means through which our society ordered itself to the effective pursuit of the common good, see generally Strang, *Central Western Philosophical Tradition*, *supra* note 135.

158. U.S. CONST. pmbl.

159. The specific clauses and the structure of the Constitution identify the concrete means by which the People sought to secure the common good. The People authorized the federal government to pursue many of the goods that constitute the common good but wisely did so in a limited fashion through the enumeration of powers and with explicit textual limits such as those in the Bill of Rights.

an institution independent of the political influence of Congress and independent of the temporary passions of the People must enforce the Constitution. This institution is the federal judiciary, which was empowered to nullify acts of Congress that contravened the Constitution. This understanding of the role of the judiciary and of constitutional judicial review is found in *Federalist 78*[160] and was utilized by Chief Justice Marshall in *Marbury v. Madison* to establish the propriety of constitutional judicial review.[161]

ii. Precedent Serves Rule of Law Values Central to Pursuit of the Common Good

Within this context, we can better see the proper role for precedent. Precedent serves Rule of Law values: values that are central to any plausible account of how a society may effectively pursue the common good.

The value of the Rule of Law is both intrinsic and instrumental.[162] The Rule of Law is intrinsically valuable because, "[w]here it is observe[d], people are confronted by a state which treats them as rational agents due some respect as such."[163] Human beings grasp and act based on practical reasons and at the same time exclude acting upon other practical reasons.[164] "Laws," in turn, "provide beings capable of grasping and acting on reasons with (additional) reasons for action"[165] because laws enable social cooperation without which members of a society could not achieve many goods.[166] Therefore, the Rule of Law, which provides members of a society with conclusive reasons for action,[167] treats the members respectfully, as rational beings, and is valuable as a result.[168]

Instrumentally, the Rule of Law provides the necessary environment so that members of a society can pursue goods constitutive of themselves free from arbitrary manipulation.[169] John Finnis has listed eight characteristics of the Rule of Law:

> A legal system exemplifies the Rule of Law to the extent...that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of

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160. THE FEDERALIST NO. 78 (Alexander Hamilton). In another Article, I discuss the implications of Hamilton's defense of judicial review and the modern rejection of the defense beginning with Alexander Bickel. *See* Strang, *Aristotelian Tradition*, *supra* note 48, at 523–24, 574–98.

161. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).

162. For a provocative discussion on the benefit of court-made law being rule-like, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

163. Neil MacCormick, *Natural Law and the Separation of Law and Morals*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 105, 123 (Robert P. George ed. 1992).

164. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 116 (1999).

165. *Id.* at 120.

166. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHT 155 (1980).

167. GEORGE, *supra* note 164, at 120.

168. While not essential to the concept of the Rule of Law, in the United States the laws by which we are governed are created through processes that encourage the participation of those whom the laws will govern. This process accords participants the respect of being capable of ordering their corporate life.

169. *See* FINNIS, *supra* note 166, at 272–73.

> decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.[170]

Stare decisis advances these values.

A doctrine of precedent advances Rule of Law values by giving those governed by the law reasons for action. In other words, members of society will know that the proposition decided in Case X will govern their conduct into the future and are thereby given reasons to prospectively guide their conduct. The legal norms announced in Case X, in our legal practice, are realistically possible to follow. In fact, one of the criteria used by the Supreme Court that counsels overruling precedent is the unworkability of the precedent's rule.[171] The publication of opinions, announcement of opinions in open court, and discussion in the media effectively alert attorneys, and to a lesser extent the populace, to the content of a precedent. The Court strives mightily to assimilate a case with past precedent and with other pertinent areas of law. The result is that precedents are generally clear and cohere with other decisions.

The doctrine of stare decisis ensures that the rule announced in a precedent will govern conduct into the future without sudden or drastic changes. A doctrine of precedent allows members of society to plan their lives, to make decisions that will have an impact into the future, and to be confident that their plans will not be harmed because of radical change. The value of stability is so great that people of all eras have tolerated unjust governments simply for the sake of stability.[172] A doctrine of precedent serves the value of stability by limiting change in the law. Change is not eliminated but its pace is slowed. Members of society know that decisions affecting their lives will do so in a predictable manner. Accordingly, they will be able to order their private and public lives with faith that their plans will not be thwarted unexpectedly.

Lastly, one of the values advanced by adherence to precedent is that the discretion of judges is constrained by precedent. As case law builds up around authoritative texts, the legal questions that remain open diminish in importance and number because such questions have been authoritatively settled through adjudication. This process advances the other interests stare decisis supports (for example, predictability) as it constrains judges through the law.

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170. *Id.* at 270–71; *see also* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (offering eight criteria of the Rule of Law similar to Finnis); Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 195 (1977) (offering a formulation of the Rule of Law). For an earlier and influential formulation of the components of the Rule of Law, see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202–03 (10th ed. 1960).

171. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[W]e may ask whether the rule has proven to be intolerable simply in defying practical workability.").

172. *See* THE DECLARATION OF INDEPENDENCE, ¶ 2 (U.S. 1776) ("Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.").

The Framers recognized the central role stare decisis plays in protecting Rule of Law values, which in turn permit the effective pursuit of the common good.[173] Madison, for example, argued that judges must follow constitutional precedents:

> Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decision of his predecessors, should vary the rule of law according to his individual interpretation of it.[174]

These theoretical arguments that stare decisis advances the Rule of Law are bolstered by empirical research. For example, in a comparative study of the U.S. and Swiss Supreme Courts, Swiss scholar Thomas Probst[175] found that "an inadequately developed theory and practice of precedent [by the Swiss Supreme Court] had led to a loss of predictability and an unacceptably high frequency of violations of the principle that like cases ought to be treated alike."[176] The real world effect of the U.S. Supreme Court's adherence to a doctrine of precedent has been improved adherence to Rule of Law values compared to other court systems without as developed a concept of precedent.

In the United States, the harmful impact of the Court's failure to adhere to constitutional precedent can be seen by looking at its death penalty jurisprudence. The Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishments."[177] When the Eighth Amendment was ratified in 1791, the death penalty was regularly used. Further, the text of the Constitution appears to recognize the constitutionality of the death penalty in the Fifth Amendment by permitting the deprivation of "life" with due process of law.[178] Therefore, it came as no surprise when, in the 1971 case of *McGautha v. California*, the Supreme Court upheld the constitutionality of the challenged death penalty regimes.[179]

However, the very next year, in *Furman v. Georgia*, the Court ruled that the death penalty as practiced in most states was unconstitutional.[180] Even Justice Blackmun, who explicitly acknowledged his strong moral opposition to the death penalty, found that in the Court's sudden change of heart it "overstepped" its role.[181] *Furman* caused enormous disruption in the nation both culturally and legally. The

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173. I will discuss the views of those contemporaneous to the Ratification in the next section.

174. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 391 (Marvin Meyers ed., rev. ed. 1981).

175. THOMAS PROBST, DIE ANDERUNG DER RECHTSPRECHUNG: EINE RECHTSVERGLEICHENDE, METHODOLOGISCHE UNTERSUCHUNG ZUM PHANOMEN DER HOCHSRICHTERLICHEN RECHTSPRECHUNGSANDERUNG IN DER SCHWEIZ (CIVIL LAW) UND DEN VEREINIGHTEN STAATEN (COMMON LAW) (1993); *see also* Thomas Probst, *Sources of Law, Legal Reasoning and Stare Decisis: Comparative Methodological Reflections on the Law in the United States and Switzerland* (on file with author) (extensively comparing the role of stare decisis in the United States and Switzerland).

176. Mary Ann Glendon, *Comment*, *in* SCALIA, *supra* note 15, at 95, 102.

177. U.S. CONST. amend. VIII.

178. *Id.* amend. V.

179. 402 U.S. 183, 196 (1971).

180. 408 U.S. 238, 239–40 (1972).

181. *Id.* at 414 (Blackmun, J., dissenting).

immediate legislative result was that at least thirty-five states reenacted death penalty statutes trying to conform to *Furman*'s mandates.[182]

A mere four years after *Furman*, in *Gregg v. Georgia*, the Supreme Court reversed course again, this time concluding that the death penalty was not unconstitutional in all applications, and upholding Georgia's revised capital punishment statute.[183] Since *Gregg*, the Supreme Court has erratically restricted the death penalty by both imposing further strictures on use of the death penalty,[184] and in other cases by issuing conflicting rules.[185] The result of the Supreme Court's death penalty jurisprudence has been, as Justice Scalia wrote recently in dissent, to "destroy[] stability and make[] our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials."[186]

iii. Nonoriginalist Precedent and Stare Decisis: Originalism Must Accommodate Stare Decisis for Sake of the Common Good

These examples show that stare decisis advances Rule of Law values and that a lack of respect for precedent undermines these values. Because Rule of Law values are inherently and instrumentally worthwhile, stare decisis is essential to effective pursuit of the common good.

The overruling of all of the accumulated nonoriginalist constitutional precedent would greatly harm Rule of Law values. For example, Justice Thomas, a strong advocate of originalism, has urged the Court to repudiate the "substantial effects test" from its Commerce Clause jurisprudence.[187] However, much of the modern regulatory state, nearly all anti-discrimination laws, and countless other federal laws and regulations are based on the expansive reading of Congress's Commerce Clause power made possible by the substantial effects test.

Take just one aspect, anti-discrimination laws, and consider the disruption caused by an originalist repudiation of the substantial effects test. People, especially those who might be subject to invidious discrimination, have ordered their lives in part on the assumption that they have legal recourse if they are subject to discrimination. Anti-discrimination laws have substantially aided the upward mobility of those subject to discrimination.[188] Governmental and other institutions have ordered

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182. Gregg v. Georgia, 428 U.S. 153, 179–80 (1976).

183. *Id.* at 187, 206–07.

184. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (ruling that the execution of the mentally retarded is unconstitutional); *see also* Stanford v. Kentucky, 492 U.S. 361 (1989) (ruling that execution of a criminal who committed murder at age seventeen did not violate the Eighth Amendment), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005).

185. *Compare Furman*, 408 U.S. at 239–40 (requiring that the sentencer not have unlimited discretion), *with* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (requiring that the sentencer be allowed to take all mitigating circumstances into account).

186. *Roper*, 543 U.S. at 630 (Scalia, J., dissenting).

187. The most extreme example of the Court's "substantial effects test" is found in *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress's Commerce Clause authority extended to wheat grown and consumed on a farm).

188. *See, e.g.*, THE NATIONAL ACADEMY OF SCIENCES, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 297 (1990) ("[T]he decade of the 1960s was a period of great economic advancement for blacks. These gains were largely due to overall employment growth, increases in blacks' relative education, and reduction in racial discrimination."); BENJAMIN I. PAGE & JAMES R. SIMMONS, WHAT GOVERNMENT CAN DO: DEALING WITH POVERTY AND INEQUALITY 233 (2000) (noting that many factors, including antidiscrimination laws, led to "considerably less overt discrimination").

themselves to comply with and further the federal anti-discrimination mandates. As a result, the substantial effects test is deeply entrenched in the law. This is not to say that such an overruling is not required, only that there are costs that must be acknowledged.

As discussed above, the theory and practice of adhering to precedent supports Rule of Law values, which are vitally important to societal pursuit of the common good because the Rule of Law is both intrinsically and instrumentally valuable.[189] The purpose of the U.S. Constitution is to enable society to effectively pursue the common good, and the duty of the judge in constitutional adjudication is to enforce the prudential social ordering embodied in the Constitution through enforcement of the original meaning of the text of the Constitution. This ensures effective pursuit of the common good.

However, there are situations where a judge enforcing the original meaning could cause grave harm to the common good. Such harm could occur in overruling nonoriginalist cases and doctrines that do not greatly deviate from the original meaning, are deeply embedded in the law; are heavily relied upon by society, institutions, and individuals, and which possess the characteristic of non-legal justness.[190] Consequently, there is a strong, legitimate need for constitutional interpretative methodologies—and especially originalism—to preserve a means for judges to decline to overrule mistaken precedent when doing so would gravely harm society's pursuit of the common good. Given, as I have argued, originalism's grounding in the common good, originalism premised on the Aristotelian tradition can readily accommodate stare decisis. Indeed, the central role of the common good in originalism makes accommodation of constitutional stare decisis normatively attractive. Hence, originalism not only can accommodate stare decisis, it should accommodate precedent when overruling the precedent would gravely harm the common good.

This grounding of originalism in the Aristotelian tradition's concept of the common good distinguishes it from other justifications for originalism, which, as noted earlier,[191] have difficulty accommodating constitutional stare decisis. Other originalists whose originalism is not grounded in the common good either, consistent with their premises, reject all nonoriginalist precedent,[192] or inexplicably accommodate some but not all nonoriginalist precedent.[193] Either avenue opens originalism to the criticisms commonly lodged against it: that originalism is either too disruptive, or incoherent and unprincipled. Below, I tie the argument of this subsection, that originalism rooted in the common good can and should accommodate nonoriginalist precedent the overruling of which would gravely harm the common good, to the original meaning of the Constitution by showing that

189. *See supra* notes 162–172 and accompanying text.

190. I discuss this characteristic later in this Article. *See infra* Part III.B.2.c. In short, non-legal justness is the term I use to describe the effect of a precedent that was illegal when issued but that still created what would have been rightly ordered relationships absent the legal norm.

191. *See supra* notes 151–155 and accompanying text.

192. *See Barnett*, *supra* note 92 (manuscript at 1, on file with author); Lawson, *supra* note 2, at 27–28.

193. *See* SCALIA, *supra* note 15, at 138–40.

originalism does, in fact, require federal judges to give significant respect to precedent.

b. The Original Meaning of "judicial Power" in Article III Requires Federal Judges to Give Significant Respect to Constitutional Precedent

In this subsection I will provide a necessarily brief review of the original understanding of "judicial Power" found in Article III. I will begin by reviewing the English understanding of precedent up to the ratification of the Constitution. Then I will turn to the colonial, early American, and post-Ratification understanding(s) of precedent, and show how Article III incorporated the contemporary practice and understanding of precedent into judicial power.

Although there is disagreement among scholars regarding whether and in what fashion precedent was incorporated into the judicial power, I believe the evidence shows that the understanding of precedent evolved over time and that by 1787–1789, the concept of judicial power included significant respect for precedent. The core determinate understanding was that judicial power included significant respect for precedent and that judges would be bound by precedent such that they would have to follow analogous precedent or give significant reasons for not doing so.[194]

i. The Practice and Understanding of Precedent in Great Britain

The American understanding of judicial power has its roots in the English common law. Both the American and English doctrines have changed over time.[195] "It is widely recognized that the English doctrine of precedent hardened during the nineteenth century."[196] Some authors have interpreted the "hardening" of the doctrine of precedent during the nineteenth century to mean either that there was no practice of precedent prior to the nineteenth century,[197] or that if such a practice did exist it was nevertheless a toothless and impotent one[198] (which would have the same practical effect as no theory at all).

Although the historical evidence does support the notion that the doctrine of precedent did not "harden" until the nineteenth century, by 1787 the British understanding and practice of precedent required significant respect for prior analogous cases. In fact, as two British legal scholars have noted, "The importance of case-law has been emphasized since the days of the year books, and there are

194. *See* Price, *supra* note 2, at 92–93 ("It is reasonable to conclude that informed thinkers in the Founding period expected a doctrine of precedent to work at least some minimal degree of constraint on the methods all courts would use to decide controversies.").

195. *Cf.* SIR CARLETON KEMP ALLEN, LAW IN THE MAKING 187 (7th ed. 1964) ("Though it is difficult to determine the precise stages of evolution, a gradual building up of tradition is discernible.").

196. Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, *in* PRECEDENT IN LAW 35, 35 (Laurence Goldstein ed., 1987); *see also* E.M. Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043, 1045–46 (1975) (discussing the strict version of stare decisis that developed in nineteenth century England).

197. *See, e.g.*, Healy, *supra* note 38, at 55–56 ("[F]or most of its life the common law operated without a doctrine of stare decisis.").

