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# The Irrepressibility of Precedent

Michael J. Gerhardt

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# THE IRREPRESSIBILITY OF PRECEDENT\*

MICHAEL J. GERHARDT\*\*

*In this Article, I discuss three important ways in which precedent still matters in constitutional law in spite of some empirical data and normative critiques suggesting otherwise. First, I describe how precedent shapes the Court's institutional practices and secures basic stability in constitutional adjudication. In fact, the Court not only leaves the overwhelming bulk of its prior decisions intact, but also steadfastly employs precedent as the most popular basis for its decisions and mode of argumentation. Second, I describe how the Justices have employed precedents in particular cases during the first two Terms of the Roberts Court. Although the Roberts Court has not yet formally overruled any constitutional precedents, its track record thus far demonstrates the extremely weak constraining force of particular decisions on the path of the Court's constitutional decisionmaking. Third, I suggest a normative defense of precedent in response to the critique that precedent provides a weak if not illegitimate basis for the Court's constitutional decisionmaking. Precedent provides an independent, neutral source on which Justices may constrain or avoid reliance on their personal or political preferences.*

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\*\* Samuel Ashe Distinguished Professor of Constitutional Law and Director, UNC Center on Law and Government, University of North Carolina School of Law. I am grateful to the participants in this Symposium on Precedent and the Roberts Court. I am especially grateful to Colin Baker and Ellinor Coder for their hard work in organizing this Symposium and to Alex May and Paul Zimmerman for their excellent research assistance.

## INTRODUCTION

The most remarkable fact about the Roberts Court's handling of constitutional precedents in its first two Terms is that it was unremarkable. It was unremarkable because it merely tracked the Court's historic patterns in deploying, deferring to, and manipulating constitutional precedents. Yet, this unremarkable fact merits special attention because it is the proverbial dog that did not bark in the night<sup>1</sup>: it reveals that the role of precedent in constitutional adjudication over the past two years was no different than it has been for more than a century.

In this Article, I will illustrate how, in its first two Terms, the Roberts Court's jurisprudence reflected an essential dynamic in constitutional adjudication, a dynamic that persists in spite of shifts in the ideological composition of the Court. This dynamic is the duality of precedent, which entails its simultaneous functioning at both macro and micro levels in constitutional adjudication. In other words, precedent functions, *inter alia*, as both a durable source of argumentation and authority across cases, over time, and as particular, prior decisions whose authority and meaning are at issue in specific constitutional disputes. This duality of precedent helps to explain why on one level constitutional law is relatively stable, while on another level—closer to the ground, so to speak—it can appear to observers as if there were a great deal of flux in particular areas of constitutional doctrine. This Article aims to show that the duality of precedent is a constant phenomenon in constitutional law and that it is no contradiction for precedent to operate simultaneously as shaping the Court as an institution and as sources of decision within individual constitutional disputes.

In each Part, this Article shows a different way in which the basic duality of precedent is evident. In Part I, I examine precedent from the perspective of historical institutionalism, a perspective which focuses on historic patterns in the Court's decisionmaking over time, and not just on the aggregation of the individual votes of the Justices in particular cases.<sup>2</sup> An institutionalist perspective suggests, perhaps contrary to the expectations of many, that there is relative stability in constitutional doctrine. There are, in fact, only a few discrete areas in

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1. See SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335, 349 (1927) (referring to the significance of the fact that the "dog did not bark").

2. On historical institutionalism as a perspective on constitutional law, see generally MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS, at xviii–xix, 2–3 (2003).

which the Court is shifting or modifying its case law at any given time. Even within these areas, shifts in doctrine are often modest rather than radical. Moreover, precedent is an enduring modality of constitutional argumentation. Indeed, it has long been the single most popular source of constitutional authority on which the Court relies.

In Part II, I shift my perspective from historical institutionalism to a case-by-case analysis of the Roberts Court's handling of precedent. From this perspective, it is evident that particular constitutional precedents generate little path dependency—that is, they impose very little constraint on the choices of individual Justices in individual constitutional disputes. While some scholars would prefer that the Roberts Court had reached more liberal outcomes or construed some precedents more liberally than it did,<sup>3</sup> they fail to account for the multiple factors precluding most constitutional precedents from generating relatively strong path dependency in constitutional adjudication. Among the most important of these factors is the extent to which a particular precedent has been cited with approval or disapproval in constitutional adjudication, an aspect of what I believe are its network effects. In fact, the precedents which have provided the least constraint on the Roberts Court have been cited with quite minimal or no approval by the Court in prior cases. Even older precedents often lack the potency to constrain the Justices from doing what they please unless they have been cited with so much approval for so long that their meaning or significance has been fixed or entrenched in constitutional law.

In the third and final Part, I shift to a normative perspective. I suggest that the doctrine of constitutional stare decisis has the virtue of facilitating the constitutional ideal of judicial restraint. Fidelity to precedent—particularly prior decisions whose network effects are relatively extensive—allows the Justices to ground their decisions on a lawful source of authority independent from their personal preferences. This is especially true for Justices who profess to be committed to judicial modesty, which requires respecting the judgments of others.

