

Response

It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt

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In recent years, as the popularity of originalist interpretation has risen from the ashes of its supposed demise in the 1980s,¹ its critics have increasingly harped on its supposed incompatibility with the doctrine of stare decisis. Or perhaps more accurately, they have asserted stare decisis to defend their favorite cases and doctrines from originalist critiques. In some measure, this response has been effective because originalists themselves are divided on the role of precedent vis-a-vis originalism.²

Some originalists—let us call them “faint-hearted originalists,” which is how Justice Scalia describes himself³—base their originalism in important part on “the rule of law” with its resultant predictability and stability, upon which stare decisis

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1. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–29 (1999) (describing the rise of the “New Originalism”); see also Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1124–48 (2003) (discussing the contributions to this development played by Robert Bork, Steven Calabresi, Frank Easterbrook, Gary Lawson, John Manning, Michael McConnell, Michael Paulsen, Saikrishna Prakash, Antonin Scalia, Guy Seidman, and others).

2. See Symposium, *Stare Decisis*, 22 CONST. COMMENT. (forthcoming Apr. 2006).

3. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.”). On the basis of his writings and judicial decisions, I reluctantly conclude that Justice Scalia is not really an originalist. See Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CINN. L. REV. (forthcoming Dec. 2006).

also seems to be based. Perhaps most importantly, a commitment to some degree of stare decisis allows faint-hearted originalists to plead *nolo contendere* with certain precedents that they would rather not challenge because to do so would be political suicide. Or so they think. Of course, it is also possible that some originalists simply prefer the results of certain precedents over the original meaning of the Constitution that these cases have supplanted, and they are looking for a limitation on their professed commitment to originalism.

Other originalists like Mike Paulsen,⁴ Gary Lawson,⁵ and myself⁶—call us “fearless originalists,” perhaps because we will never personally have to fear Senate confirmation hearings—reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices. The reason why fearless originalists reject stare decisis can be summarized by the following syllogism:

(1) Originalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed.

(2) None of the three branches of government on which the written Constitution imposes limits should be able to alter these limitations, either alone or in concert, without properly amending the Constitution in writing.

(3) For this reason, the Supreme Court cannot change the Constitution which it is sworn to uphold and enforce.

(4) Were the Court mistakenly to decide a case that adopts an interpretation that contradicts the original meaning of the text, and this mistake became entrenched by the doctrine of precedent, then the Supreme Court's interpretation of the text would trump its original meaning.

(5) In this manner, the doctrine of stare decisis is inconsistent with originalism.

4. See, e.g., Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. (forthcoming Apr. 2006).

5. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

6. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. (forthcoming Apr. 2006); available at http://www.bu.edu/law/faculty/papers/pdf_files/BarnettR050205.pdf. The argument I make there is summarized in the next few paragraphs.

The normative case for originalism is based, in large measure, on the superiority of the enacted text over the opinions of members of the government whom it is supposed to govern and limit—including members of the Supreme Court.⁷ I do not see how an originalist can accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist. In other words, once it becomes appropriate for the Supreme Court to discard original meaning and the original meaning of the text is thereby reduced to a factor among many considerations by which the Constitution is “interpreted,” the method being used is no longer originalism.

I suppose we can say that faint-hearted originalists refuse to ignore original meaning *completely*, as some nonoriginalists are willing to do. But whether they are willing to follow it or discard it is being determined by other nonoriginalist principles—such as the need for stability and predictability—an approach with which many nonoriginalists would be entirely comfortable. Indeed, it is fashionable these days for nonoriginalists to include some role for history in their methods of interpretation,⁸ as a starting point, as a factor to be combined with other “modalities,”⁹ or as meaning that must be “translated” into modern content.¹⁰ It becomes quite difficult to distinguish these nonoriginalists from faint-hearted originalists.

The rejection by fearless originalists of *stare decisis* when it conflicts with original meaning is not, I hasten to add, a rejection of all use of precedent. Elsewhere, I describe several important roles for precedent within fearless originalism.¹¹ Decisions reached by the Court in prior cases (1) can be followed in nonconstitutional cases, which make up the bulk of what the Supreme Court decides; (2) can provide constitutional construc-

7. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–117 (2004) (expanding the normative argument for originalism beyond that presented above and in Barnett, *supra* note 1).