198. *See* J.W. TUBBS, THE COMMON LAW MIND 18 (2000).

signs that the [English doctrine of precedent] was becoming rigid in the *eighteenth* century."[199]

I will discuss some of the features of the English common law system out of which developed the English doctrine of stare decisis. First was "the judges' practice of reasoning by analogy."[200] As long ago as the thirteenth century, Lord Bracton articulated the rule that courts should rely on analogy in making their decisions when confronted with new issues: "If, however, any new and unaccustomed cases shall emerge, and such as have not been usual in the realm, if, indeed any like cases should have occurred, let them be judged after a similar case, for it is a good occasion to proceed from like to like."[201]

Bracton himself exemplified this principle: his treatise referred to some five hundred decided cases.[202] Bracton did not invent the practice of reasoning by analogy, however, because it is evident from many of the cases that he cited in his treatise that "judges were seeking the guidance of precedent as early as the thirteenth century."[203] The Year Books, which began during the reign of Edward I and ended during the reign of Henry VIII, contain many examples of arguments and decisions guided by precedents.[204]

In the mid-sixteenth century, the practice of according binding status to precedent began to solidify.[205] Sir Edward Coke was central to this change.[206] Coke produced the most complete set of law reports to date, and he extensively used precedent in his conflicts with the Stuarts and to limit the authority of the King and other courts.[207]

Another feature of the English legal system that contributed to the rise of the doctrine of stare decisis was the increasing availability of reliable law reports.[208] Before such reports were available, attorneys and judges were reluctant to rely on precedent for fear of inaccuracy[209] and because of the simple fact that many past

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199. RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 24 (4th ed. 1991) (emphasis added).

200. *Id.* at 25. As Cross and Harris explained, "[t]he rule of *stare decisis* causes the judges to reason by analogy because the principle that like cases must be decided alike involves the analogical extension of the decision in an earlier case." *Id.* at 26.

201. 1 HENRICI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 9 (Sir Travers Twiss ed., William S. Hein & Co. 1990) (1878).

202. ALLEN, *supra* note 195, at 188. This should not be taken to mean that *every* judge of the thirteenth century followed the same practice, however. As Allen pointed out, "Bracton went far beyond his contemporaries in this respect, and cannot be regarded as representative of the judicial method of his day." *Id.* This point should not be stretched too far, however, as there is some evidence that Bracton's contemporaries and successors did compile casebooks, even if they never published them. *See id.* at 195 (supposing that Bracton's contemporaries compiled case-books because "some of the judicial dicta have an air of being based on some kind of private jottings").

203. *Id.* at 189.

204. *See id.* at 190–203.

205. Healy, *supra* note 38, at 60–62. For a discussion of the transformation of English use of precedent, see Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 444–51 (1996).

206. For a review of the impact of Coke and his followers, see generally Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994).

207. Healy, *supra* note 38, at 62–66.

208. *See id.* at 72–73.

209. *See id.* at 63 (noting that one of Sir Edward Coke's contributions to the development of a doctrine of precedent was the introduction of reasonably accurate case reports).

cases became lost to history. By the mid-eighteenth century, relatively reliable reports first became available.[210]

An important characteristic of the English common law that affected the development of the doctrine of precedent was the "declaratory theory" of precedent: courts do not make the law, but merely declare and apply the principles of the common law in concrete cases—thus, the decisions of courts did not say what the law was, but rather provided "evidence of the law."[211] The declaratory theory was used by contemporaries to explain the pervasive practice of precedent.[212] This was the tradition articulated by Coke, Hale, and Blackstone.

Lord Coke stated that "the function of a judge" was not to make law, "but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."[213] As Chief Justice from 1613 to 1617, Lord Coke exemplified the philosophy he espoused; he frequently relied on precedent to guide his decisions.[214] Lord Coke's writings had an enormous influence on several generations of jurists and likely inspired John Vaughan, the Chief Justice of the Court of Common Pleas from 1668 to 1674, to attempt "to develop a systematic theory of the authority of precedents."[215]

Sir Matthew Hale, another influential legal scholar of the seventeenth century, also drew on the declaratory theory in *The History and Analysis of the Common Law of England*:

> [T]he Decisions of Courts of Justice, tho' by Vertue of the Law...do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof, than the Opinion of any private Persons, as such, whatsoever.[216]

In Hale's view, individual judges were constrained by prior decisions: they were not empowered to ignore decisions they found disagreeable.

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210. *Id.* at 69.

211. *See* CROSS & HARRIS, *supra* note 199, at 25 ("According to this theory, the decisions of the judges never make law, they merely constitute evidence of what the law is."); *see also id.* at 27–34 (providing an overview of the declaratory theory).

212. *See* Healy, *supra* note 38, at 68 ("The declaratory theory was a tidy compromise between the dictates of natural law and the growing pressure to follow precedent.").

213. 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 51 (London, E&R Brooke 1797) (1642).

214. Healy, *supra* note 38, at 63.

> But, while [Lord Coke] had great faith in precedent, he believed in it only if it was used intelligently. He was profoundly dissatisfied with the indiscriminate and pretentious citation, which seems to have come into vogue in his day, which has not ceased since his death, and of which, it must be confessed, he was himself not always innocent.

ALLEN, *supra* note 195, at 207.

215. ALLEN, *supra* note 195, at 209.

216. SIR MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 68 (Legal Classics Library 1987) (1713).

And, of course, no discussion of the declaratory theory of precedent would be complete without reference to Sir William Blackstone's seminal *Commentaries*, published in four volumes between 1765 and 1769 and likely the most influential legal authority in eighteenth century America.[217] Blackstone wrote that recorded "judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."[218] Blackstone went on to state:

> [I]t is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm as has been erroneously determined....[W]hat is not reason is not law....The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration....[219]

Blackstone's noted exception to the "established" rule of following prior analogous decisions ("where the former determination [was] *most evidently* contrary to reason")[220] helps clarify that stare decisis in 1760's England was not an iron-clad rule, but one that was more flexible.[221] In the words of Professor Lee, "Blackstone's venerable statements on the law of precedent...seem to chart a compromise course

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217. Two editions of the four-volume *Commentaries* were initially prepared—an English version first published in 1764 and an American edition, which appeared in 1772. One thousand copies of the English version were sold in the American colonies before the publication of the American edition, of which an additional 1,400 sets were sold. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996). Blackstone's *Commentaries* proved so popular in the colonies that Edmund Burke remarked in Parliament that "they have sold nearly as many of Blackstone's Commentaries in America as in England." Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), *in* PRE-REVOLUTIONARY WRITINGS 206, 225 (Ian Harris ed., 1993).

218. WILLIAM BLACKSTONE, 1 COMMENTARIES *69.

219. *Id.* at *69–70.

220. *Id.* at *69 (emphasis added).

221. Some have argued that Blackstone was not advocating a rule of precedent at all because the exception to the rule swallowed the rule itself. *See, e.g.*, Alschuler, *supra* note 217, at 37 ("[Blackstone] presented the 'declaratory theory' with a wink and a nod. Blackstone's language appeared to treat the 'declaratory theory' as a fiction designed to indicate continuity with the past even when innovation had plainly occurred.").

between the classic adoption of the declaratory theory and a strict notion of stare decisis."[222]

Some commentators have interpreted the predominance of the declaratory theory to mean that judges were not bound by prior decisions.[223] However, from the evidence discussed above, it is clear that the common law understanding was that precedent was binding, and that "common law judges were perceived to have a duty to articulate some justification for setting aside the evidence of the law found in prior decisions."[224] As Lord Coke stated, "[O]ur booke cases are the best proofes what the law is."[225]

The strong bindingness of precedent—including for advocates of the declaratory theory—was prominently displayed in *Perrin v. Blake*, where Blackstone reversed Chief Judge Mansfield's refusal to follow the Rule in *Shelley's Case* established by Coke.[226] In his opinion for the Exchequer Chamber, Blackstone wrote:

> There is hardly an ancient rule of real property but what has in it more or less of a feudal tincture....[B]ut whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy, that no court of justice in this kingdom has either the *power* or (I trust) the *inclination* to disturb them....[227]

Stare decisis was applied more vigorously in cases involving property or contract. The predominant view was that for property and contractual reliance issues, it was better that the law "be settled than that it be settled right."[228]

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222. Lee, *supra* note 2, at 662.

223. In particular, Professor Lee argues:

> This declaratory notion of common law decisions presupposes a relatively weak (if not non-existent) doctrine of stare decisis. Far from demanding adherence to case law, the classic declaratory theory left ample room for departing from precedent under the fiction that prior decisions were not law in and of themselves but were merely evidence of it.

Id. at 660; *see also* Paulsen, *supra* note 2, at 1577 ("The picture that emerges is one in which precedent is treated as evidence of the content of the law, but not as law itself.").

224. Lee, *supra* note 2, at 661.

225. 2 SIR EDWARD COKE, COKE UPON LITTLETON bk. 3, ch. 7, § 420 (Philadelphia, Robert H. Small 1853).

226. *See* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 135–42 (1989). The Rule in *Shelly's Case* requires that when a life estate is given to a person and the remainder is given to the same person's heirs, then the holder of the life estate takes the remainder as well. *See* HERBERT HOVENKAMP & SHELDON KURTZ, PRINCIPLES OF PROPERTY LAW 219 (6th ed. 2005).

227. LIEBERMAN, *supra* note 226, at 139–40.

228. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); *see, e.g.*, Healy, *supra* note 38, at 69 ("Though a judge could still declare in 1760 that 'erroneous points of practice...may be altered at pleasure when found to be absurd or inconvenient,' most judges agreed that precedent should be followed in cases involving property or contracts, where certainty was essential.") (footnote omitted); *see also, e.g.*, Lee, *supra* note 2, at 688 ("Blackstone's explication of error correction drew no express distinction between commercial cases and other decisions, but the distinction had already taken hold in the English courts.").

Another important limitation on judges' ability to circumvent precedent that is rarely considered by contemporary commentators is the fact that the English courts of equity never relied on the declaratory theory. The reason was because, as stated above, the declaratory theory was part of the common law, which was thought of as a holistic body of law completely separate from the courts of equity. The courts of equity, on the other hand, developed out of the chancery system. Lawrence Friedman describes the courts of equity as "the most astounding" of "the formal rivals of the common law." FRIEDMAN, *supra* note 72, at xvii. Friedman describes the development of the courts of equity as almost a system of "antilaw"; courts of equity were not bound by strict common-law rules: "Looser principles governed, principles in accord with prevailing ideas of 'equity.'" *Id.* at xviii. Because the courts of equity were not bound by the principles of the common law, the doctrine of precedent became more important for courts of equity than courts of law. Without a solid system of precedent, nothing would prevent a court of equity

One frequently cited case that illustrates this principle is *Morecock v. Dickins*, argued before the High Court of Chancery in 1768.[229] In issuing his opinion, Lord Camden stated that although he was inclined to agree with the logic of the plaintiff's claim, he was bound by precedent to rule against him:

> If this was a new point, it might admit of difficulty; but the determination in *Bedford* v. *Bacchus* seems to have settled it, and it would be mischievous to disturb it....It is a point in which a great deal of property is concerned, and is a matter of consequence. Much property has been settled, and conveyances have proceeded upon the ground of that determination....A thousand neglects to search [i.e., to search the registries] have been occasioned by that determination, and therefore I cannot take upon me to alter it. If it was a new case, I should have my doubts; but the point is closed by that determination, which has been acquiesced in ever since.[230]

In sum, as the foregoing analysis demonstrates, there was in England by 1787 a coherent theory and practice of precedent. The eighteenth-century system of precedent practiced by British courts was largely based on the declaratory theory. Although the British practice and understanding of precedent may have been more flexible than the hardened nineteenth-century view of precedent that would later emerge, judges were bound in real and meaningful ways—they were not free to simply ignore prior decisions.

ii. The Practice and Understanding of Precedent in the United States

Americans had an understanding and practice of precedent, which developed over time from the colonial era to the Ratification of the Constitution. By the time of the Ratification, the Framers and Ratifiers understood judicial power to include stare decisis: judges must give significant respect to prior analogous cases and must give significant reasons for overruling precedents.

(a) Precedent in Colonial America

In order to understand how the doctrine of precedent developed in the United States, it is necessary first to explore some of the factors that influenced the American legal system in its formation. When the colonists came to the New World, they brought with them and created legal norms rooted in the British common

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from deciding a case one way and then ruling in a completely opposite manner the next time it was confronted with that same issue.

It should come as no surprise, then, that the courts of equity did, in fact, place a strong emphasis on precedent. As one historian noted, "it may be said of the modern practice of Equity that it has depended even more than the Common Law on uniformity of decision." ALLEN, *supra* note 195, at 382. "[T]here [was] an uninterrupted chain in the influence of precedent, from the earliest times" in the courts of equity, because its principles were "entirely constructed upon precedent." *Id.* at 380 (internal quotation marks omitted). As early as 1670, the courts of equity recognized that they had a firmly entrenched system of precedent. *See* Fry v. Porter, 1 Mod. 300 (1670). Finally, despite the view some modern legal scholars have taken that the systems of equity and the common law were wholly independent, *see, e.g.*, FRIEDMAN, *supra* note 72, at xviii–xix, it is worth pointing out that courts of equity frequently called upon common law judges to assist in deciding cases. ALLEN, *supra* note 195, at 381.

229. 27 Eng. Rep. 440 (Ch.) (1768).

230. *Id.* at 441 (citation omitted).

law.[231] Of course, as some scholars have pointed out, labeling the colonial laws a legal "system" or "systems" is something of a misnomer.[232] As one historian has written:

> At least a century separates the beginnings of Massachusetts from the beginnings of Georgia. During this time, English law did not stand still. The colonies began their careers at different points in the process of legal development. During all this time...[t]he colonies borrowed as much English law as they wanted to take or were forced to take. Their appetite was determined by requirements of the moment, by ignorance or knowledge of what was happening abroad, and by general obstinacy.[233]

In the seventeenth century, the colonists had only just begun the process of taming the New World, and so it is not surprising that their legal system was exceedingly simple. Aside from the normal difficulties associated with constructing a new society, there were several obstacles that the colonists had to overcome to establish a practice of precedent. I will briefly address three of these obstacles: (1) the animosity that many colonists felt for lawyers, (2) the lack of adequate legal training in the early colonies, and (3) the scarcity and poor quality of early court reports.

The first obstacle, the ill will directed at lawyers by the colonists, was fairly widespread.[234] In many locations lawyers were forbidden to practice their craft, and there was often a great deal of ill-will directed at anyone who professed training in or knowledge of the law.[235] For example, in 1669 the drafters of the Fundamental Constitutions of the Carolinas stated that "it was considered 'a base and vile thing to plead for money or reward.'"[236] Lawyers were similarly disliked in Virginia where they were excluded from the courts beginning in 1645, and Connecticut, where they were prohibited from practicing.[237]

The colonists' enmity lacked longevity, however, and there was a dramatic reversal of public opinion in the late seventeenth and early eighteenth centuries. The colonists began to accept lawyers as a "necessary evil," and "as soon as a settled society posed problems for which lawyers had an answer or at least a skill, the lawyers appeared in force, and flourished despite animosity."[238] By the mid-

231. FRIEDMAN, *supra* note 72, at 4–5, 15. After the Revolutionary War, many colonies officially adopted the common law by statute. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860, at 4 (1977) ("Between 1776 and 1784, eleven of the thirteen original states adopted, directly or indirectly, some provisions for the reception of the common law as well as of limited classes of British statutes.").

232. *See, e.g.*, Stanley N. Katz, *Explaining the Law in Early American History*, 50 WM. & MARY Q. 3, 6 (1993); *see also* FRIEDMAN, *supra* note 72, at xiii ("[T]here was no 'colonial law' any more than there is an 'American law,' common to all fifty states. There were as many colonial systems as there were colonies.").

233. FRIEDMAN, *supra* note 72, at xiii.

234. *See* DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 197 (1958) ("[T]here was no developed legal profession in any of the colonies before the mid-eighteenth century. The ancient English prejudice against lawyers secured new strength in America.").

235. FRIEDMAN, *supra* note 72, at 53–59.

236. *Id.* at 53.