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3. See, e.g., Linda Greenhouse, *On the Wrong Side of 5 to 4, Liberals Talk Tactics*, N.Y. TIMES, July 8, 2007, § 4, at 3 (describing liberal scholars' reactions to several Roberts Court's decisions, including Cass Sunstein's plea for the Court's liberals to express "a more heroic vision").

## I. THE INSTITUTIONAL PERSPECTIVE ON PRECEDENT

An institutional perspective differs from the popular method of social scientists merely to aggregate the individual votes of the Justices in particular cases. This institutional analysis measures the historical patterns in the functioning of precedent, including how it facilitates stability, in constitutional adjudication over time.<sup>4</sup>

There are three particularly noteworthy patterns. First, a survey of the 133 cases in which the Court has expressly overruled itself<sup>5</sup> indicates that the Court overrules constitutional precedents in some areas more than in others.<sup>6</sup> In particular, the areas in which the Court has overruled itself six or more times are criminal procedure (forty), Fourteenth Amendment Due Process Clause (nineteen), the Commerce Clause (eighteen), Fourteenth Amendment Equal Protection Clause (eight), Eleventh Amendment (seven), Article I other than Commerce Clause (six), and freedom of expression or speech (six).<sup>7</sup> The Court has overruled itself fewer than six times in other areas of constitutional law. This suggests, *inter alia*, that *most* areas of constitutional law have had relatively few of the sharpest, most extreme shifts in constitutional law—namely, explicit overrulings.

In its first two Terms, the Roberts Court did not, however, overrule a single constitutional case. One would have to go back to the early Warren Court to find the last time the Supreme Court went a whole Term without overruling at least one constitutional precedent.<sup>8</sup> Moreover, neither of the Court's two newest Justices—Chief Justice Roberts and Justice Samuel Alito, Jr.—voted to overrule, or joined any opinion urging the overruling of, a constitutional precedent.

The second significant pattern is that most areas of constitutional law are relatively well-settled. These areas include not only the constitutionality of legal tender and incorporation of most of the Bill

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4. See *supra* note 2 and accompanying text.

5. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 206–45 tbl.1 (2008). Table 1 shows, *inter alia*, that in 133 cases, the Court has expressly overruled 208 of its constitutional precedents. The difference between the numbers of overruling and overruled cases is attributable to the fact that in many of the overruling cases the Court overruled more than one precedent. Indeed, in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Burger Court overruled more than thirty constitutional precedents. *Id.*

6. See GERHARDT, *supra* note 5, at 246 tbl.2.

7. *Pennhurst* skews the results of a survey of the areas in which the Court has overruled itself most often. See *id.* at 233.

8. See *id.* at 12 (describing the explicit overrulings made by the Warren Court).

of Rights to the states (through the Fourteenth Amendment Due Process Clause), but also landmark precedents upholding fundamental rights of men and women to marry, the fundamental right to use contraception, and landmark legislation on Social Security, environmental protection, and civil rights.<sup>9</sup>

There are also numerous areas of well-settled constitutional law outside of the courts. These areas comprise the domain of nonjudicial precedent (nonjudicial actors' past constitutional judgments which public authorities seek to invest with normative authority).<sup>10</sup> A short but illuminating list of stable, resilient nonjudicial precedents encompasses such diverse constitutional subjects as the scope of a President's pardon power, the scopes of the House's and Senate's respective impeachment authorities and authorities to determine their respective rules of internal governance, presidential succession, the scope of a President's veto authority (or the grounds on which he may exercise his veto authority), and the scope of the Senate's advice and consent authority.<sup>11</sup>

Third, there is strong evidence of the Court's adherence to precedent as a modality of constitutional argumentation. For instance, studies show that by 1900 the Supreme Court had settled into the practice of citing and relying upon its precedents as modalities of argumentation and sources of decision in at least ninety percent of its constitutional decisions.<sup>12</sup> The Roberts Court steadfastly maintains this practice<sup>13</sup>: In every constitutional case decided in its first two Terms, the Court claimed precedent as a basis for its decision. When one examines the modalities of constitutional argumentation (or sources of decision) employed by the individual Justices on the Roberts Court, the same pattern holds for every single Justice but Clarence Thomas. In every constitutional opinion in which the other eight Justices wrote or joined, precedent was claimed

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9. For these and other settled disputes, see generally *id.* at 44–46, 177–98.

10. For a more detailed discussion of nonjudicial precedent, see generally Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. (forthcoming May 2008), available at <http://ssrn.com/abstract=1011505>.

11. On the finality of these and other nonjudicial precedents, see generally GERHARDT, *supra* note 5, at 131–35.

12. See, e.g., James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16, 19 (2008), available at <http://ssrn.com/abstract=1008032>.