237. *Id.*

238. *Id.* at 83–84.

eighteenth century lawyers had gained respect and prestige, and many held public office.[239]

The second obstacle that the colonists had to overcome was the lack of good-quality, consistent legal training in the country. There were no American law schools in the seventeenth century; the first formal law school in America was not established until nearly the end of the eighteenth century, when the Litchfield Law School was founded in Connecticut in 1782.[240] To fill the vacuum, some lawyers came over from England to practice in the colonies.[241]

Many colonists also began to take up the practice of law through self-instruction or apprenticeship.[242] With a few notable exceptions, the quality of self-education was poor, due in large part to the dearth of law books and because standards for admission to the bar were minimal.[243]

In the eighteenth century, an increasing number of would-be lawyers were able to secure apprenticeships, where, in theory at least, they would learn the law from an established practitioner. Usually the aspiring lawyer paid a fee of one hundred to two hundred pounds, a substantial sum for that era, and then spent several years serving as an assistant to the veteran lawyer.[244] The clerkship system, however, was "plagued with numerous problems."[245] Such prominent lawyers as Thomas Jefferson and William Livingston complained about clerkships because the clerk received very little real legal training of worth and spent most of his time merely copying forms.[246]

One other option that was available to a few fortunate men was to study at the prestigious Inns of Court in England. The cost of attending the Inns was considerable, however, so only the wealthiest colonists could afford to do so.[247]

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239. *Id.* at 84–85.

240. CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 133 (1993).

241. *See* FRIEDMAN, *supra* note 72, at 55 (noting that "[m]en trained in law in England, who came over, found their services in demand").

242. *See*, Richard J. Ross, *The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History*, 50 WM. & MARY Q. 28, 40 (1993) ("Most early American lawyers and judges had little or no professional training; some labored at more than one calling, combining law with medicine, trade, ministry, or government."). The tradition of self-education proved an enduring one. As late as 1855, Abraham Lincoln advised an aspiring lawyer who wished to study with him that it was unnecessary:

> If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already. It is but a small matter whether you read *with* any body or not. I did not read with any one. Get the books, and read and study them till, you understand them in their principal features; and that is the main thing.

Letter from Abraham Lincoln to Isham Reavis (Nov. 5, 1855), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 337, 337 (Roy P. Basler ed., 1946).

243. KLAFTER, *supra* note 240, at 8. Patrick Henry, for example, studied Coke and the Virginia Statutes for about six weeks before seeking permission to practice law. "The majority of his examiners concluded that he knew little of the law, but they nevertheless approved him because they thought he would learn quickly." *Id.* Henry's experience was typical of new lawyers during the colonial era. "The obvious problems with this method of education led to a period after the Revolution when all of the states except Virginia passed laws requiring at least some specified period of clerkship before admittance to practice, thus precluding self-education as a sole means of legal training." *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. The high costs of attending one of the Inns of Court undoubtedly deterred Americans who, since they hailed from one of the colonies, definitely were under a social handicap and, hence,

"Perhaps as many as sixty American-born lawyers were educated at the Inns of Court prior to the year 1760, and more than 115 between 1760 and the American Revolution. Of the 236 or so American-born members of the Inns of Court before 1815, nearly half were admitted between 1750 and 1775."[248] Lawyers trained at the Inns often became mentors to the next generation of lawyers and had a significant impact on the quality and standards of the colonial legal profession.[249]

Similar to England, the third obstacle the colonists faced in establishing their legal system was the lack of case reports. As one historian bluntly stated, "There were no American reports to speak of in the colonial period."[250] Colonial lawyers had to rely chiefly on English casebooks or on what they could decipher about the cases included in English legal treatises.[251] A few lawyers made their own reports. Some used only cases to which they were a party; some collected cases tried by the local courts, on their own or with the assistance of sitting judges; most had to rely on their memory, but a few had access to notes written by the lawyers or judges involved in the case. For the most part these lawyers did not publish the reports they made; they seem to have made them simply for their own use.[252]

Some were published, however, such as Ephraim Kirby's *Connecticut Reports*, which began in 1789, and Alexander Dallas's *Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania, Before and Since the Revolution*, which was published in 1790 and contained cases going back as far as 1754.[253] These reports proved to be quite popular: "lawyers were eager for a supply of reported cases; and were willing to pay for such reports."[254] Notwithstanding the efforts of these enterprising lawyers, the few private reports that were available were inadequate for the needs of the burgeoning colonial legal system.

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had to maintain appearances at great expense to themselves. Philip Livingston, for instance, found it impossible to live in London on less than £450 per year.

1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE COLONIAL EXPERIENCE 33 n.88 (1965).

248. *Id.* at 33.

249. *Id.* at 36 & n.98. The quality of education available at the Inns of Court steadily declined, however, and by the mid-eighteenth century "the Inns had deteriorated into clubhouses for the profession, which no longer offered formalized legal education." KLAFTER, *supra* note 240, at 8 (citation omitted). The Inns were in such a sad state that Blackstone lamented in his *Commentaries* that there was probably nothing that was "more hazardous or discouraging" for a would-be lawyer than attending them. BLACKSTONE, *supra* note 218, at *31. Blackstone felt that the Inns "entirely neglected" any form of academic oversight "either with regard to morals or studies," *id.* at *25, and offered instead only "allurements to pleasure" and addictive "amusements [and] other less innocent pursuits." *Id.* at *31. Regarding the Inns, William S. Holdsworth commented that "[f]rom the latter half of the seventeenth century to the middle of the nineteenth century the student was left to his own resources." W.S. Holdsworth, *The Disappearance of the Educational System of the Inns of Court*, 69 U. PA. L. REV. 201, 216 (1921).

250. FRIEDMAN, *supra* note 72, at 241. Frederick Kempin put it this way:

> The position of the reports in the American colonies was the same as, or worse than, the position of the English reports. While England had some reliable, although unofficial, reports during the 17th and 18th centuries, it is safe to say that the colonists had none until the nineteenth century.

Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, *in* 3 AM. J. LEGAL HIST. 28, 34 (1959) (footnote omitted).

251. FRIEDMAN, *supra* note 72, at 241–42.

252. Kempin, *supra* note 250, at 34–35; *see also*, FRIEDMAN, *supra* note 72, at 241–45.

253. FRIEDMAN, *supra* note 72, at 242.

254. *Id.*

Given these conditions, it is not surprising that the doctrine of precedent was slow to develop in the colonial legal system. Nevertheless, such a system did develop. The doctrine of stare decisis was at its weakest in the seventeenth century when the colonists were still focused on eking out an existence in their new land and did not have the time or resources necessary for a system of precedent to function. During the seventeenth century colonial law seemed to favor flexibility and innovation over certainty.[255] As colonial society grew more populous and more sophisticated, the services of skilled lawyers became more in demand. Lawyers came in ever greater numbers from England and brought a strong respect for precedent with them, which was inculcated in subsequent generations of lawyers. In the early to mid-eighteenth century, lawyers and judges began to develop and apply a system of precedent.[256]

The declaratory theory became even more popular after the publication of Blackstone's *Commentaries*. It is difficult to overstate the importance of Blackstone's writings on the developing colonial legal system.[257] As one scholar has observed, "In Blackstone, early American lawyers encountered a legal authority who regarded precedent as the cornerstone of the common law, the principal bulwark against the usurpation of the rule of law by judicial tyranny."[258]

While during the seventeenth century colonial courts seemed to favor flexibility and innovation over certainty, in the eighteenth century these values were reversed. "Americans of the prerevolutionary period expected their judges to be automatons who mechanically applied immutable rules of law to the facts of each case."[259] Indeed, "lawyers had for a half century watched inactive legislatures and judges who adhered to precedent with a simple-minded rigor and consistency. The mere citation of precedent, in short, seemed to solve virtually every legal problem."[260]

John Adams exemplified the growing respect for precedent. He regarded precedent as an absolute necessity to prevent the courts from encroaching upon the rights of the citizens.[261] Adams wrote that "the Laws of every State ought always to be fixed, [and] certain,"[262] and that "every possible Case [should be] settled in a

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255. *Id.* at 22 ("[The] long-run trend was the same [throughout the colonies]: from simplicity and innovation to more complexity, and ever greater doses of English formality, somewhat second-hand.").

256. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 50 (1st ed. 1973) ("The doctrine of precedent was in high fashion among lawyers and judges. English law was held up as a model.").

257. *See* William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5 (1994). As Bader observed, historians such as Daniel Boorstin, James McLellan, Bernard Bailyn, and R. Kent Newmyer have "all specifically noted that Sir William Blackstone was the common law scholar with the most profound influence on shaping the legal thought of the Revolutionary and Founding generations." *Id.* at 6 (footnote omitted).

258. *Id.* at 8. The declaratory theory was less favored in those colonies that had rejected the common law or extensively modified it. In Massachusetts, for example, the doctrine of precedent was much more binding. One historian has noted that the colonists of Massachusetts embraced the doctrine of precedent as a method "[t]o bind judges to the rule of law and thereby render the lives, liberties, and properties of individuals secure." WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 18 (1975).

259. NELSON, *supra* note 258, at 19.

260. *Id.*

261. Adams' views were no doubt influenced by the years he spent practicing law in Massachusetts which from an early time had a system of precedent that was much stricter than the other colonies. *See supra* note 258.

262. NELSON, *supra* note 258, at 19.

Precedent, leav[ing] nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge."[263]

As in England, stare decisis was especially strong in cases involving property or commercial reliance interests. In *Somerville v. Johnson*,[264] for example, a Maryland judge wrote an opinion reminiscent of the language found in the early English case of *Morecock v. Dickins*.[265] The court in *Somerville* was confronted with a question involving the interpretation of a will in which William Deacon granted a life estate in land and four slaves to Mary Johnson. The main issue was whether children born to one of the slaves after Deacon's death were also part of the life estate.[266] The judge believed that the better argument was that the children should be part of the life estate,[267] but ruled against Johnson because of precedent:

> I apprehend the present rule must be *stare decisis*, a rule founded on great convenience....[As] Lord Talbot observed, that the rules of property being certain and known, it is not of great consequence what they are. The instances in which Judges have been governed by this consideration, are infinite....
>
> [E]ver since the case of *Scott v. Dobson*, the law has been in this point looked upon to be settled. The general opinions of lawyers have been accordingly; purchases have been made, and much property is held under it, and if a solemn decision in the dernier provincial resort should not be conclusive, contentious suits would be infinite.[268]

The language used by the court was very similar to that of the English *Morecock* case: both judges were expressing similar concepts based on a long-standing tradition of increased deference to precedents involving property and commercial reliance issues.[269]

From the foregoing analysis, it is clear that there was a discernible doctrine and practice of precedent in the American colonial legal system. During the seventeenth century such a doctrine was weak, but in the eighteenth century, as the colonial legal system became increasingly complex, the doctrine of precedent came to resemble its English counterpart. Stare decisis was particularly strong in cases involving property or commercial reliance issues.

(b) Precedent in State Courts After the Revolution

Several scholars and commentators have argued that the doctrine of precedent was firmly established in the late eighteenth century. For example, in his opinion in *Anastasoff v. United States*, Judge Arnold wrote:

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263. 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 167 (L.H. Butterfield ed., 1961). It has also been noted that when Adams served as defense counsel for the British soldiers responsible for the Boston Massacre, Adams' defense relied heavily on precedent, and all but one of the cases he relied on were British cases. NELSON, *supra* note 258, at 19–20.

264. 1 H. & McH. 348 (Md. Ch. 1770).

265. 27 Eng. Rep. 440 (1768); *see supra* notes 229–230 and accompanying text.

266. *Somerville*, 1 H. & McH. at 348–49.

267. *See id.* at 353 ("[I]f this was a new case, I should be strongly inclined to advise a different order from that which I think myself bound to....").

268. *Id.* at 353–54.

269. The practice and understanding of precedent continued to afford increased deference to precedent involving property or commercial reliance interests in the nineteenth century. *See* Price, *supra* note 2, at 95–99.

> The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. To the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law.[270]

Judge Arnold determined that "the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty."[271]

By contrast, Thomas Healy has argued that the doctrine of precedent was far from settled in the late eighteenth century. According to Healy,

> in the decades following the war the courts embarked on one of the most creative periods in American judicial history, shaping the law to meet the needs of the new nation and abandoning large numbers of precedents, both English and domestic. Judges during this period adopted an instrumental view of the law.[272]

In a similar vein, Morton Horwitz has written that the colonial legal system in the eighteenth century applied "a strict conception of precedent....[T]he overwhelming fact about American law through most of the eighteenth century is the extent to which lawyers believed that English authority settled virtually all questions for which there was no legislative rule."[273] After the Declaration of Independence, however, "one of the most universal features of postrevolutionary American jurisprudence was an attack on the colonial subservience to precedent."[274]

I believe that this scholarly divergence can be reconciled. While true, the instrumentalists' model as argued by Thomas Healy is incomplete because it oversimplifies the behavior of post-Revolutionary American courts. Although there is evidence indicating that, after the Declaration of Independence, American courts did increasingly reject precedents, they did not do so haphazardly. Rather, American courts developed a set of principles that governed when courts would disregard precedents.

These principles developed out of the growing reluctance of American courts to be bound by *English* precedents. This was, in part, a natural result of the Revolution.[275] Indeed, even Healy—despite his instrumentalist view—recognized that courts "frequently departed from long-standing *English* precedents" and that the "most frequent justification" for overruling precedent "was that common law rules were inapplicable to American circumstances."[276] Moreover, it is telling that

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270. 223 F.3d 898, 900 (8th Cir. 2000) (citations and footnote omitted).

271. *Id.*

272. Healy, *supra* note 38, at 78.

273. HORWITZ, *supra* note 231, at 8.

274. *Id.* at 24. Horwitz argued that the cause of the shift in stare decisis from a strict to a lax conception was the shift in conceptions of the nature of the common law from natural law to positive law. *Id.* at 14–30.

275. *See* KLAFTER, *supra* note 240, at 67 ("[D]uring America's post-Revolutionary and early National periods, a distinctly American legal methodology was employed by American lawyers and judges to question the soundness of English precedents.").

276. Healy, *supra* note 38, at 79–80 (emphasis added) (footnote omitted). Professor Caleb Nelson has argued that the declaratory theory of precedent held by common law lawyers permitted American courts to reject English precedent. NELSON, *supra* note 258, at 28–31. I believe this analysis is correct so far as it goes, but that it fails to

in Healy's long discussion of overruled cases, he listed only two cases that overruled domestic precedents, both of which were post-1800.[277]

Connecticut was possibly the first state to begin to reject English precedents. In 1786, the Superior Court of Connecticut decided *Wilford v. Grant*, where the court was confronted with the problem of whether to grant a new trial for two minors who had been sued for and found guilty of assault and battery along with four other men.[278] The minors had been absent from the trial because, as minors, they were legally incapable of arranging their own defense. The jury found for the plaintiff against all the defendants in the amount of seventy-five pounds. Requesting a new trial, the minor defendants appealed, but common law precedents did not permit a new trial to be granted for some co-defendants and not for others.[279] The court granted the new trial for the minors, and in so doing, articulated a modified version of stare decisis that afforded less weight to English precedent:

> The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn: The rules, however, which have not been made our own by adoption, we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice; which, for the reasons above suggested, we do in this case, and reverse the judgment as to the minors only.[280]

Thus, the court adopted a modified doctrine of stare decisis "by which English precedents which had not yet been adopted by Connecticut courts could be disregarded under certain circumstances on a case-by-case basis."[281] In doing so, the court provided another reason why English precedent should receive less respect: English common law precedent accorded with English custom which, although usually the same as Connecticut's, was not always the same. Hence, when the customs of the two differed, Connecticut was justified in rejecting the English precedent.[282]

The Connecticut Supreme Court of Errors later expanded on this modified doctrine of stare decisis in the case of *Bush v. Bradley*.[283] In *Bush*, Justice Reeve, the founder of the Litchfield Law School,[284] departed from a British precedent because "our system of law respecting real property is, in many instances, very

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account for the disparity between the relatively frequent reversals of English rather than American precedent discussed in his text.

277. Healy, *supra* note 38, at 81–82.

278. 1 Kirby 114 (Conn. 1786).

279. *Id.* at 114–16.

280. *Id.* at 116–17.

281. KLAFTER, *supra* note 240, at 69.

282. As Richard Murphy stated:

> Distinguishing the force of English precedents makes considerable sense if one starts...with the premises that the common law is rooted in custom and practice and that these vary between Connecticut and England; on this view, one would not necessarily expect English courts to give authoritative statements concerning Connecticut custom and law, especially after a revolution.

Murphy, *supra* note 34, at 1092.

283. 4 Day 298 (Conn. 1810).

284. For a discussion of Litchfield, see generally MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL (1986).

different from the *English* system."[285] Justice Reeve thus "redacted into Connecticut legal practice the idea that the modified doctrine of *stare decisis* should be applied to the entire law of real property because a strict adherence to precedents would have prohibited consideration of local customs and laws that were different from those in England."[286]

Not all states were so quick to embrace a modified doctrine of stare decisis. Virginia, for example, demonstrated reluctance in abrogating English precedents.[287] Part of this reluctance probably stemmed from the fact that the Virginians' "preferred method of modifying the common law was to redact it into codes."[288] Even in Virginia, however, some judges felt that English precedents were no longer binding after the Revolution. In the case of *Commonwealth v. Posey*, for example, Judge Tazewell argued that

> [p]recedents, like many other things, may be carried too far; and, although adjudications upon statutes are often to be considered, as valuable expositions of the grounds and extent of the enactments, yet, in a case of life and death, I cannot be bound by the dictum of a British judge, upon a written law; for, although I venerate precedents, I venerate the written law more.[289]

Judge Tazewell was in the minority, however, and the court declined the opportunity to reject the English precedents on point.[290]

Virginia courts were less reticent about rejecting English precedents where those precedents were "deemed to be in conflict."[291] When precedents were in conflict, Virginia courts would often discount them altogether and base their judgments on other considerations. For example, in the case of *Newton v. Wilson*, St. George Tucker issued an opinion for the Virginia Supreme Court of Appeals, stating that "[w]here authorities are uncertain and contradictory, we must have recourse to principle as our guide."[292]

Some states went farther even than Connecticut in modifying the doctrine of stare decisis. New York, for example, demonstrated a particular zeal for casting off English precedents.[293] In 1799, the New York Supreme Court of Judicature ignored an English precedent because "a strict adherence to English common law principles could on occasion be incompatible with New York's notions of justice and rationality."[294] The following year, the New York Supreme Court of Judicature took

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285. *Bush*, 4 Day at 305.

286. KLAFTER, *supra* note 240, at 70.

287. *See, e.g.*, Boswell v. Jones, 1 Va. (1 Wash.) 322 (1794).

288. KLAFTER, *supra* note 240, at 71.

289. 8 Va. (4 Call) 109, 116 (1787).

290. Four judges made statements indicating that they would follow precedent. In particular, Judge Blair said that "if it were a new case," he would have found for the defendant, but because the precedents had "prevailed [sic] so long," they "must be submitted to." *Id.* at 122 (opinion of Blair, J.).

291. KLAFTER, *supra* note 240, at 73.

292. 13 Va. (3 Hen. & M.) 470, 480 (1809).

293. KLAFTER, *supra* note 240, at 74 ("New York, perhaps because it perceived itself to have suffered a rich history of abuses pursuant to English common law authority, adopted and exceeded the same types of modifications incorporated into Connecticut and Virginia law.").

294. *Id.* at 75 (discussing Silva v. Low, 1 Johns. Cas. 184 (N.Y. Sup. Ct. 1799)). In *Silva*, Judge Radcliffe stated: "I entertain a high respect for the decisions of the English courts, but I do not feel myself, in this instance, shackled by their authority." *Silva*, 1 Johns. Cas. at 190.

this even further; in a minority opinion, the Chief Justice declared that he "no longer considered English cases binding authority in New York courts."[295] By 1802, the New York High Court of Errors followed the Chief Justice, declaring that English precedents no longer bound New York courts.[296]

One of the reasons the modified doctrine of stare decisis gained traction in the post-Revolutionary era was because of the support of legal educators. As mentioned above,[297] Justice Reeve established the first law school in America in 1782.[298] Other schools soon followed[299] and by 1810 there were nearly a dozen.[300] Most of these schools included some form of the doctrine of stare decisis in their curriculum.[301]

Many of the prominent legal scholars of the late eighteenth century, including Justice Reeve and St. George Tucker, who held the chair of law at William and Mary College,[302] served both as educators and as distinguished judges. They had a "double-impact" on the shape of the law. As scholars, both Justice Reeve and St. George Tucker wrote treatises arguing that American courts should be able to disregard English precedents in certain circumstances.[303] As judges, both men led the way in putting their own jurisprudential theories into practice, setting the example for other state courts to follow. One legal historian commented:

> Through the efforts of these prominent legal educators in their capacity as judges, the method for reducing issues of legal precedents to questions of legal principles was firmly established into American legal practice. The next step was to gain acceptance for a process whereby these principles could be judged against comparative standards. This was an essential aspect of the modified doctrine of *stare decisis* for it provided the legal system with the predictability necessary to protect a society from governmental harassment. The comparative standards used to judge precedents introduced by America's first generation of legal educators and successfully integrated into American legal practice were: utility, logic, morality and conflicting American law and the policy behind the law.[304]

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295. KLAFTER, *supra* note 240, at 75 (discussing Goix v. Low, 1 Johns. Cas. 341 (N.Y. Sup. Ct. 1800), *rev'd*, 2 Johns. Cas. 480 (N.Y. Sup. Ct. 1802)).

296. HORWITZ, *supra* note 231, at 27. As one legal historian has noted, in the post-Revolutionary period, courts and legal educators began to "integrate" a "systematic and predictable method for judging precedents introduced by America's first generation of legal educators." KLAFTER, *supra* note 240, at 77. The first part of this method involved reducing precedents to their "fundamental principles," by which future cases could be evaluated. *Id.*

297. *See supra* note 286 and accompanying text.

298. FRIEDMAN, *supra* note 72, at 239.

299. *See id.* ("The Litchfield school spawned a number of imitators.").

300. *See* KLAFTER, *supra* note 240, app. 2.

301. *See id.* at 67–93 (showing that "a predominant aim of American legal educators" following the Revolution was to limit the influence of English precedents through their teaching, treatise writing, and actions as prominent judges); *see also* ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES: A REPORT PREPARED FOR THE SURVEY OF THE LEGAL PROFESSION 21–28 (1953) (noting the use of Blackstone's *Commentaries* by legal educators); Andrew M. Siegel, Note, *"To Learn and Make Respectable Hereafter": The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978, 2013–14 (1998) (discussing Reeve's use of principles and precedents).

302. FRIEDMAN, *supra* note 72, at 240.

303. KLAFTER, *supra* note 240, at 69, 74.

304. *Id.* at 78. Klafter discussed the manner in which each of these comparative standards was applied by the various states. *See id.* at 79–93.

Thus, the instrumentalist view expressed by some legal historians does not fully describe the behavior of the state courts in the post-Revolutionary era. It is apparent that, although state courts did grow increasingly willing to depart from *English* precedents, they did so based on a systematic method, which was incorporated into a modified doctrine of stare decisis.

Furthermore, despite the fledgling states' willingness to modify the doctrine of stare decisis, they still took the doctrine very seriously. Although state courts deviated from English precedents, they were far less likely to deviate from their own precedents. As a result, a two-tiered doctrine of stare decisis developed[305] in which English precedents were not accorded as much weight as American precedents. Moreover, in many states, the unmodified doctrine of stare decisis remained the rule.[306] Finally, even in the cases where courts did depart from precedent, they still felt the need to address those precedents, and they offered reasons for abandoning them.

(c) Precedent as Understood by the Framers and Ratifiers of the Constitution

There is not a great deal of direct evidence to draw from in this period. Professor Norman Williams has discussed the difficulty regarding the sparse historical record: "The Framers never engaged in a focused discussion of the role of precedent in federal court adjudication, much less whether...Article III required some respect for precedent and, if so, in what form."[307] I am not aware of any mention of the doctrine of stare decisis in the Constitutional Convention.[308] Likewise, there does not appear to be any mention of the doctrine of stare decisis in the records of the state ratifying conventions.[309] On the other hand, there is some historical evidence, and what there is certainly merits close examination.

Tellingly, *both* opponents and proponents of the new Constitution argued for their respective positions based on the assumption that judicial power included stare decisis.[310] As one scholar has noted, "they all expected the new federal courts to

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305. This could really be considered a three-tiered doctrine: precedents concerning property and reliance issues were accorded the most weight, American precedents were accorded more weight than English precedents, and English precedents (unrelated to property interests) were accorded the least weight. *See* Lee, *supra* note 2, at 651 (arguing that American courts in the late eighteenth century accorded more weight to precedents involving property interests).

306. *See, e.g.*, Oliver v. Newburyport Ins. Co., 3 Mass. (2 Tyng) 37 (Mass. 1807); Fisher v. Morgan, 1 N.J.L. 125 (N.J. 1792); Young v. Erwin, 2 N.C. (1 Hayw.) 323 (N.C. 1796); Hannum v. Askew, 1 Yeates 25 (Pa. 1791).

307. Williams, *supra* note 2, at 766.

308. *See* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James Brown Scott eds., int'l ed. 1999). Most of the references made regarding the judicial branch of the federal government were concerned with whether that branch should be given a power of judicial review of all statutes passed by the legislature, *id.* at 51, 56, 67, 69, 294, 300, 405, how long federal judges should serve, *id.* at 58, 277, 473–74, whether the Supreme Court should be involved in impeachment proceedings, *id.* at 472, 535–36, and what method should be used to appoint the judges. *Id.* at 56–58, 97, 274–77, 300–03.

309. *See generally* 1–5 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (William S. Hein & Co. 1996) (2d ed. 1861).

310. *See* Murphy, *supra* note 34, at 1076 ("Both sides in the ratification debates subscribed to this understanding and shared Madison's expectation that the new federal Constitution would, like lesser law, be subject to such precedential 'fixative' effects."). In light of the direct evidence from the Framers and Ratifiers discussed below, I think Professor Paulsen's argument that "no such claim (or accusation) [that "judicial Power" included

adhere to something like the declaratory theory's doctrine of precedent."[311] One of the earliest references to the doctrine of precedent in the debates leading up to Ratification of the Constitution appears in *The Anti-Federalist Papers*.[312] The Federal Farmer was concerned about the lack of precedents to guide the federal courts, especially with regard to decisions that in England had been left to courts of equity: "[W]e have no precedents in this country, as *yet*, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion."[313] This comment reveals both an understanding that precedent acts as a binding limitation on a federal court's decision-making power, and also a recognition that the judicial power exercised by federal courts would, in time, create binding precedents.

The complaint by the Federal Farmer—"mere discretion"—exemplifies the concern of the Framers and Ratifiers (along with Blackstone and others) about judges exercising arbitrary discretion. The theme of cabining judicial discretion through precedent crossed party lines as is seen below in the discussion of the Federalists, Hamilton and Madison.

Unlike the Federal Farmer who was concerned about the lack of binding precedent, another important Anti-Federalist writer, Brutus, feared the opposite danger, namely, too many precedents. Brutus feared that the courts' precedents would metastasize and eventually swallow the freedom of the citizens of the nation:

> Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the *meaning of the constitution*[314] will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them.[315]

Brutus believed that federal courts would issue binding *constitutional* precedents.[316] And although Brutus did not express a fear of uncabined judicial discretion, as did the Federal Farmer, his premise—precedent binds federal judges—remained.

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a concept of precedent] was ever made" by the Framers or Ratifiers or "any prominent opponent of the Constitution" is too broad. *See* Paulsen, *supra* note 2, at 1571.

311. Murphy, *supra* note 34, at 1096.

312. The Anti-Federalists were a rather disorganized group of people, not evenly spread throughout the states, who opposed ratification of the Constitution. *See generally, e.g.*, HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION (1981).

313. Letter from the Federal Farmer III (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (Herbert J. Storing ed., 1981) (emphasis added). For a discussion of precedent that focuses on this issue, see generally Murphy, *supra* note 34.

314. *Contra* Williams, *supra* note 2, at 803 ("[N]one of [the Framers] linked their conception of the role of precedent to the Constitution....").

315. Brutus XV (Mar. 20, 1788), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 308 (Ralph Ketcham ed., 1986) (emphasis added).

316. For an extended discussion of Brutus's arguments and the reasons why he believed that federal courts would be bound by precedent, see Murphy, *supra* note 34, at 1108–13.

Alexander Hamilton penned *Federalist 78* in response to the concerns similar to those expressed by the Federal Farmer and Brutus. Hamilton described the nature of the federal judiciary and then defended the need for lifetime appointment of judges. In Hamilton's view, the judicial branch was the "least dangerous" of the three branches envisioned by the Framers because its power was limited by the Constitution in several ways.[317] One of the limits Hamilton discussed was the requirement of following precedent. In Hamilton's words:

> It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.[318]

Hamilton's discussion of precedent is far from exhaustive. Indeed, Hamilton only raised the issue as part of an argument in favor of lifetime appointment for federal judges: only men who were engaged in the craft for life would have the experience and time to study the "considerable bulk" of precedents that would bind them. Still, it shows that, at the very least, Hamilton presumed that federal judges would, like the common law judges with whom he was familiar, create and work with binding precedents.[319] Indeed, Hamilton followed the common theme of tying an accumulation of precedent to limiting judicial discretion, a value central to Hamilton's vision of the limited role of judges as exercising judgment and not will.

James Madison had a relatively clear understanding of the doctrine of precedent and the role it played as part of judicial power. In a letter to Samuel Johnson in the months preceding Ratification, he lamented that, at times, the meaning of certain parts of the Constitution was difficult to determine conclusively.[320] Contrary to Brutus, he looked forward to the accumulation of precedents because such precedents would help to settle the meaning of the Constitution: "Among other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[321] Madison presented these same thoughts publicly during the period of Ratification, in *Federalist 37*, arguing that precedents are necessary to "liquidate[]" the meaning of the Constitution.[322]

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317. *See* THE FEDERALIST NO. 78, *supra* note 140, at 402.

318. *Id.* at 407.

319. Some scholars have argued against excessive reliance on this passage from *Federalist 78*. *See* Lee, *supra* note 2, at 663–64; Paulsen, *supra* note 2, at 1572–76. I am simply using the passage as one further piece of evidence that the Framers and Ratifiers accepted precedent as part of their background understanding of the nature of judicial power.

320. *See* Letter from James Madison to Samuel Johnston (June 21, 1789), *in* 12 THE PAPERS OF JAMES MADISON 249, 250 (Charles F. Hobson et al. eds., 1979).

321. *Id. But see* Williams, *supra* note 2, at 818 (arguing that it is unclear whether Madison's use of the word "precedents" applied exclusively to judicial precedents).

322. *See* THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001) (arguing, in the context of discussing the difficulties the Constitutional Convention faced in

More than forty years later, Madison again touched on the importance of the doctrine of precedent. Madison described the "authoritative force" of "judicial precedents" as stemming from the "obligations arising from judicial expositions of law on succeeding judges."[323] He justified the binding force of judicial precedent by appealing to certainty and stability.[324] Madison rejected the claim that later judges were free to disregard constitutional precedent they deemed erroneous:

> Yet, has it ever been supposed that he (the judge) was required or at liberty to disregard all precedents, however solemnly repeated and regularly observed, and, by giving effect to his own abstract and individual opinions, to disturb the established course of practice in the business of the community?...
>
> There is, in fact and in common understanding, a necessity of regarding a course of practice, as above characterized, in the light of a legal rule of interpreting a law, and there is a like necessity of considering it a constitutional rule of interpreting a Constitution.[325]

Thus, Madison, like Hamilton, understood that judicial power included the doctrine of binding precedent.[326] And like his contemporaries, Madison saw binding precedent as a means to limit judicial discretion, which was inconsistent with the limited role of the judiciary.

In the period following Ratification, William Cranch, the second reporter for the Supreme Court, began his first edition of the Supreme Court Reports with a preface discussing the importance of precedents:

> In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge....[A]nd perhaps, nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge: he cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public.[327]

According to Cranch, central to the Rule of Law was limited judicial discretion, and central to constraining federal judges in their exercise of the judicial power was precedent.

Given the common law background which was pervasive in the legal education, legal practice, and thought[328] of the Framers and Ratifiers, it is not surprising that

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forming "a proper plan," that is, the Constitution, that "[a]ll new laws" must have "their meaning...liquidated and ascertained by a series of...adjudications").

323. Letter from James Madison to Charles Jared Ingersoll, *supra* note 174, at 391.

324. *Id.* ("[T]he good of society requires that the rules of conduct of its members should be certain and known....").

325. *Id.* at 392.

326. Madison contends that the judge's oath to uphold the law extends by implication to the 'legal rule of interpreting a law,' including the rule that directs the judge to give due regard to precedents....[T]he judicial oath provides no basis for adoption of the judge's individual understanding of a constitutional provision at the expense of precedent.