13. My research assistants and I surveyed all of the constitutional cases decided by the Roberts Court in its first two Terms to determine the relative frequency with which the Justices relied upon the different modalities of constitutional decisionmaking. We measured reliance on a particular modality as not merely a string cite to it, but rather as an actual discussion of its relevance as grounds for the Court's eventual decisions. (Data on file with the North Carolina Law Review).

as a basis for the decision. For Justice Thomas, precedent was claimed as a basis for the decision in all but three of the constitutional cases he wrote or joined.<sup>14</sup> None of the other conventional modes, such as text, structure, and original meaning, comes close.

Even more startling may be the relative percentages for each of the Justices' references to, or reliance on, each of the conventional modalities of constitutional argument. The next most common modalities are variations of precedent. For instance, history encompasses historical practices, tradition, and custom, all of which are different forms of nonjudicial precedent (defined as any nonjudicial actor's past constitutional judgments that nonjudicial actors seek to invest with normative authority). Thus, Supreme Court precedent was cited as a basis for the decision in all thirty-three constitutional opinions that Chief Justice Roberts wrote or joined in the 2006 Term, and historical practices were claimed as a basis for the decisions in seventeen cases. In contrast, the text of the Constitution was cited as a basis for the decision in merely two of the thirty-three cases, while three of the thirty-three cases relied on ethos—the notion of a national identity, which is, practically speaking, merely another category of nonjudicial precedent. Perhaps tellingly, none of the thirty-three cases claimed original meaning in support of the decisions. The statistics for Justice Alito in the 2006 Term are similar: in the thirty-seven constitutional cases in which he either wrote or joined opinions, the Court's precedents were cited as a basis for the decisions in all but one of the cases, and historical practices are cited as a basis for nearly fifty percent of the cases (eighteen of the thirty-seven cases). In contrast, only one of the thirty-seven cases actually discussed original meaning as a specific basis for its decision.<sup>15</sup>

Even Justices Scalia and Thomas, contrary to the expectations of most people, prioritized precedent over all other sources of decision. Indeed, no other source came close for either Justice. For instance, in the thirty-nine constitutional cases in which Justice Scalia either wrote or joined opinions in the 2006 Term, precedent was a basis for the decision in all of the cases. In contrast, historical practices were claimed as a basis for the decisions in twenty of those cases, but original meaning was cited as a basis for the decisions in only three of

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14. See *Uttecht v. Brown*, 551 U.S. \_\_\_, 127 S. Ct. 2218 (2007); *L.A. County v. Rettele*, 550 U.S. \_\_\_, 127 S. Ct. 1989 (2007); *Cunningham v. California*, 549 U.S. \_\_\_, 127 S. Ct. 856 (2007).

15. See *Schriro v. Landrigan*, 550 U.S. \_\_\_, 127 S. Ct. 1933 (2007).

the thirty-nine cases.<sup>16</sup> While historical practices were cited as a basis for the decisions in the nineteen constitutional opinions written or joined by Justice Thomas, original meaning was cited as a basis for the decision in only five of those cases.

The Court's two newest Justices exhibited almost exactly the same relative level of reliance on precedent in their first Term as they did in the 2006 Term. The percentages of their relative reliance on the different sources of constitutional decision are nearly the same, with precedent being the only source claimed in each of the constitutional decisions which they wrote and joined. Moreover, rather than weaken constitutional precedents in his first year on the Court, Chief Justice Roberts actually joined Justice Breyer's opinion in *Randall v. Sorrell*,<sup>17</sup> which expressly reaffirmed the Court's embattled precedent, *Buckley v. Valeo*.<sup>18</sup>

The basic statistics do not prove—but strongly suggest—that the deployment of precedent is more than strategic. If, as Professors Lee Epstein and Jack Knight have suggested, everyone within the legal system or our constitutional culture believed precedent did not matter, then no one would bother to cite it.<sup>19</sup> The Justices persistently ground or frame their decisions in precedent precisely because people (especially lawyers and judges) believe that precedent does matter. In other words, the omnipresent reliance on precedent is not merely a universal cipher, but rather a reflection of the persistent recognition of its influence in constitutional law.

The fact that Justices appear to manipulate precedent does not, however, mean they do not respect it. Instead, the Justices merely could be opting for one of several plausible constructions of prior decisions, or the outcomes in particular cases could be hard to reconcile because, as the product of a collegial or multimember institution, they are likely to be inconsistent.<sup>20</sup>

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16. See *Morse v. Frederick*, 551 U.S. \_\_\_, 127 S. Ct. 2618 (2007); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. \_\_\_, 127 S. Ct. 2553 (2007); *Schriro v. Landrigan*, 550 U.S. \_\_\_, 127 S. Ct. 1933 (2007).

17. 548 U.S. \_\_\_, 126 S. Ct. 2749 (2006).

18. 424 U.S. 1 (1976). In a separate concurrence, Justice Alito stated that the Court need not have addressed the question of stare decisis because it had not been raised by the respondents before oral argument. *Randall*, 548 U.S. at \_\_\_, 126 S. Ct. at 2500–01 (Alito, J., concurring in part and concurring in the judgment).