Lee, *supra* note 2, at 711.

327. 1 WILLIAM CRANCH, REPORTS OF CASES ARGUED AND DECIDED IN THE SUPREME COURT OF THE UNITED STATES, at iii (1804). *But see* Williams, *supra* note 2, at 825 (arguing that Cranch's commentary was "self-serving" because Cranch had "an incentive to laud the value of precedent so as to encourage sales of his reports").

328. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985) (arguing that the intellectual lives of the Framers and Ratifiers was formed by the common

all of the evidence we have of the Framers' and Ratifiers' views on the nature of judicial power is consistent with the declaratory theory of precedent. Others have recognized as well that the declaratory theory of precedent "was entrenched in common-law jurisprudence at and about the time of founding."[329]

This connection was made explicit in James Wilson's writings. Wilson argued that "[j]udicial decisions are the principal and most authentic" proof of what the law is and "every prudent and cautious judge will appreciate them [because] his duty and his business is not to make the law, but to interpret and apply it."[330] This view of precedent required courts, as Professor Murphy has argued, to "defer to precedents that fall within what might be characterized as a zone of reasonable legal interpretation[:]...a judge should not reject a precedent merely because she would have decided the case differently given the chance in a case of first impression."[331] For instance, Chief Justice of the Connecticut Supreme Court, Zephaniah Swift, argued that "when a court ha[s] solemnly and deliberately decided any question or point of law, that adjudication bec[omes] a precedent in all cases of a similar nature, and operate[s] with the force and authority of a law."[332]

From the foregoing analysis it is clear that, despite the relative dearth of evidence from the period on the subject, all of the direct evidence discussed above shows that the Framers and Ratifiers did have a relatively clear understanding of the role precedent would play in the judicial power exercised by federal judges: federal judges would create and in turn be bound by precedents. In other words, the doctrine of precedent was one of the background assumptions involved in the formation of the federal judiciary. Further, the direct evidence coincides with what one would expect to find given the broader historical legal context discussed earlier: stare decisis was part of the background of their lawyerly understanding of judicial power. The binding nature of federal precedent was also a product of the Framers' and Ratifiers' goal of containing judicial discretion to accord with the judges' limited role in a republic.

Indeed, it is the very lack of a comprehensive discussion of stare decisis by the Framers and Ratifiers that makes it likely that they understood and accepted it as a basic foundation of a workable judiciary. After all, the simple fact is that there are many topics regarding which the Framers never had a "focused discussion,"[333] but about which we are relatively certain they had a coherent understanding. For instance, the nature of "Court" is not defined in Article III, nor was it extensively discussed at the time of the Framing and Ratification.[334] The most plausible reason is that to the Framers and Ratifiers, from their common law background, the term

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law, among other things).

329. Murphy, *supra* note 34, at 1086.

330. 1 THE WORKS OF JAMES WILSON 502 (Robert Green McClosky ed., 1967); *see also id.* at 524 ("[A] judgment is a declaration of the law.").

331. Murphy, *supra* note 34, at 1086–87.

332. 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 40 (Windham, John Byrne 1795).

333. Williams, *supra* note 2, at 766.

334. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 799–825 (2001) (gathering historical evidence regarding the evolution of courts in England and the United States up to the Framing and Ratification).

"Court" referred to the common law institution of courts as defined by the social practice. This suggests that if the Framers and Ratifiers thought that the doctrine of precedent was something altogether mysterious, or that it was a new concept, then they likely would have discussed it in great detail.[335] This is especially true since both opponents and proponents based arguments on the assumption that federal judges would create and be bound by precedents. The fact that in each of the instances when one of the Framers mentioned the doctrine of precedent it was to draw on the doctrine as a supporting argument for a larger—more controversial—claim leads to the reasonable conclusion that such a doctrine was always seen as a background principle, which apparently needed no greater explanation.

It is significant that thirty-one of the fifty-five delegates to the Constitutional Convention were lawyers.[336] As I have demonstrated in the preceding two subsections, a doctrine of precedent was part of the basic structure of the English and colonial legal systems. Since so many of the Framers and Ratifiers were lawyers, it would be remarkable if they did not share an understanding of the doctrine of precedent, which was so central to the common law.

Finally, many historians who do not attribute a doctrine of stare decisis to the Framers and Ratifiers instead argue that a "strict" view of precedent rather suddenly appeared early in the nineteenth century.[337] Based on the evidence provided in this Article, I believe that the more plausible description of the history is that the Framers and Ratifiers had a conception of binding precedent and that—instead of its appearance out of whole cloth—later courts employed a stricter conception of stare decisis that had evolved out of the earlier understanding.[338]

(d) Practice and Understanding of Precedent in Federal Courts after the Ratification of the Constitution Until 1800

In this subsection I conclude with a discussion of the understanding and practice of the doctrine of precedent in the newly-created federal courts.[339] My focus is on the earliest federal court decisions, beginning with the Judiciary Act of 1789 until the dawn of the nineteenth century.

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335. The Framers did, after all, engage in a "focused discussion" of the nature and powers of the federal judiciary itself. *See, e.g.*, THE FEDERALIST NOS. 78–82 (Alexander Hamilton) (describing the federal judiciary).

336. FRIEDMAN, *supra* note 72, at 59.

337. *See* Price, *supra* note 2, at 84 (stating that "historians have located the beginning of a 'strict' doctrine of precedent only in the post-founding period" and collecting citations).

338. *See id.* at 99 ("The immediate post-Founding generation behaved as though starting with precedent was a natural obligation of courts.").

339. Although I do not discuss state court practice following ratification, it is clear that state courts, like their federal counterparts, continued the practice of following precedent. For example, in the Pennsylvania Supreme Court decision, *Kerlin's Lessee v. Bull*, 1 U.S. (1 Dall.) 175, 178–79 (Pa. 1786), the Court described the declaratory theory of precedent it followed and then followed a prior case even "though some may not [have] be[en] satisfied in their private judgment," because it enunciated a "rule of property."

Further, the legal practice in the state courts was heavily focused on precedent. For instance, in *Commonwealth v. Coxe*, where the Pennsylvania Supreme Court evaluated a dispute over tracts of land located along the Ohio and Allegheny Rivers, an attorney relied on a number of authorities supporting his argument. 4 U.S. (4 Dall.) 170 (Pa. 1800). Alexander Dallas, the reporter, summarized the arguments: "*Stare decisis*, is a maxim to be held forever sacred, on questions of property; and, in the present instance, applies with peculiar force, as the rule was given by the state herself, through the medium of her officers...." *Id.* at 192.

A review of the reports reveals that the legal practice in the early federal courts included frequent citation to, discussion of, and reliance upon precedent. For example, in *United States v. Callender*,[340] the United States was attempting to prosecute Callender for seditious libel against President Adams. The defendant's attorney, Hays, argued that the allegedly libelous book could not be introduced as evidence supporting the indictment because the indictment failed to name the book itself.[341]

Hays argued that he had reviewed "fifteen or twenty cases" that supported his argument and explained three such cases in more detail.[342] After doing so, Hays argued that "the attorney for the United States cannot give a single case" against his position.[343] Circuit Justice Chase then distinguished Hays' cases and relied on a contrary case (drawn from his memory) to overrule Hays' objection.[344] There are countless similar examples showing that stare decisis was a ubiquitous feature of early federal court legal practice as employed by litigants,[345] the courts,[346] and even the reporters.[347]

The earliest explicit discussion of the doctrine of stare decisis in the federal courts appears to have occurred in *Jennings v. Carson*,[348] three years after the birth of the federal judiciary.[349] In *Jennings*, the District Court of Pennsylvania evaluated a claim under admiralty law regarding a challenge to the capture of a Dutch sloop and her cargo during the Revolutionary War.[350] The sloop was captured by a privateer schooner owned by Joseph Carson.[351] Carson maintained that the Dutch sloop was carrying goods "belonging to the subjects of Great Britain, contrary to the regulations and laws of the then congress."[352] The sloop was condemned after a jury

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340. 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

341. *Id.* at 246.

342. *Id.* at 247.

343. *Id.*

344. *Id.* at 249.

345. *See, e.g.*, United States v. Maunier, 26 F. Cas. 1210, 1211 (C.C.D.N.C. 1792) (No. 15,746) (defense counsel citing precedent); Harvey v. Harvey, 1 Del. Cas. 342 (C.C.D. Del. 1793), *available at* 1793 WL 618 (both parties' counsel citing precedent); United States v. Ravara, 27 F. Cas. 714, 715 (C.C.D. Pa. 1794) (No. 16,122a) (government counsel citing precedent); Parasset v. Gautier, 2 U.S. (2 Dall.) 329, 331 (C.C.D. Pa. 1795) (defense counsel citing precedent); Geyger's Lessee v. Geyger, 2 U.S. (2 Dall.) 332 (C.C.D. Pa. 1795) (defense counsel citing precedent); United States v. Insurgents of Pa., 2 U.S. (2 Dall.) 334, 339 (C.C.D. Pa. 1795) (government counsel citing precedent); United States v. Stewart, 2 U.S. (2 Dall.) 343, 344 (C.C.D. Pa. 1795) (defense counsel citing precedent).

346. *See, e.g.*, Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 407 (1792) (opinion of Wilson, J.); *id.* at 408 (opinion of Cushing, J.); Georgia v. Brailsford, 2 U.S. (2 Dall.) 415, 417 (1793) (opinion of Iredell, J.); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 429, 437–39, 442–44 (1793) (opinion of Iredell, J.); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 303, 317 (C.C.D. Pa. 1795); Dixon v. The Cyrus, 7 F. Cas. 755, 756, 757 (D.C.D. Pa. 1789) (No. 3,930); Weeks v. The Catharina Maria, 29 F. Cas. 579, 579 (D.C.D. Pa. 1790) (No. 17,351); Findlay v. The William, 9 F. Cas. 57, 60 (D.C.D. Pa. 1793) (No. 4,790); Tunno v. Preary, 24 F. Cas. 323, 323 (D.C.D.S.C. 1794) (No. 14,238); Jansen v. The Vrow Christina Magdalena, 13 F. Cas. 356, 359 (D.C.D.S.C. 1794) (No. 7,216).

347. *See, e.g.*, Rice v. The Polly & Kitty, 20 F. Cas. 666, 667 n.2 (D.C.D. Pa. 1789) (No. 11,754).

348. 13 F. Cas. 540 (D.C.D. Pa. 1792) (No. 7,281).

349. The Constitution established the Supreme Court and authorized Congress to establish the lower federal courts. U.S. CONST. art. III, § I, cl. 1. Congress passed the Judiciary Act in 1789 to create these lower federal courts. *See generally*, ORIGINS OF THE FEDERAL JUDICIARY (Maeva Marcus ed., 1992).

350. *Jennings*, 13 F. Cas. at 540.

351. *Id.* at 540–41.

352. *Id.*

trial in the state court of admiralty of New Jersey.[353] Jennings, representing the interests of the owner of the Dutch sloop, brought suit against Carson's executors, claiming that the sloop had been taken in violation of the law of the sea.[354] Carson's executors defended the capture and relied on the decision by the New Jersey state court of admiralty.[355] Jennings countered by arguing that the decision of the New Jersey state court had been reversed by the Court of Appeals of the United States in 1780.[356]

The district court first looked to the English case of *Case of Lindo and Rodney*—brought to the court's attention by counsel—to evaluate whether it had jurisdiction to hear prize appeals.[357] It then examined the history of admiralty courts in the United States and the American colonies.[358] Judge Peters determined that the rule of admiralty law created by Lord Mansfield in *Case of Lindo and Rodney* was not found in any American admiralty courts—it was unique to the English courts.[359] He concluded that the United States was no longer bound by English precedent in admiralty cases and held that the Constitution granted jurisdiction to federal courts to hear all admiralty cases: "Acting as we now do in a national, and not a dependent capacity, I cannot conceive that we are bound to follow the practice in England, more than that of our own, or any other nation."[360]

This case is instructive because it shows that the earliest federal courts were familiar with the requirements of the doctrine of stare decisis. Even though the court did not follow the *Case of Lindo and Rodney*, the fact that the advocates before the court argued from precedent, and that the judge felt required to articulate his reasons for departing from that precedent, demonstrates that federal judges understood their judicial power to include a respect for precedent.

Eight years later, the Circuit Court for the District of Pennsylvania considered the requirement of following precedent. In the famous *Case of Fries*, the Circuit

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353. *Id.* at 541.

354. *Id.* at 540–41.

355. *Id.* at 541.

356. *Id.* The Court of Appeals in Cases of Capture was a creature of the Continental Congress. After the beginning of the Revolutionary War, merchants complained of unlawful condemnations by the state courts of admiralty. Congress established a system whereby merchants could appeal the judgments of the state courts of admiralty to a committee of Congress. In 1780 the committee was dissolved and the Court of Appeals was established in its place. For a discussion of the problems of admiralty law in the newly-formed states, see generally Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 339–43 (1996).

> Although Congress claimed the power to overrule state courts of admiralty in the matter of prize appeals, this authority was contingent on the cooperation of the state courts. Because neither the Standing Committee nor the congressional Court of Appeals possessed the ability to enforce its decrees, the confederation period was marked by a series of conflicts between the state admiralty courts and Congress over the final disposition of prize cases. Having no marshal, Congress was left to rely on state courts for the implementation of its decrees; but states were not always willing to cooperate.

Id. at 343. This seems to have been the situation in *Jennings*.

357. Case of Lindo and Rodney, *discussed in* LeCaux v. Eden (1781) 99 Eng. Rep. 375, 385 n.1 (K.B.).

358. *Jennings*, 13 F. Cas. at 542.

359. *Id.*

360. *Id.* Furthermore, Judge Peters asserted that "[t]he admiralty proceeds by a law which considers all nations as one community, and should not be tied down to the precedent of one nation..." *Id.* Thus, it would be inappropriate to follow the precedents established by one nation.

Court evaluated the conviction of John Fries for treason.[361] Fries had been the "ringleader" of a group of men who had resisted enforcement of federal tax statutes requiring property owners to pay taxes on the value of their slaves and lands.[362] Fries was charged with treason for levying war against the United States.[363]

Fries argued that he was not guilty of treason as defined by the Constitution.[364] Specifically, Fries complained that the judge had given an incorrect instruction to the jury that resisting enforcement of a federal statute constituted treason.[365] In essence, Fries argued that the judge had misconstrued the constitutional definition of treason.[366]

Judge Chase began by pointing out that the Constitution defined treason in Article III.[367] Judge Chase then outlined how previous federal courts had interpreted the Constitution's definition of treason in two cases of insurrection in Pennsylvania from 1795.[368] Judge Chase concluded, based on this precedent:

> The[se] decisions, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, though not altogether obligatory, ought to be viewed with great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness.[369]

Judge Chase believed himself bound by precedents on the *constitutional* definition of treason.[370] Chase "considered the law as settled by those decisions, with the correctness of which on full consideration he was entirely satisfied; and by the authority of which he should have deemed himself bound, even had he regarded the question as doubtful in itself."[371] Hence, from its earliest days, the federal courts gave significant respect to precedent.

Contrary to the claims of some scholars,[372] the Supreme Court, from its inception, frequently looked to precedent to guide it. One recent study evaluated the reliance

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361. 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5,127).

362. *Id.* at 935.

363. *Id.* at 924.

364. *Id.* at 935.

365. *See id.* at 930.

366. *Id.* at 935.

367. *Id.* at 930 (citing U.S. CONST. art. III, § 3, cl. 1).

368. *Id.* at 931 (discussing United States v. Mitchell, 26 F. Cas. 1277 (C.C.D. Pa. 1795) (No. 15,788); United States v. Vigol, 28 F. Cas. 376 (C.C.D. Pa. 1795) (No. 16,621)).

369. *Id.* at 935.

370. *See id.* at 936 ("[I] considered [my]self and the court as bound by the authority of the former decisions."); *see id.* ("As the court [i.e., Chase] held itself bound by the former decisions....").