19. See Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1020–23 (1996).

20. See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 955–57 (2008).



Last but not least, the Court's decisions reflect another resilient norm in constitutional adjudication—one that I call the golden rule of precedent. This rule provides that Justices generally recognize that they need to respect the precedents of others or else risk having other Justices treat their preferred precedents with disdain. Consequently, Justices tend to pick carefully the cases they will challenge. Indeed, one statistic suggestive of this propensity is that the Justice who urged the overruling of constitutional precedents more than any other was Clarence Thomas, who on average has urged only overruling 2.07 constitutional precedents per Term (from the date of his appointment to the end of the Rehnquist Court).<sup>21</sup> It is plausible that, given Justice Thomas's frequently expressed commitment to original meaning, he is probably at odds with more than two constitutional precedents he is called upon to review per Term; but he does not urge the overruling of every precedent he deems wrongly decided. The other Justices, including Justice Scalia, vote to overrule precedent urging overruling only once per Term.<sup>22</sup> None of these Justices appear to be strongly disposed to overrule many precedents.

## II. THE LIMITED PATH DEPENDENCE OF PARTICULAR PRECEDENTS IN THE ROBERTS COURT'S FIRST TWO TERMS

For many people, the most significant achievement of the Roberts Court to date might be its severe weakening of several constitutional precedents, especially during the 2006 Term. In particular, in three cases decided in the 2006 Term, the Roberts Court ruled exactly the opposite from what the Court had ruled in previous cases. For instance, in *FEC v. Wisconsin Right to Life*<sup>23</sup> ("WRTL") the five-member majority of the Roberts Court held unconstitutional a provision of the Bipartisan Campaign Reform Act that limited expenditures by corporations,<sup>24</sup> even though the Court had upheld the same provision four years earlier.<sup>25</sup> Similarly, in *Gonzales v. Carhart*,<sup>26</sup> (*Carhart II*) the same five-member majority upheld the constitutionality of a federal partial-birth abortion law,<sup>27</sup> even though the Court had struck down a nearly identical state partial-birth

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21. See GERHARDT, *supra* note 5, at 12.

22. *Id.*

23. 551 U.S. \_\_\_, 127 S. Ct. 2652 (2007).

24. *Id.* at \_\_\_, 127 S. Ct. at 2659.

25. See *McConnell v. FEC*, 540 U.S. 93, 209 (2003).

26. 550 U.S. \_\_\_, 127 S. Ct. 1610 (2007).

27. *Id.* at \_\_\_, 127 S. Ct. at 1639.

abortion law in 2000.<sup>28</sup> Moreover, in *Hein v. Freedom from Religion Foundation*,<sup>29</sup> the same five-member majority held that individual taxpayers had no standing to assert an Establishment Clause challenge to President George W. Bush's faith-based initiatives,<sup>30</sup> even though more than forty years earlier in *Flast v. Cohen*,<sup>31</sup> the Warren Court had recognized that taxpayers had standing to assert an Establishment Clause challenge to the constitutionality of congressional expenditures. In yet another case, *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>32</sup> the Court struck down the voluntary desegregation plans of two municipalities in spite of their similarity to what Justice Stephen Breyer described as the "efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake."<sup>33</sup>

It is important, however, not to overstate the significance of what the Roberts Court did in *Carhart II*, *Hein*, and *Parents Involved*. First, in each of these cases, the Roberts Court primarily grounded its decision on earlier decisions. In fact, the weakening of *some* precedents in these cases corresponded with the Roberts Court's adherence to, or strengthening of, *other* precedents. For instance, while the Court did not overrule *Flast*, *Flast* had long been in tension with a more extensive line of precedents in which the Court has consistently rejected taxpayer standing to assert constitutional claims against congressional or presidential activities on bases other than the Establishment Clause.<sup>34</sup> Hence, the Court in *Hein* was clearly aligning itself with the separation of powers and other constitutional concerns in which these latter cases were grounded rather than those expressed in *Flast*.<sup>35</sup> While the taxpayer plaintiffs in *Flast* and *Hein*

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28. See *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000).

29. 551 U.S. \_\_\_, 127 S. Ct. 2553 (2007).

30. *Id.* at \_\_\_, 127 S. Ct. at 2559.

31. 392 U.S. 83 (1968).

32. 551 U.S. \_\_\_, 127 S. Ct. 2738 (2007).

33. *Id.* at \_\_\_, 127 S. Ct. at 2800 (Breyer, J., dissenting); see also *id.* at \_\_\_, 127 S. Ct. at 2811 ("A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals . . .").

34. For a discussion of some of the case law conflicting with *Flast*, see RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 130–31 (5th ed. 2003).

35. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 349–60 (1996) (holding that delays in access to legal materials and assistance in the Arizona prison system did not violate the constitutional right of access to courts and that parties were not actually injured by legitimate delay); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 476–82 (1982) (holding that plaintiff organization lacked standing

were each asserting Establishment Clause claims, the fact that the Court had in other cases denied taxpayer standing to challenge executive branch actions was also clearly important, if not dispositive, to the majority.<sup>36</sup>

Moreover, the complaint that the Roberts Court unfairly weakened some Supreme Court precedents fails to come to grips with the generally limited path dependency of these precedents.<sup>37</sup> There are many factors preventing particular precedents from constraining Justices from ruling as they would like.<sup>38</sup> Among the most important of these factors are the network effects of precedents.<sup>39</sup> The meaning of a precedent depends heavily on what subsequent Justices think (and say) it means. The more a precedent is cited for the same proposition, the more fixed its meaning becomes; however, the less often it is cited (either at all or for the same proposition of law), the less secure its meaning in constitutional law.<sup>40</sup> In both *Carhart II* and *WRTL*, there was but a single precedent arguably on point and thus no opportunity to rely on a meaning of the case fixed by other decisions. These two cases were the first opportunities the Court had to determine the meaning and significance of *Stenberg v. Carhart*<sup>41</sup> and *McConnell v. FEC*,<sup>42</sup> respectively. It should not be surprising to find that cases with minimal or no supporting network of citations have very weak or perhaps no constraining power. The absence of a pattern of approving citations to the construction of a particular precedent makes it easier for a majority to avoid adherence to any particular construction.

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because the transfer of federally owned property to a religious school did not satisfy the Article III requirement of personal injury).

36. See, e.g., *Allen v. Wright*, 468 U.S. 737, 766 (1984) (holding that parents of black children attending public schools did not have standing to challenge the Internal Revenue Service's failure to adopt standards sufficient to deny tax-exempt status to racially discriminatory schools because any injury based on inability to receive an education in an integrated school was not traceable directly to the IRS' conduct).

37. See Gerhardt, *supra* note 20 *passim*.

38. I hasten to add that the evident limited path dependency of precedent does not make it unique among the conventional sources of constitutional argumentation and sources of decision. For instance, in the hard cases that come before the Court both the text and original meaning of the Constitution are subject to many of the same factors that impede the path dependency of precedent.

39. See generally GERHARDT, *supra* note 5, at 109–10 (describing how the network effects of precedent influences Justices' willingness to follow or to disregard that precedent).

40. *Id.*

41. 530 U.S. 914 (2000).

42. 540 U.S. 93 (2003).

The extent and nature of a precedent's network of citations influence the strength of its constraining power. Although a seminal case may be seminal in part because it has substantial network effects, the clarity of its significance and meaning in constitutional law depends on the consistency and uniformity with which the Court and other public authorities have cited it. In other words, even a seminal case may not have much constraining force if the Court has failed to consistently invest it with the same meaning over time. The more often a case is cited for the same proposition, the more fixed its meaning or significance in constitutional law it may become. But, again, the corollary is also true—the less often a precedent is cited for a particular proposition, the less certain it becomes for that precedent to stand for that particular proposition.

This corollary helps to explain the Court's decision in *Parents Involved*. There, the Court considered the constitutionality of Seattle's and Louisville's voluntary desegregation plans, which employed race as a factor in school assignments.<sup>43</sup> The Court struck down both plans and found that neither was compelled by its seminal decision in *Brown v. Board of Education*<sup>44</sup> or its progeny, including *Grutter v. Bollinger*,<sup>45</sup> which had barely upheld the constitutionality of a state's employing race as a factor in graduate and professional school admissions. Criticism of the Roberts Court for not following *Brown* and *Grutter* rests on the mistaken premise that these two cases could only be read in one way in *Parents Involved*. While the case of *Grutter* was too new to have any fixed network of citations, *Brown* and its progeny have been cited, at least since the mid-1990s, to support subjecting any race-based classification to strict scrutiny.<sup>46</sup> This is true in spite of the fact that *Brown* said nothing about the level of scrutiny it was employing. Thus, Chief Justice Roberts in *Parents Involved* claimed to be following precedents when he subjected Seattle's and Louisville's voluntary desegregation plans to strict scrutiny.<sup>47</sup> There was nothing new about applying strict scrutiny in *Parents Involved*; indeed, in *Grutter* the Court employed strict

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43. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_, \_\_\_, 127 S. Ct. 2738, 2746 (2007).

44. 347 U.S. 483 (1954).

45. 539 U.S. 306 (2003).

46. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (applying strict scrutiny in striking down the use of racial classifications to award federal contracts); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (applying strict scrutiny to strike down a minority set-aside program).