371. *Id.* at 936. Turning to Fries's further allegations that his constitutional right to the assistance of counsel had been violated, Chase noted that it was not the defense counsel's duty to decide what evidence or what interpretation of the law should be presented to the jury. *Id.* at 938. In Judge Chase's words:

> As counsel, they owe to the person accused, diligence, fidelity and secrecy, and to the court and jury, due and correct information, according to the best of their knowledge and ability, on every matter of law which they attempt to adduce in argument. The court, on the other hand, hath power, and is bound in duty, to decide and direct what evidence, whether by records or by precedents of decisions in courts of justice, is proper to be admitted for the establishment of any matter of law or fact.

Id. Fries was later pardoned by President John Adams. *See id.* at 944.

372. *See* Healy, *supra* note 38, at 85 ("[T]he content of the Court's opinions showed little concern for precedent.").

on precedent by the early Supreme Court.[373] From 1787 to 1815, the Supreme Court decided 706 cases. Of those, 275 included "references to legal citations,"[374] most of which relied on common law precedents to reach their decisions.[375]

From 1787 to 1800, the Court relied on common law precedents 667 times and cited its own precedent eight times.[376] However, there was a marked shift in the pattern of the Court's reliance beginning in 1801. From 1801 to 1805, the Court relied on common law precedents seventeen times and cited its own precedents nine times.[377] From 1806 to 1815, the Court relied on common law precedents forty-five times, and cited its own precedents forty-three times.[378] Thus, beginning around 1801, the Court began to rely on its own precedents with greater relative frequency than English precedents.[379] This shift is attributable to a critical mass of its own precedent as the most recent authority on legal issues, which replaced citation to earlier, and less authoritative, English common law and other sources.[380] Further, during this same period, the Court also frequently cited lower federal court precedent and state court precedent.[381]

Thus, it is apparent that the federal judiciary followed precedent from its formation. In the beginning, the federal courts looked to the precedents of the colonial and early state courts, along with the precedents of the English common law. As time passed and the courts developed their own corpus of case law, they increasingly relied on their own precedents, discounting the English precedents.

iii. The Common Law and the Constitution

The discussion above shows that by the time of the framing and ratification of the Constitution, stare decisis was an acknowledged component of judicial power. This understanding of precedent is applicable to the context of constitutional precedent for a number of reasons.

First, there is no logical impediment to the application of stare decisis to an authoritative legal text such as the Constitution. Indeed, the pervasive current practice where constitutional precedent is accorded precedential respect belies such a contention. I argued above that according binding effect to some—even mistaken —constitutional precedent is required by the common good. This makes application

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373. James F. Spriggs et al., The Political Development of a Norm Respecting Precedent in the American Judiciary (Apr. 15–18, 2004) (unpublished paper presented at the annual meeting of the Midwest Political Science Association) (on file with author).

374. *Id.* at 12.

375. *Id.* ("[R]eferences to the common law outnumber references to all other legal citations.").

376. *Id.* at 21 tbl.3.

377. *Id.*

378. *Id.*

379. Overall, our preliminary findings indicate that, for the U.S. Supreme Court, English common law seemed to become less important for it over the first 20 years of its existence, while its own precedent, and precedent and legal authorities from within the U.S. (the state and federal constitutions, for example) became more important.

Id. at 14.

380. *See id.* at 12 ("This [high percentage of citation to common law rather than Supreme Court cases] is not surprising, given that the U.S. was less than 30 years old during the years we have analyzed so far."); *id.* ("Indeed, as a new Court, that decided very few cases from its beginning, it simply did not have many precedents from which to draw.").

381. *Id.* at 13 (discussing table 3); *id.* at 20 tbl.2.

of stare decisis to constitutional text not only logically possible but normatively attractive.

Second, common law precedent in England, in the colonies, and in the newly independent states prior to the advent of judicially enforceable written constitutions often included precedents interpreting and applying statutes which were the supreme law of the land. The concept of precedent where later courts give significant respect to previous applications of, for example, parliamentary statutes,[382] is analogous to federal courts following precedential applications of the Constitution. Both situations involve an authoritative text that is changeable only through specific means that do not include judicial alteration. Therefore, the concept of stare decisis first at home in the common law context is applicable to constitutional precedent.

Perhaps most importantly, the original meaning of "judicial Power" requires federal courts to exercise significant respect for constitutional precedent.[383] This is a non-negotiable demand that our written Constitution places on federal judges. Thus, regardless of questions on exactly how this command should play out in the constitutional context—questions this Article does not address—the constitutional command remains.

2. Criteria to Determine When Judges Should Overrule Nonoriginalist Precedent

Normally, in a constitutional case, a judge following an originalist methodology must attempt to discern and apply the original meaning of the text of the Constitution. However, when faced with a nonoriginalist precedent purporting to interpret the Constitution, a judge's duty is more complicated. A judge in such a situation must overrule the precedent unless doing so would gravely harm society's pursuit of the common good. To determine whether overruling a nonoriginalist precedent would gravely harm society's pursuit of the common good, a judge must weigh (at least) the following three factors:[384] (1) the degree of departure of the nonoriginalist precedent from the original meaning of the Constitution, (2) the impact on Rule of Law values caused by overruling the precedent, and (3) the non-legal justness[385] of the precedent.[386] Making these determinations requires judges with judicial virtue.

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382. *See* Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL'Y 39, 39–40 (1994) (arguing that the English practice of following prior interpretations of parliamentary statutes—the supreme law of the land in England—provided an analogue from which one could argue that the "judicial Power" in Article III included the authority to follow incorrect interpretations of the Constitution).

383. *See supra* notes 307–338 and accompanying text.

384. For a list of factors involving some of the same substantive considerations as those examined here, see Monaghan, *supra* note 6, at 756–63.

385. I will describe this concept below.

386. I do not discuss whether the conclusions reached in this Article detract from Professor Paulsen's argument that Congress may statutorily abrogate the effect of stare decisis. *See* Paulsen, *supra* note 2. My preliminary thought is that they do not, especially in light of the historical evidence of congressional control of judicial procedures marshaled by Paulsen. *See id.* at 1567–70, 1582–90; *see also* Murphy, *supra* note 34, at 1139 (agreeing with Paulsen's analysis).

a. Degree of Departure

The first factor, the degree to which the nonoriginalist precedent departs from the original meaning, directly addresses the legitimacy of the Supreme Court's and the nonoriginalist precedent's authority. The Supreme Court may legitimately overrule an act of the elected branches only if the elected branches contravened the (determinate) original meaning of the Constitution. A Supreme Court justice's duty is to enforce the prudential social ordering that has enabled our society to effectively pursue the common good. Part of that social ordering is originalism. The more a precedent deviates from the original meaning the stronger is the judge's obligation to correct the deviation.

The obligation of judges to reverse nonoriginalist decisions varies positively with the decision's variation from the original meaning for a number of reasons. First, in practice it is often difficult to judge with complete accuracy whether and how much a particular decision deviates from the original meaning. This counsels caution and requires judges to analyze the degree to which a decision does or does not depart from the original meaning. In some cases it is easy to see that a decision greatly deviates from the original meaning. For example, few if any scholars argue that the doctrine of substantive due process is faithful to the original meaning of the Fourteenth Amendment's Due Process Clause, and most scholars agree that the doctrine is a radical departure from the Clause's original meaning.[387] However, the bulk of potentially nonoriginalist decisions are not so clear-cut. Do cases holding that the Equal Protection Clause governs all racial classifications depart from the original meaning of the Clause, and, if so, how far?[388] Or, what about cases that extend the protection of the Religion Clauses of the First Amendment to nontheistic beliefs[389] and beyond monotheistic beliefs?[390]

Another reason why a judge's duty is variable is that the perceived legitimacy of the exercise of constitutional judicial review varies depending on the clarity and extent to which a decision deviates from the original meaning. The more a decision deviates, the more likely it jeopardizes the valuable role the proper exercise of constitutional judicial review plays in preserving our constitutional social ordering. Constitutional judicial review is essential to our society's ability to govern itself through time by keeping the elected branches within their delegated powers. Since the average American's view of the proper exercise of constitutional judicial review is roughly characterized as originalism,[391] deviations from the original meaning

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387. *See, e.g.*, ELY, *supra* note 69, at 18 ("[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.'").

388. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (holding that all racial classifications are subject to strict scrutiny).

389. *See* United States v. Seeger, 380 U.S. 163, 165–66 (1965) (defining religion in the draft-exemption statute to include nontheistic beliefs purportedly to avoid the constitutional issue of an establishment); Torcasco v. Watkins, 367 U.S. 488, 495 (1961) (defining religion to include theistic and nontheistic beliefs, such as "Secular Humanism"); *see also* Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 200–04 (2002) [hereinafter Strang, *First Amendment*] (discussing the evolution of the Court's definition of religion).

390. *See* Strang, *First Amendment*, *supra* note 389, at 210–37 (arguing that the original meaning of religion in the First Amendment included only theistic belief systems).

391. *See* FALLON, *supra* note 6, at 13 ("When quizzed about the appropriate role of the Supreme Court in American government, most law students—and I would guess most interested citizens—tend almost reflexively

threaten public acceptance of constitutional judicial review and threaten our society's ability to abide by our constitutional social ordering.[392] This is because, absent following the original meaning, most Americans believe that the Supreme Court is merely imposing its own policy preferences on society.[393] Leaving other factors aside,[394] the greater a decision deviates from the original meaning, the more suspicious Americans are of the Supreme Court's exercise of constitutional judicial review.[395]

b. Rule of Law Values

The second factor judges must consider when addressing nonoriginalist precedent is the impact on Rule of Law values caused by overruling or limiting the

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to rely on a theory that has been labeled most recently as 'originalism.'"); *id.* at 123 ("As a sociological matter, there can be little doubt that the written Constitution is widely perceived as having a claim to legitimacy that the unwritten Constitution does not."); *see also* ELY, *supra* note 69, at 12 ("[Originalism] does seem to retain the substantial virtue of fitting better our ordinary notion of how law works: if your job is to enforce the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time."); Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407, 434 (2003) (reviewing RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001)) ("What makes originalism so intuitively attractive? Most people probably comprehend that originalism is the only mode of interpretation that is consistent with our willingness to submit to a lawmaker."); *A Newsweek Poll: Bork, the Court and the Issues*, NEWSWEEK, Sept. 14, 1987, at 26 (describing a September 1987 Gallup Poll which concluded that 52% of Americans believe that Supeme Court justices should "apply the intentions of the original authors of the Constitution," while only 40% thought that the justices should "apply their own values as well" as the original intentions of the authors).

392. *See* SCALIA, *supra* note 15, at 46–47 (arguing that today the "American people have been converted to belief in The Living Constitution" with the result that politics has entered the judicial confirmation process and judges are appointed based on political views that conform with the majority's view); BORK, *supra* note 57, at 3 (describing the massive annual pro-life march in Washington, D.C. to the Supreme Court on the anniversary of *Roe*).

393. *See supra* note 391 (describing the average American's attachment to originalism); BARNETT, *supra* note 11, at 1–2 (arguing that "judges and their academic enablers" undermine the "original Constitution" but, because they "seek the obedience of the faithful," they will not admit to having done so); *see also* Atkins v. Virginia, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting) ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.").

394. Factors other than a decision's deviation from the original meaning can have a dramatic impact on the public's perception of the decision's and the Court's legitimacy. Probably the most prominent examples of this phenomenon are *Brown* and *Roe*. *Brown* is almost universally viewed by the American public as reaching a just result—eliminating racial segregation—and consequently does not greatly undermine the Court's legitimacy. *See* FALLON, *supra* note 6, at 58 (finding that today no one questions *Brown*'s legitimacy because "[i]n nearly all eyes, *Brown* reflects the Supreme Court at its best"). Many Americans view *Roe* as tragically unjust—the sanctioning of murder—hence the Court's legitimacy has continued to suffer because of *Roe*. *See id.* at 56 (recognizing that *Roe* is "[m]uch more controversial than *Brown*"); Casey v. Planned Parenthood of Se. Pa., 505 U.S. 833, 867 (1992) (explaining why the Court cannot overrule *Roe* "under fire"); *id.* at 998 (Scalia, J., dissenting) (questioning the Court's decision to "stand by an erroneous constitutional decision" because of "the substantial and continuing public opposition the decision has generated"); PollingReport.com, Abortion and Birth Control, http://www.pollingreport.com/abortion.htm (last visited May 4, 2006) (listing numerous polls indicating sustained substantial opposition to abortion in all or some situations).

395. The variability of a judge's duty when faced with nonoriginalist precedent may be a particular instance of a familiar occurrence. More generally, my duty to abide by unjust laws is variable and depends, among other things, on the level of unjustness of the particular law. Thus, if a positive law is slightly unjust, but my breaking the slightly unjust law would cause great harm to the common good, I am obliged to follow the slightly unjust law to avoid greater harm to the common good. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I of pt. II, q. 96, art. 4, at 1019–20 (Fathers of the English Dominican Province trans., Benziger Bros. 1947). However, if the converse occurs—the law in question is gravely unjust and my not following the law would cause little harm to the common good—I would not be obliged to follow the gravely unjust law. Or lastly, if the positive law in question requires that I break Divine Law and does not simply contravene human good, I am obliged to disobey the law. *See id.*

precedent. A judge must evaluate many values that are difficult to weigh and compare.[396] How much will overruling a particular decision harm stability? How much weight should a judge give reliance interests? Is the rule announced in the nonoriginalist decision workable? Is it deeply embedded in the law? Answering these questions requires a high degree of practical wisdom.

There is no single rule of how a judge should address the Rule of Law values because the circumstances regarding nonoriginalist cases are myriad. On one end of the spectrum are cases where it is relatively clear that overruling the decision would cause great harm to Rule of Law values. For example, Article I, Section 8, Clause 5 of the Constitution authorizes Congress to "coin money."[397] There is a strong scholarly consensus that Congress was not authorized by this provision to issue paper money.[398] However, the Supreme Court held in the *Legal Tender Cases* that acts passed by Congress making notes issued by the Federal Government legal tender were constitutional.[399]

Today, however, over 120 years later, paper money is ubiquitous. "[I]n our age of checks, credit cards and electronic banking, the issue is off the agenda: no Supreme Court would now reexamine the merits, no matter how closely wedded it was to the original intent theory and no matter how certain it was of its predecessor's error."[400] A return to the original meaning—the Supreme Court overruling the *Legal Tender Cases*—would dramatically harm Rule of Law values. As Robert Bork put the point, "Whatever might have been the proper ruling shortly after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian."[401]

On the other end of the spectrum are cases where overruling would not significantly harm Rule of Law values, either because the overruling itself would not harm the values or because the nonoriginalist precedent harms Rule of Law values and overruling the precedent would eliminate those harmful effects. A recent example of this is *Crawford v. Washington*.[402] There the Court overruled a 1980 case, *Ohio v. Roberts*, which had held that the Confrontation Clause of the Sixth Amendment did not bar admission of an unavailable witness' statements against a criminal defendant if the statements bore "adequate 'indicia of reliability.'"[403] The majority in *Crawford* found that the original meaning of the Confrontation Clause prohibited

396. For a list of characteristics of a precedent to guide courts when determining whether to overrule a precedent, see Rehnquist, *supra* note 32, at 358.

397. U.S. CONST. art. I, § 8, cl. 5.

398. *See, e.g.*, Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 ("[I]t is difficult to escape the conclusion that the Framers intended to prohibit [the] use [of paper money]."); Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1399 n.358 (2001) ("It is uncontroversial that the Framers did not view the Constitution as giving Congress the power to issue paper money to be invested with the status of legal tender.").

399. 110 U.S. 421 (1884).

400. Monaghan, *supra* note 6, at 744.

401. BORK, *supra* note 57, at 155.

402. 541 U.S. 36 (2004), *overruling in part* Ohio v. Roberts, 448 U.S. 56 (1980).

403. *Roberts*, 448 U.S. at 66.

admission of unavailable witness' statements that were "testimonial" absent the opportunity for cross-examination by the criminal defendant.[404]

The overruling of nonoriginalist precedent in *Crawford* had relatively little negative impact on Rule of Law values and may, in fact, have advanced them. This is because the rule announced in *Crawford*, unlike the "indicia of reliability" rule from *Roberts*, is relatively easy to apply and applies in a more predictable manner so defendants and the government can plan more accurately. Also, the rule in *Crawford* accords with the results of most of the Court's case law in the area.[405] Importantly, there are few reliance interests harmed by the overruling of *Roberts* because it does not affect previously existing property or contract interests and because only the relatively small number of criminal defendants who had not yet had a trial before *Crawford* was announced, and prosecutors prosecuting these defendants, could conceivably have relied on *Roberts*.

The two ends of the spectrum are relatively easy to identify. By contrast, the vast area between the ends requires sound practical wisdom. The duty of the judge in the vast middle area is to determine whether and/or how overruling a nonoriginalist precedent will harm the Rule of Law values so central to society's effective pursuit of the common good. Unlike those cases where the original meaning is determinate and judges have no discretion to utilize their judgment regarding what the natural law would require in the case, here judges are relatively unconstrained and must make practical judgments drawing on their virtue.

Two final notes before moving on: first, although I need to perform further research into the issue, one possible manner by which much of the potential harm to Rule of Law values caused by overruling nonoriginalist precedent could be eliminated is through exercise of equitable power to tailor a court's order. For example, a court could determine that, to allow society time to adjust to an overruling, the court's ruling would take effect at a point in the future. Or, a court could issue an order implementing its ruling in stages over a period of time. The most prominent example of this equitable tailoring of an order is *Brown v. Board of Education*, where the Court tailored the implementation of its ruling taking into account the systemic obstacles facing desegregation.[406]

Second, as Keith Whittington has suggested, a court faced with a nonoriginalist precedent "need not seek to overturn the existing corpus of constitutional law overnight, or even over a decade."[407] A court could initially limit the nonoriginalist case and then, as the case law moves away from the nonoriginalist case, the case becomes a relic that is relatively easily overruled. This slow evolution and eventual overruling permits individuals and society to conform to the shift towards the original meaning of the Constitution and away from the nonoriginalist precedent with relatively little harm to Rule of Law values.

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404. *Crawford*, 541 U.S. at 53–54.
405. *See id.* at 57.
406. 349 U.S. 294, 299–301 (1955).
407. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 169.

c. Non-Legal Justness

The last factor a judge must consider when faced with a nonoriginalist precedent is what I am going to call the *non-legal justness* of the decision. Non-legal justness is the characteristic of a precedent to rightly order the relationships of persons and institutions even though the judicial act of ordering—the announcement of the precedent—was itself illegal because it was not in accord with the governing law. This characteristic is summarized by the common expression, "I like the result of the case," where one believes that the ruling in a case results in just relationships, but at the same time believes that the judge was not authorized by the law to reach the desirable result.

In any system of law such as ours that does not employ animate justice—where the law making and law applying functions are separated[408]—the phenomenon of non-legal justice will occur. Aristotle defined justice, broadly understood, as *justice as lawfulness* because of the central role law plays in enabling a society to effectively pursue the common good.[409] As St. Thomas described the connection, "[S]ince it belongs to the law to direct to the common good...it follows that the justice which is in this way styled general, is called *legal justice*, because thereby man is in harmony with the law which directs the acts of all the virtues to the common good."[410] Consequently, the just man is "the man who acts according to the law."

Aristotle also described a narrower conception of justice: justice as equality, or giving each his due.[411] Modern scholars often employ the label "general" justice for justice as lawfulness, and "particular" justice for justice as equality.[412]

There will be occasions where the positive law norm, when applied correctly, will lead to an ordering of relationships that, absent the positive law norm, would be unjust in the sense of *justice as equality*. In other words, the characteristic of non-legal justness will be in tension with the characteristic of justice as lawfulness: judgment in accord with the positive law.

For St. Thomas, this result arises because of the limited nature of the authority of the judicial office. Judges receive their authority to judge from their office, which

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408. Perhaps the most prominent example of animate justice is King Solomon who had received from God the grace of wise judgment: "Behold I have done for thee according to thy words, and have given thee a wise and understanding heart, insomuch that there hath been no one like thee before thee, nor shall arise after thee." 3 *Kings* 3:12. And perhaps the most well-known example of Solomon's solomonic exercise of judgment occurred when two women appeared before Solomon both claiming to be the mother of the same child:

> The king therefore said: Bring me a sword. And when they had brought a sword before the king, Divide, said he, the living child in two, and give half to one, and half to the other. But the woman whose child was alive, said to the king...I beseech thee, my lord, give her the child alive, and do not kill it....The king answered, and said: Give the living child to this woman, and let it not be killed, for she is the mother thereof.

Id. at 3:24–27.

409. ARISTOTLE, NICOMACHEAN ETHICS 1129a–1129b (D.P. Chase trans., E.P. Dutton 1911).

410. AQUINAS, *supra* note 395, pt. II of pt. II, q. 58, art. 5, at 1438; *see also id.* pt. II of pt. II, q. 58, art. 7, at 1439 ("[L]egal justice...directs man immediately to the common good....").

411. ARISTOTLE, *supra* note 409, at 1129b.

412. *See, e.g.*, JOHN FINNIS, AQUINAS 130 n.e (1998) ("'General' is the more convenient qualifier because Aquinas, following Aristotle, divides justice into 'general' (or 'legal') and 'particular' (or 'special')."); KRAUT, *supra* note 37, at 102 n.6 ("Many scholars call justice as lawfulness 'universal' or 'general' justice, and justice as equality 'particular' or 'special' justice.").

is a creation of the judge's particular society.[413] If a judge acts beyond that authority, the judge has wrongfully usurped authority.[414] In a society such as ours that does not employ animate justice, a federal judge's authority extends only to enforcement of the law: "Hence, it is necessary to judge according to the written law...."[415]

Aquinas provided an example of the limitation of authority of public officials where a city has a law that prohibits the opening of the city gate when the city is besieged.[416] Aquinas further supposed that the enemy is pursuing the city's army, which is outside of the city, and that without opening the gate the city's army will be destroyed. Aquinas concluded that the relevant official should open the gates, but with this important caveat:

> Nevertheless it must be noted, that if the observance of the law according to the letter does not involve any sudden risk needing instant remedy, it is not competent for everyone to expound what is useful...: those alone can do this who are in authority, and who, on account of such like cases, have the power to dispense from the laws.[417]

Applied to our society's office of federal judge, Aquinas's example shows that even when proper application of a just law would lead to what, absent the law, would be an unjust ordering of relationships, the judge may not misapply the law because to do so would contravene the limits of judicial authority.

A poignant example of this phenomenon is *DeShaney v. Winnebago County Department of Social Services*.[418] There, the mother of four-year old Joshua, who had been severely beaten by his father, leaving him profoundly mentally retarded, sued the county social services department and local government officials.[419] Prior to the beating, the county officials had good reason to believe that Joshua's father was abusing him.[420] Joshua's mother argued that the failure of the county officers to intervene to stop the abuse deprived Joshua of his liberty without due process in violation of the Fourteenth Amendment.[421]

The Supreme Court ruled, consistent with the text, history, and purpose of the Due Process Clause, that the officials had not deprived Joshua of due process.[422] The Court acknowledged the "undeniably tragic" facts of the case[423] and how "[j]udges and lawyers...[were] moved by natural sympathy in a case like this to find

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413. AQUINAS, *supra* note 395, pt. II of pt. II, q. 60, art. 2, at 1447.
414. *Id.*
415. *Id.* pt. II of pt. II, q. 60, art. 5, at 1450.
416. *Id.* pt. I of pt. II, q. 96, art. 6, at 1021.
417. *Id.* at 1021–22. A powerful example of Aquinas's belief that judges may not act contrary to the law is when he asks whether it is lawful for a judge to pronounce a judgment against what he knows to be the truth (acquired through the judge's private capacity) based on the evidence fairly submitted in a fair trial. *Id.* pt. II of pt. II, q. 67, art. 2, at 1483–84. Aquinas answers that the judge must "pronounce[] sentence according to the law...and not according to his private opinion" because the judge "exercises public authority." *Id.* (emphasis omitted).
418. 489 U.S. 189 (1989).
419. *Id.* at 193.
420. *Id.* at 191–93.
421. *Id.* at 193.
422. *Id.* at 195–96.
423. *Id.* at 191.

a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them."[424] Despite the wrong dealt to Joshua and his mother, the Court refused to incorrectly interpret or apply the positive law norm (the Due Process Clause) to rightly order the relationships between Joshua, his mother, and the government officials. The Court, in other words, acted justly (justice as lawfulness) and refused to effect—through a legally unwarranted decision—rightly ordered relationships among the parties (non-legal justness).

Many nonoriginalist decisions rightly order the relationships of persons and institutions—*Brown v. Board of Education* probably being the most prominent example—so judges will often have to address this factor. *Brown*, decided in 1954, ruled that racial segregation in public schools was unconstitutional.[425] As the Court itself apparently recognized, the original meaning of the Equal Protection Clause of the Fourteenth Amendment did not outlaw racially segregated schools.[426] This is also the scholarly consensus.[427] Thus, *assuming* that the original meaning of the Equal Protection Clause did not outlaw segregated public schools, the ruling in *Brown* was not just (justice as lawfulness). The justices who misconstrued the meaning of the Equal Protection Clause violated their oaths to uphold the Constitution by disregarding the Clause's original meaning.

However, most agree that the result in *Brown* rightly ordered the relationships of persons and institutions in states with segregated public schools. Black Americans were no longer accorded and denied benefits solely on the basis of race, which is rarely (if ever) an appropriate basis for such decisions.[428] The result in *Brown*, though illegal, was just (non-legal justice).

The characteristic of a precedent of non-legal justness is something, *all else being equal*, that a society and judge should prefer. Remember, the situation about which we are concerned is not whether, prior to the deciding of a case, a society and judge should prefer rightly ordered relationships between persons and institutions. Given a judge's duty to enforce the positive law norms of a society, the judge must strive for legal justice, even at the expense of non-legal justice—even if following the law would result (or allow to persist) in what, absent the legal norm, would be an unjust ordering of the relationships of the parties to the case. The situations about which we are concerned are nonoriginalist precedents—precedents that, when issued, violated the law—and our only question is what shall a judge do regarding such precedents. One potential characteristic of such precedents that may make retention of such a precedent more desirable is its non-legal justness.

Return again to *Brown*: assuming that the other two factors are in equipoise, a judge is left with two possible worlds—one in which *Brown* is overruled and one in which *Brown* is not overruled. The fact that not overruling *Brown* would more likely lead to a society in which relationships, relative to the world where *Brown* is overruled, are rightly ordered is a further reason to not overrule *Brown*.

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424. *Id.* at 202–03.

425. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

426. *See id.* at 489–90.

427. *See infra* note 430.

428. Perhaps in the context of race riots in prison, for example, government could legitimately act based on the race of rioters.

3. Paradigm Examples of Nonoriginalist Precedents and Application of Originalist Theory of Precedent

In this subsection I apply the originalist theory of precedent described above to two of the most contentious Supreme Court decisions in the twentieth century: *Brown v. Board of Education* and *Roe v. Wade*. These are the two decisions against which constitutional interpretative methodologies are often measured by individuals in light of their deeply held moral beliefs, and by scholars for intellectual consistency.

Application of these three criteria[429] calls for judges with virtue. The judge must accurately apply and balance these criteria to determine whether to overrule a nonoriginalist precedent. The applications below are preliminary in nature. Of course, people may have legitimate differences on the conclusion of this complex process.

a. *Brown v. Board of Education*

As previously stated, the first factor in deciding what to do with nonoriginalist precedent is the extent of deviation from the original meaning. The scholarly consensus is that *Brown* deviated from the original meaning of the Equal Protection Clause.[430] Even Michael McConnell, whose position is contrary to the scholarly consensus, has noted:

> An impressive array of academic authorities, from across the ideological and jurisprudential spectrum—including such figures as Alexander Bickel, Laurence Tribe, Richard Posner, Mark Tushnet, Raoul Berger, Ronald Dworkin, and Walter Burns—had come to the conclusion that under the original understanding of the Fourteenth Amendment, racial segregation of public schools was constitutionally permissible.[431]

Perhaps the most powerful piece of evidence is that, when the Fourteenth Amendment was ratified in 1868, the District of Columbia and twenty-four of

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429. Again, the three factors are (1) the degree of departure of the nonoriginalist precedent from the original meaning of the Constitution, (2) the impact on Rule of Law values caused by overruling the precedent, and (3) the non-legal justness of the precedent. *See supra* notes 384–386 and accompanying text.

430. There has been significant scholarly research into whether the original meaning of the Equal Protection Clause prohibited segregated public schools. The consensus is that it did not. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 132–54 (2d ed. 1997) (arguing that segregation was not precluded by the Fourteenth Amendment); BORK, *supra* note 57, at 75 ("The inescapable fact is that those who ratified the amendment did not think it outlawed segregated education."); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 12–13 (1991) ("There is very little doubt that most of the [Framers of the Fourteenth Amendment] assumed that segregated public schools were, at the time, entirely consistent with the Fourteenth Amendment."); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955) (finding that the Fourteenth Amendment, "as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation"); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983) (concluding that "[i]f we asked [the framers] whether the amendment outlawed segregation in public schools, they would answer 'No'").

431. Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457, 457 (1996). For a powerful critique of the consensus position, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 955–84 (1995).

thirty-seven states had de jure racially segregated public schools.[432] However, even if *Brown* violated the original meaning of the Clause, its ruling was not radically contrary to the Clause's original meaning because the overall purpose of the Clause was to remove the incidents of slavery of black Americans,[433] a purpose with which *Brown* comports.

Brown is not like other applications of the Clause, which have deviated much further from the Clause's original meaning. For example, Justice O'Connor argued in her concurrence in *Lawrence v. Texas* that the Texas statute, which prohibited homosexual sodomy, violated the Clause.[434] O'Connor relied on the claim that the Equal Protection Clause "'is essentially a direction that all persons similarly situated should be treated alike,'"[435] to find that Texas law was motivated only by "a desire to harm a politically unpopular group,"[436] and hence was not rational and was therefore unconstitutional. This entire string of claims is only remotely related to the original meaning of the Clause. In sum, if *Brown* deviated from the original meaning of the Constitution, its deviation was not great.

The second factor is whether overruling the nonorginalist precedent would harm Rule of Law values. The no-segregation rule announced in *Brown* is easy to apply and it was clearly stated.[437] The no-segregation rule of *Brown* has been consistently applied by the Supreme Court, lower federal courts, and state courts. The rule is now, over fifty years later, deeply embedded in our law, not only in the case law following and implementing *Brown*, but through federal and state statutes, such as the Civil Rights Act of 1964,[438] which enforces and expands upon the *Brown* rule. Further, state and federal institutions such as schools and public accommodations premise their mode of operation on the *Brown* rule, and many federal and state institutions are charged with ensuring the implementation of *Brown*. In sum, overruling *Brown* would cause great harm to the Rule of Law values served by precedent.

Last is the question of the non-legal justness of the precedent. As explained above in the discussion concerning the third factor, *Brown* is a clear example of a nonoriginalist decision creating rightly ordered relationships. In conclusion, assuming that *Brown* is a nonoriginalist precedent, application of my theory of originalist precedent likely calls for a judge to refrain from overruling *Brown*.

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432. Michael J. Klarman, *An Interpretative History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991).

433. *See* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.7, at 310 (3d ed. 1999) ("Their central concern throughout the debate was securing some rights for freed blacks which state governments (or a future Democratic Congress) could not disregard.").

434. 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

435. *Id.* (quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)).

436. *Id.* at 580.

437. The only substantial question was the breadth of the rule, which was relatively quickly resolved by the Court in subsequent cases:

> Although *Brown* technically invalidated the separate but equal doctrine only as applied to education, a series of Court decisions soon came down which indicated the invalidity of that doctrine in other areas as well: public beaches and bathhouses, municipal golf courses, buses, parks, public parks and golf courses, athletic contests, airport restaurants, courtroom seating, and municipal auditoriums.

3 ROTUNDA & NOWAK, *supra* note 433, § 18.8, at 332–33.

438. 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to -e17 (2000).

b. *Roe v. Wade* and Its Progeny

Roe held, in 1973, that a woman has a constitutionally protected right to abortion.[439] The constitutional right announced in *Roe* is a large departure from the original meaning of the Due Process Clause of the Fourteenth Amendment. First, the Due Process Clause did not have substantive content when enacted.[440] Therefore, finding substantive rights in the term "liberty" is contrary to the original meaning. Second, when the Due Process Clause was ratified in 1868, all states had limits on abortion, many states strictly limited abortion, and the trend was toward complete prohibition of abortion except in rare cases.[441] Therefore, the original meaning of "liberty" did not encompass a right to abortion. Further, the primary goal of the Due Process Clause was to ensure that newly freed black Americans were protected from arbitrary deprivations simply because of racial animosity.[442] This is a concern far from preventing states from prohibiting the killing of unborn human beings.