47. *Parents Involved*, 551 U.S. at \_\_\_, 127 S. Ct. at 2774.

scrutiny.<sup>48</sup> Nor was it unreasonable for the Chief Justice to conclude that the Seattle and Louisville desegregation plans at issue were not narrowly tailored (even assuming they were supported by compelling justifications).<sup>49</sup>

Yet another critique of the Roberts Court's handling of precedent is that its willingness to weaken, if not implicitly overrule, some precedents reflects a disturbing lack of candor by the Court. Some commentators might protest that Justices such as John Roberts, Jr. and Samuel Alito, Jr. should candidly acknowledge that they are overruling earlier decisions rather than pretend that they are doing something different.<sup>50</sup>

This criticism is overstated. Indeed, it is antithetical to the notion of judicial minimalism usually championed by Professor Sunstein.<sup>51</sup> The theory of judicial minimalism is not designed to maximize candor, clarity, or elaboration in particular constitutional cases. Instead, it is designed to do the opposite: to have courts say as little as possible and thus leave ample room for democratic actors to address a disputed question of constitutional law.<sup>52</sup> Yet, the complaint that the Court should have acknowledged it was overruling a precedent in *Carhart II* rests on the assumption that the Court had a duty to say more than it did. It is, however, unclear why the Justices should be compelled to do anything more than what they did in that case. It is plausible that three members of the majority in *Carhart II*—Chief Justice Roberts and Justices Kennedy and Alito—were not prepared to overrule *Stenberg*. They might have wanted to put that question off to another day, or preferred to allow more time for the Court and democratic actors to address the necessity of overruling

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48. See *Grutter*, 539 U.S. at 326.

49. Where a precedent has been consistently cited—and even reaffirmed—for the same basic purpose, its network effects may be hard to ignore. This seems to explain why the Chief Justice joined Justice Breyer's opinion reaffirming *Buckley*. See *supra* text accompanying notes 17–18. *Buckley* is older than *McConnell* or *Stenberg* and thus has generated more network effects than either of those cases.

50. See Cass R. Sunstein, *Minimalists v. Visionaries: The Real Divide on the Supreme Court Is Between Two Kinds of Conservatives*, WASHINGTONPOST.COM, June 28, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/28/AR2007062800991.html>.

51. See Cass Sunstein, *Implicitly Theorized Arguments in Constitutional Law*, 74 SOC. RES. 1, 13 (2007) [hereinafter Sunstein, *Implicitly Theorized Arguments*]; Cass R. Sunstein, *The Virtues of Simplicity*, 116 YALE L.J. POCKET PART 70, 70 (2006), [http://thepocketpart.org/images/pdfs/63\\_b.pdf](http://thepocketpart.org/images/pdfs/63_b.pdf) [hereinafter Sunstein, *The Virtues of Simplicity*].

52. See Sunstein, *Implicitly Theorized Arguments*, *supra* note 51, at 13; Sunstein, *The Virtues of Simplicity*, *supra* note 51, at 70.

*Stenberg*. It is also plausible that the majority in *Carhart II* could agree on the outcome but not all of its ramifications.

Of course, none of this is meant to suggest that anything goes, or should go, when the Court construes its own precedents. To the contrary, in any given case, the parties, lower courts, prior precedents, and other possible authorities (through the creation of precedents in various forms such as historical practices) help to frame for the Court a relatively finite range of plausible constructions of precedent. But framing an issue is not the same thing as deciding it. Once an issue is framed, the Justices must still decide it, and that means they must choose from among a range of plausible constructions of precedent. Because there are no established rules to guide the Justices' constructions of precedent, they are rarely constrained by a single case unless it has a rigidly fixed meaning established by the Court through a series of decisions. Unless a precedent has a rigidly fixed meaning, current or future Justices have the latitude to choose which meaning to invest it with. The critical thing is to figure out, for any given case, the particular meaning of a prior case that the Court is trying to reinforce or establish. The Roberts Court can, like any other Court, try to invest a specific precedent with a particular meaning or significance. In time, however, it is bound to discover, as other Courts have, that it has limited control over what other Courts do to its precedents. In other words, the Roberts Court cannot do much to prevent the precedents it makes from being reconstructed by its successors.

### III. A NORMATIVE PERSPECTIVE ON PRECEDENT IN THE (RECENT) SUPREME COURT

This final Part sets forth a normative defense of fidelity to precedent (and particularly to the doctrine of constitutional stare decisis). In this Symposium, Michael Paulsen has reiterated the arguments he has previously made that the doctrine of constitutional stare decisis has no constitutional legitimacy and is nothing more than a set of policy judgments subject to regulation by Congress.<sup>53</sup> But the doctrine—unlike my friend Michael Paulsen's attacks on the legitimacy of constitutional stare decisis—rests on every conventional source of constitutional meaning. First, the constitutional text authorizes Article III courts, including the Supreme Court, to decide

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53. See, e.g., Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1121 (2008).

"all Cases . . . arising under the Constitution."<sup>54</sup> One may easily infer from this language that the Court has the power to decide constitutional cases, that a decided constitutional case is a precedent, and that such a precedent is part of the supreme law of the land unless or until it is overruled by the Court or displaced by a constitutional amendment. A plain inference from the formal amendment process required by Article V is that it provides the exclusive process for formally altering the meaning of the Constitution (presumably as found by the Court or other constitutional authorities).<sup>55</sup> Second, the Framers and Ratifiers regarded precedent as an important feature of the legal system they inherited from the British and used in the colonies prior to ratification. For instance, the Federalist Papers explicitly make reference to precedent in the course of discussing constitutional law.<sup>56</sup> Third, the doctrine of constitutional stare decisis is a reasonable inference to be drawn from the structure of the Constitution. The federal judiciary was one of the three branches created by the Framers, and people generally understood, both before and after ratification, that courts, in the course of discharging their duties, produced and maintained precedents.<sup>57</sup> Fourth, pragmatic considerations—or concerns about consequences—support the doctrine of constitutional stare decisis. A court's inherent authority extends to taking into account the practical ramifications of its judgments, including those to overrule—or not overrule—its precedent.<sup>58</sup> Finally, historical practices overwhelmingly support the doctrine of constitutional stare decisis. While it took almost a century for this doctrine to finally take shape, the Court has consistently recognized it as a permanent feature of the system of constitutional adjudication. If there were ever a thing like superprecedent—prior case law which is practically immune to reconsideration—the doctrine of constitutional stare decisis would seem to qualify.<sup>59</sup>

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54. U.S. CONST. art. III, § 2, cl. 2.

55. U.S. CONST. art. V.

56. See THE FEDERALIST NO. 78 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that [the judges] be bound down by strict rules and precedents . . .").

57. See Thomas Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 662–66 (1999); *supra* note 56 and accompanying text.

58. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 576 (2001).

59. See generally Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006) (defining the concept of a superprecedent).

My last reference to superprecedent touches upon a feature of the doctrine of constitutional stare decisis that seems especially troublesome to Professor Paulsen. He is concerned about the Court basing a judgment not on a correct reading of the Constitution but rather simply on the fact that the Court previously had made that judgment.<sup>60</sup> To be sure, I think the Court rarely does this. Nevertheless, there may be several compelling reasons to regard such a decision as constitutionally legitimate. First, even this kind of decision is supported by all the conventional sources of constitutional meaning.<sup>61</sup> Among these, no doubt, are both historical practices and pragmatic considerations. It is not an act of judicial policymaking to take into consideration the extent to which deviating from a very well-settled practice would disrupt our social order. In his confirmation hearings, Chief Justice Roberts expressed concern that overruling a precedent would be a “‘jolt to the legal system.’”<sup>62</sup> It follows that at least he, if not all other Justices, would avoid reaching a particular judgment if he thought it would produce too great a shock to the legal system. He and other Justices who share this same attitude about constitutional stare decisis are acting well within their inherent authority to consider the impact of their decisions on the Court and society when reconsidering precedents.

Second, the point at which a well-settled practice becomes, by virtue of being well-settled, practically immune to reconsideration is the point at which that precedent has become a superprecedent. Nothing becomes a superprecedent, at least in my judgment, unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress. For instance, when Professor Fallon states that “[a] Court that today overruled settled precedents and held Social Security or paper money to be unconstitutional would exceed its lawful authority,” he is acknowledging that all public authorities have accepted, at least implicitly, the constitutionality of Social Security as a settled matter.<sup>63</sup> Some people may believe that Social Security is not constitutional, but Social Security, at least as a durable social fact in this country, is quite easy to see.

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60. See Paulsen, *supra* note 53, at Part I.B.2.

61. See *id. passim*.

62. Liz Halloran, *Roberts Backs Right of Privacy*, U.S. NEWS & WORLD REP., Sept. 13, 2005, <http://www.usnews.com/usnews/news/articles/050913/13roberts.htm> (quoting Chief Justice Roberts).

63. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008).



Third, another important justification for adhering to a very well-settled precedent is that it promotes judicial restraint. Professor Thomas Merrill makes this point quite nicely in defending what he calls a "strong theory of precedent."<sup>64</sup> He argues, among other things, that deferring to extremely well-settled precedent makes sense because it "results in more judicial restraint."<sup>65</sup> Fidelity to precedent provides, in other words, a neutral, external source of decision on which a Justice may rely. If we are concerned about minimizing the extent to which Justices ground their decisions on their personal or policy preferences, one checking mechanism is precedent, particularly prior decisions they did not create.

The strongest argument against superprecedent is that the Court should always be free to reconsider *any* question of constitutional law in order to ensure that the question is correctly decided.<sup>66</sup> It does not follow, however, that the need for the Court to have the discretion to re-decide a particular question of constitutional law requires that every issue of constitutional law be kept potentially open for reconsideration. Our legal system would cease to work if it ignored precedent. As Justice Scalia once explained:

Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. . . . [O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpative new ones.<sup>67</sup>

Some issues need to remain settled to preserve a number of important institutional values. These values include, among others, preventing the squandering of scarce judicial resources, avoiding social or political upheaval, treating similarly situated litigants similarly, investing the law with relative predictability, and ensuring the stable operation of the social, economic, and legal systems. There needs to be something more compelling than a particular constituency's skepticism about the correctness of an earlier decision in order to license the risk of traumatizing the legal system. The larger the constituency—the more public authorities who are

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64. See Thomas Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273 (2005).