In contrast to *Brown*, overruling *Roe* would likely not harm Rule of Law values, although there are factors pointing in both directions. The rule announced in *Roe* (although not the rule in *Casey*) was clear and relatively easy to apply.[443] Also, the principle of individual autonomy that *Roe* took from *Griswold v. Connecticut*[444] is embedded in some parts of the Court's case law.[445] However, there is also case law that limits the principle relied upon by *Roe*.[446] There are numerous state and federal laws that attempt to limit *Roe*, along with several attempts at overruling it. These include partial birth abortion bans;[447] repeated attempts at a constitutional amendment to end abortion;[448] the annual introduction of the Hyde Amendment, which prohibits federal funding for abortions;[449] restrictions on the use of military facilities

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439. 410 U.S. 113, 164–65 (1973).

440. *See, e.g.*, ELY, *supra* note 69, at 98.

441. For a discussion of the legal history of abortion, see, for example, Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 827–39 (1973); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 365–416 (1979); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1267–92 (1975); and James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985).

442. 3 ROTUNDA & NOWAK, *supra* note 433, § 18.8, at 309–10.

443. For a discussion of *Casey*, see *supra* notes 23–30 and accompanying text.

444. 381 U.S. 479 (1965).

445. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 565 (2003); Romer v. Evans, 517 U.S. 620 (1996).

446. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (observing that only those rights that are "deeply rooted in this Nation's history and tradition" are fundamental rights (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)); Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (using the same proposition); *see also* Paulsen, *supra* note 2, at 1557–62 (arguing that *Glucksberg* significantly undercut *Roe*).

447. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C.A. § 1531 (West Supp. 2005)). States have also imposed partial-birth abortion bans. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3603.01 (Supp. 1999); ARK. CODE ANN. § 5-61-203 (2005); FLA. STAT. ANN. § 390.0111 (West Supp. 2002); 720 ILL. COMP. STAT. § 513/5 (1999); MICH. COMP. LAWS ANN. § 333.17016(5)(c) (West Supp. 2000); NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999); N.J. STAT. ANN. § 2A:65A-6(e) (West Supp. 2001); OHIO REV. CODE ANN. § 2919.15(A) (West 1997).

448. *See, e.g.*, S.J. Res. 12, 96th Cong. (1980).

449. *See, e.g.*, Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926; Act of Oct. 12, 1979, Pub. L. No. 96-86, § 118, 93 Stat. 656, 662; Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586; Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460; Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434.

to provide abortions;[450] attempts to restrict federal court jurisdiction over abortion cases;[451] recognition that unborn children are criminal victims;[452] recognition that unborn children are human beings;[453] and requiring parental notification.[454]

Unlike *Brown*, there are no governmental institutions built to ensure widespread acceptance and compliance with *Roe*. Instead, *Roe* and abortion continue to be what is likely the most divisive issue in American legal and social life. *Roe* has also been incredibly harmful to the institutional integrity of the Supreme Court and the Rule of Law, as the plurality in *Casey* recognized.[455] Further, federal and state governments have taken action to ensure that their governmental apparatuses do not promote—and instead often act to limit—use of the abortion license.[456]

Scholars have severely criticized the broad conception of reliance used by the *Casey* plurality, which makes the ability to procure abortion the nexus of people's lives.[457] A more traditional understanding of reliance would recognize that those women who are pregnant (and those by whom they became pregnant) *may* have acted in reliance on *Roe*.[458] It is questionable whether there are many such persons.[459]

Perhaps obviating the dispute over the nature of reliance is the fact that overruling *Roe* would return the legal landscape to the state-by-state regime that existed prior to *Roe*, with some states permitting and some prohibiting abortion. Thus, reliance by individuals on the right announced in *Roe* could be met in states that permit abortion. In sum, although the conclusion is not as clear as with *Brown*, it is likely that Rule of Law values would *at least* not be significantly harmed by overruling *Roe*, and may in fact be advanced by overruling *Roe*.

Lastly, *Roe* is (non-legally) unjust. The proper relationship between human beings—much less between mother and child—is one of respect: do unto others. This principle is common across the political, ideological, and religious spectrum.[460]

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450. *See, e.g.*, 10 U.S.C. § 1093(b) (2000); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 738, 110 Stat 186, 384; *see also* Memorandum from William Mayer, M.D., Assistant Sec'y of Def. to the Sec'ys of the Military Dep'ts (June 21, 1988), http://www.tricare.osd.mil/policy/memos/abortion.html (last visited Apr. 11, 2006).

451. *See, e.g.*, H.R. 867, 97th Cong. (1981); S. 158, 97th Cong. (1981).

452. *See, e.g.*, Unborn Victims of Violence Act (Laci and Conner's Law) of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C.A. § 1841 (West Supp. 2005)); CAL. PENAL CODE § 187(a) (West 1999); FLA. STAT. ANN. § 782.09 (West 2000); 720 ILL. COMP. STAT. ANN. 5/9-1.2, -2.1, -3.2 (West 2002); MICH. COMP. LAWS SERV. § 750.322 & n.2 (LexisNexis 2003); N.Y. PENAL LAW § 125.00 (McKinney 2004); OHIO REV. CODE ANN. §§ 2903.01–.05, .09 (LexisNexis 2003); 18 PA. CONS. STAT. ANN. §§ 2601–05 (West 1998); TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon Supp. 2004); Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984).

453. *See supra* note 452.

454. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.33 (2001); N.H. REV. STAT. ANN. §§ 132.24–.28 (2006); TEX. FAM. CODE ANN. §§ 33.001–.011 (Vernon 2002 & Supp. 2005).

455. Casey v. Planned Parenthood of Se. Pa., 505 U.S. 833, 855, 861, 866–67, 869 (1992).

456. *See supra* note 447.

457. *See, e.g.*, Paulsen, *supra* note 2, at 1554 ("[T]here is relatively little 'reliance' in the sense of the existing rule having tended to create its own reliance—having caused people to 'sink costs,' so to speak.").

458. *See id.* at 1553 ("Traditionally, [reliance] is thought most apposite in the commercial context, where resources have been committed and investments have been made in reliance on a legal rule or set of rules reflected in judicial decisions.").

459. How many people are sexually intimate in reliance on access to abortion? How many people who otherwise would be sexually intimate would not if *Roe* was reversed?

460. *Luke* 6:31; *see also* ARISTOTLE, *supra* note 409, bk. V; DWORKIN, *supra* note 67, at 7–8 ("[G]overnment must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern."); EMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 433

Roe permits the antithesis of this to flourish: one human being taking the life of another.[461]

In the United States since *Roe*, approximately 46 million abortions have occurred.[462] The result has been the death of those aborted, the broken lives of women who aborted their children,[463] the development and growth of an entire, multi-million dollar industry that preys on the weaknesses and fears of women who are pregnant in unfortunate circumstances,[464] and a coarsening culture that continually devalues human life.[465] Unlike *Brown*, the non-legal *in*justice wrought by *Roe* counsels in favor of its overruling. In conclusion, a judge faced with the question of whether to overrule *Roe* should probably overrule *Roe*.

4. Theory of Judicial Virtue Is Necessary to This Originalist Theory of Precedent

The originalist theory of precedent I have been discussing provides that judges will often have broad discretion to determine how to react to nonoriginalist constitutional precedent. In this subsection, I will discuss the character judges must

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(James W. Ellington trans., 1981) ("For all rational beings stand under the law that each of them should treat himself and all others never merely as means but always at the same time as an end in himself.").

461. Without good reason unlike, for instance, self-defense.

462. Nat'l Right to Life, Abortion in the United States: Statistics and Trends, http://www.nrlc.org/abortion/facts/abortionstats.html (last visited Apr. 11, 2006).

463. The negative effects of abortion include increased physical and mental health problems, *see* Philip G. Ney et al., *The Effects of Pregnancy Loss on Women's Health*, 38 SOC. SCI. MED. 1193, 1196–98 (1994) (finding that abortion has a greater negative impact on women's health than miscarriages); David C. Reardon et al., *Depression and Unintended Pregnancy in the National Longitudinal Survey of Youth: A Cohort Study*, 324 BRIT. J. MED. 151, 152 (2002) ("Among married women, those who aborted were significantly more likely to be at 'high risk' of clinical depression compared to those who delivered unintended pregnancies."); increased rates of suicide and homicide, *see* Mika Gissler et al., *Injury Deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987–2000*, 15 EUR. J. OF PUB. HEALTH 459, 462 (2005) ("In the year after undergoing an abortion, a woman's mortality rate for unintentional injuries, suicide and homicide was substantially higher than among non-pregnant women in all age groups combined."); David C. Reardon et al., *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, 95 S. MED. J. 834, 837–38 (2002) (finding the same); increased maternal substance abuse, *see* Priscilla K. Coleman et al., *Substance Use Among Pregnant Women in the Context of Previous Reproductive Loss and Desire for Current Pregnancy*, 10 BRIT. J. OF PSYCHOL. 255, 261 (2005) ("[H]istory of one induced abortion compared with no history of abortion was associated with a significantly higher likelihood of using substances of all forms during pregnancy...."); Priscilla K. Coleman et al., *A History of Induced Abortion in Relation to Substance Use During Subsequent Pregnancies Carried to Term*, 187 AM. J. OBSTETRICS & GYNECOLOGY 1673, 1677 (2002) ("[T]he results revealed significantly higher rates of consumption associated with a previous abortion, compared with previous birth relative to the use of any illicit drugs and alcohol."); and increased risk of complications in future pregnancies and births, *see* Jean Bouyer et al., *Risk Factors for Ectopic Pregnancy: A Comprehensive Analysis Based on a Large Case-Control, Population-Based Study in France*, 157 AM. J. EPIDEMIOLOGY 185, 192 (2003) (finding an increased risk of ectopic pregnancy from prior induced abortions); Brent Rooney et al., *Induced Abortion and Risk of Later Premature Births*, 8 J. OF AM. PHYSICIANS & SURGEONS 46, 46 (2003) (finding an increased risk of low birth weight and premature birth from prior induced abortions).

464. Abortion is an approximately $500 million per year industry. *See* Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States, 2001*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH, 16, 19 (2003) (finding that in 2001 the average cost of an abortion was $372); Lawrence B. Finer & Stanley K. Henshaw, *Estimates of U.S. Abortion Incidence in 2001 and 2002*, at 7 tbl.1 (2005), *available at* http://www.guttmacher.org/pubs/2005/05/18/ab_incidence.pdf (estimating 1,303,000 abortions in 2001).

465. *See* Nat'l Conference of Catholic Bishops, Abortion and the Supreme Court: Advancing the Culture of Death, http://www.nccbuscc.org/prolife/issues/abortion/culture.htm (last visited May 4, 2006) (noting the coarsening of American culture because of *Roe*). For an example of the coarsening of American culture, see MTV, Yo Mamma, http://www.mtv.com/onair/dyn/yo_momma/about.jhtml (last visited May 4, 2006) ("Yo Momma is a no-holds-barred competition that pits toughest trash-talkers against one another.").

have to properly exercise this discretion. A judge needs certain virtues to be an excellent judge, and most prominent among these is justice and practical wisdom.[466]

The just judge will have respect for, and abide by, the laws of his society. Aristotle defined justice as "act[ing] according to the law"—as the "lawful"—and as "equal."[467] Here, I concentrate on Aristotle's discussion of *justice as lawfulness*, which encompasses both types of justice.[468] Richard Kraut has explained Aristotle's conception of justice as lawfulness as "the intellectual and emotional skill one needs in order to do one's part in bringing it about that one's community possesses [a] stable system of rules and laws."[469]

Aristotle, in explaining justice as lawfulness and why the just man is obligated by the law, relates the law back to the common good:

> [F]urther, it is plain that all Lawful things are in a manner Just, because by Lawful we understand what have been defined by the legislative power and each of these we say is Just. The Laws too give directions on all points, aiming...at the common good of all[:]...those things that are apt to produce and preserve happiness and its ingredients for the social community.[470]

The law is the primary means through which the society secures the ordering necessary to secure the common good. The just person will therefore bring about and uphold society's laws.

A judge's duty is not to second-guess the legislative determination of how the natural law should be made effective.[471] This obedience to the law is the essence of justice as lawfulness. A judge acts unjustly when he refuses to enforce a law simply because the judge believes the law to be imprudent. In doing so, the judge "sets himself up as a rival to the body that has the authority to make laws."[472] The excellent judge will determine cases, if possible, on the basis of the conventional meaning of the laws of his society.[473] The judge must possess the virtue of justice as lawfulness to give the legal materials their due regard.

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466. For a more complete discussion of judicial virtue, *see* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003), *available at* http://ssrn.com/abstract=369940.

467. ARISTOTLE, *supra* note 409, at 1129a.

468. *See* KRAUT, *supra* note 37, at 102–03 (discussing the distinction between the two forms of justice). Kraut explains that justice as lawfulness is the virtue of following the laws of the community, while justice as equality is a narrower concept of giving each his due. *Id.* at 102–03, 107.

469. *Id.* at 106.

470. ARISTOTLE, *supra* note 409, at 1129b.

471. The question of the role of judges in making the natural law effective is one for each society to make; it is a positive and not natural law decision. In fact, Aquinas argued that it is better for judges to act in a secondary law-making role for a number of prudential reasons. AQUINAS, *supra* note 395, pt. I of pt. II, q. 95, art. 1, at 1013–14.

472. KRAUT, *supra* note 37, at 110.

473. The judge has the duty to enforce the natural law *as made effective in the society through the positive law*. Aquinas wrote:

> Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived....Now laws are said to be just, both from the end, when, to wit, they are ordained to the common good,—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver,—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good.

AQUINAS, *supra* note 395, pt. I of pt. II, q. 96, art. 4, at 1019–20.

Judges must also possess and use their practical wisdom[474] to accurately weigh the factors judges must take into account when deciding how to deal with nonoriginalist precedent. Practical wisdom is the virtue of being able to correctly discern in the contingent circumstances in which one finds oneself, what course of action is correct.[475] Contingent matters are the everyday circumstances of our individual and social lives "where there is no definite rule" of action.[476]

Parents know of the necessity for practical wisdom because they are faced with the countless, variable situations that, for example, potentially call for discipline of their children. But knowing when and how one is to discipline one's child is often very difficult to discern because of the competing values, the uncertainty of the facts of the situation, and the uncertain manner by which norms of conduct apply to the child's actions. It is in these "thick" or highly contextualized situations that one has need of practical wisdom, gained by experience[477] or grace,[478] to discern the correct course of conduct.

Judges will utilize their practical wisdom when faced with the legal underdeterminacy caused by nonoriginalist precedent. The judge will have to weigh the various values set out here to determine whether to overrule a nonoriginalist precedent, limit it, or continue to build on it. These questions are highly contextualized; there are no clear norms guiding action. Hence, in order to make accurate judgments, judges will need practical wisdom.

IV. CONCLUSION

In this Article I have advanced an originalist theory of precedent. Under this theory, a judge must exercise discretion to determine which nonoriginalist precedents to overrule. I have offered three criteria that judges should use in making such a judgment. I have also briefly described some of the virtues necessary to make this judgment. My originalist theory of precedent builds on my understanding of originalism, which has at its foundation a conception of the Constitution as a prudential social ordering decision that enables our society to effectively pursue the common good. This understanding of the nature of the Constitution, and of judges as guardians of the constitutional social ordering, is confirmed by the original meaning of judicial power, which includes stare decisis.

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474. More specifically, the type of prudence judges must possess is political prudence "which is directed to the common good of the state." *Id.* pt. II of pt. II, q. 47, art. 11, at 1396.

475. *See id.* pt. II of pt. II, q. 47, art. 1, at 1389 ("Prudence is the knowledge of what to seek and what to avoid.") (emphasis omitted); *see also id.* ("A prudent man is one who sees as it were from afar, for his sight is keen, and he foresees the event of uncertainties.") (emphasis omitted).

476. ARISTOTLE, *supra* note 409, at 1140a.

477. *See id.* at 1142a.

478. *See* AQUINAS, *supra* note 395, pt. II of pt. II, q. 47, art. 14, at 1397–98.