65. *Id.* at 278.

66. See, e.g., Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super-Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1249 (2006).

67. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–39 (1997).

persuaded to reconsider some question of constitutional law—the more public and social support there would be to allow a heretofore well-settled issue to be reopened. Indeed, it is useful to recall that the issues that are firmly settled because of longstanding precedent are well-settled because both nonjudicial authorities and the Court have heavily invested in their closure.<sup>68</sup> Thus, a well-settled precedent is not likely to be reopened without some strong or compelling justification for disrupting longstanding social, economic, and legal reliance upon it. The fact that there rarely are compelling considerations to reopen well-settled precedents helps to explain why so many of them are never reopened. The precedents which are the least likely to be reopened because of the practical impossibility of finding compelling reasons to reopen them are, effectively, superprecedents.

More over, fidelity to precedent generally, and particularly to superprecedent, constitutes an indispensable feature of “judicial modesty,” the notion advanced by Chief Justice Roberts, among others, that calls upon Justices and judges to be respectful of the opinions of others to the fullest extent possible and not to decide more than is required in any given case.<sup>69</sup> A commitment to judicial modesty, which is more of a temperament than a methodology, should entail both respect for precedent and a disposition to construct precedent incrementally. The obvious benefit of such a commitment is that it promotes judicial restraint, for it requires Justices to refrain, in Justice Scalia’s words, from remaking “the world anew.”<sup>70</sup> Justices are challenged to be modest, to recognize that the risk of disrespecting too many precedents is that it will merely embolden their colleagues and successors to question their preferred precedents. Put differently, immodest Justices run the risk of having their challenges to the preferred precedents of others turned around and employed in challenges to their preferred precedents. Modest jurists, meanwhile, do not run the risk that the immodest jurists do of having their own boldness used against them. Thus, the construction of precedent is like a mirror: it will likely reflect what it receives. The more respectful of precedent a Justice tends to be the more

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68. See GERHARDT, *supra* note 5, at 189–90.

69. See Roger Citron, *Process Makes Perfect: John Roberts’ Marked and Positive Influence on the Supreme Court*, SLATE, July 7, 2006, <http://www.slate.com/id/2145159> (describing how in his first year as Chief Justice, Roberts implemented what he had said about the importance of judicial modesty in his confirmation hearings).

70. SCALIA, *supra* note 67, at 138.

respect his preferred precedents are likely to receive from his colleagues or successors.

### CONCLUSION

In its first two Terms, the Roberts Court confirmed the duality of precedent. On the one hand, it appears to be a social scientist's dream, for in the most salient constitutional cases over the past two Terms the Justices' deployment of precedent seems to have consistently tracked their respective ideological commitments. In adjudicating the constitutionality of federal bans on partial-birth abortion and corporate campaign expenditures, taxpayer standing to assert an Establishment Clause challenge to the President's faith-based initiative, and voluntary desegregation plans, the same five-member majority of the Court consistently weakened—and rejected—liberal constructions of precedent. It was this Court that Justice Stephen Breyer chastised when he declared from the bench at the end of the 2006 Term: "It is not often in the law that so few have so quickly changed so much."<sup>71</sup>

On the other hand, the Roberts Court is quite attached to precedent. From an institutional perspective, the Court's treatment of precedent merely tracks the historical patterns in the Court's handling of precedent over the years. Among the most important of these patterns is the fact that precedent has been claimed as a basis for the Court's decision in 100% of the constitutional cases over the past two Terms. The omnipresence of precedent as a basis for the Court's decisions has significant implications for the study of precedent because it reflects a widely, if not universally, held belief that precedent matters. Moreover, when one considers the vast range of constitutional issues that the Roberts Court has not decided (and is highly unlikely to address, much less to reconsider), there is far more stability in constitutional law than many critics of the Roberts Court acknowledge. There are, in fact, far more issues of constitutional law that have been settled firmly by the Court than have not. Even when the Roberts Court weakened some precedents, it did so primarily on the basis of precedent and in ways that confirmed the fact that particular constitutional precedents rarely constrain the Justices to forego certain outcomes or choices. It is not surprising to find that in constitutional adjudication the Roberts Court has thus far confirmed the limited path dependency of particular precedents.

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71. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, June 30, 2007, at A1 (quoting Justice Breyer).

The evidence legal scholars and social scientists choose to assess the Roberts Court's approach to precedent might reflect our own biases, preferences, and disciplines. To rebut this problem, I urge that at least we maintain a strong commitment to employing an institutional perspective on the Court, because this perspective enables us to see what matters to the Court as an institution over time. Based on this assessment, it is clear that precedent has, not surprisingly, continued to be the source of argumentation and authority that matters the most to Supreme Court Justices over time; and it has continued to matter because it is a forceful, legitimate constraint within the institution.