8. See James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1344 (1997) (“In recent years, the originalist premise has also been manifested in the emerging strain of broad originalism in liberal and progressive constitutional theory.”).

9. See, e.g., PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION 12–14 (1991) (counting both “historical” and “textual” as useful and legitimate “modalities” of constitutional argument).

10. See, e.g., Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1367–68 (1997) (defending his “translation” theory).

11. See Barnett, *supra* note 6.

tions that are often needed to apply the provisions of the text to actual cases and controversies; (3) can generate reliance claims by particular individuals upon unconstitutional governmental actions that the Court has previously permitted; (4) can provide epistemic guidance in the face of uncertain original meaning; and (5) can perhaps also be used to resolve latent ambiguities in the text by “fixing” its meaning until the Constitution is formally amended.¹²

I will not repeat here my explanation of each of these potentially proper uses of precedent within a theory of originalism, and mention them now solely to emphasize that even a fearless commitment to originalism does not forgo all uses of precedent. It is fearless only in the sense that it acknowledges that Supreme Court decisions can never trump the clear original meaning of the text—a proposition denied by nonoriginalists. In this regard, although evolving constitutional law may well share some of the qualities of a common-law system, this body of judicially-developed doctrine is “bounded” by a text that it cannot supersede, in the very same manner that statutes are traditionally thought to trump common-law judicial decisions.

I. POSITING SUPER PRECEDENT

In his Essay in this symposium, Dan Farber extols the virtues of precedent,¹³ many of which have led some self-described originalists to the faint-hearted school. Among the virtues he lists are (1) efficiency, by which he means saving time and trouble,¹⁴ (2) humility,¹⁵ (3) stability,¹⁶ (4) uniformity or equality, in the sense of treating like cases alike,¹⁷ (5) the ability of

12. I am myself uncertain about the last of these five uses of precedent, but list it here in the interest of completeness.

13. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006).

14. *Id.* at 1177 (“One of these universal justifications is efficiency: it saves time and trouble to rely on earlier decisions.”).

15. *Id.* at 1178 (“A second reason is humility. It would be arrogant to assume that we alone have access to wisdom.”).

16. *Id.* at 1177 (“It is simply unworkable to leave everything up for grabs all of the time.”).

17. *Id.* at 1179 (“It seems arbitrary for a case to be decided one way this year, perhaps leading to a prisoner’s execution or other serious consequences, and for an identical case to be decided the opposite way next year simply because of a change in judicial personnel.”).

courts to provide guidance in the future,¹⁸ and (6) its tendency towards neutral principles.¹⁹

With all this going for the doctrine of stare decisis, one almost expects Farber to contend that precedent should never be reversed. But of course he is far too realistic and pragmatic for that. We all know that precedents are reversible under the right set of circumstances, and even under the wrong. The sixty-four thousand dollar question for the voluminous jurisprudence of precedent is identifying exactly when to adhere and when to reverse. I cannot survey this literature here. Suffice to say that, despite these well-known advantages of precedent so ably summarized by Farber, everyone favors reversing precedent sometimes.

In his Essay, Farber never identifies the circumstances in which precedent should be reversed—which I think is a major weakness of any serious treatment of the doctrine of stare decisis. But he does suggest which precedents should *not* be reversed. He calls these “bedrock precedents,”²⁰ but we may also refer to them, like Michael Gerhardt and Senator Arlen Specter, as “super precedent.”²¹ Here is how Farber describes these very special precedents:

At least in certain kinds of cases, precedent gains added importance in the constitutional area. One purpose of having a written constitution is to create a stable framework for government. This goal would be undermined if the Court failed to give special credence to bedrock precedents—precedents that have become the foundation for large areas of important doctrine. Some obvious examples involve the rulings of the New Deal era upholding the validity of the Social Security system and other federal taxing and spending programs, and those recognizing federal jurisdiction over the economy. These ome-

18. *Id.* at 1179 (“[O]nly by following the reasoning of previous decisions can the courts provide guidance for the future, rather than a series of unconnected outcomes in particular cases.”).

19. *Id.* (“[T]he judge is pushed to a form of neutrality—not the neutrality of being value-free, but the neutrality of articulating standards that one is willing to live with in the future.”).

20. *Id. passim.*

21. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 *passim* (2006); Jeffrey Rosen, *So, Do You Believe in ‘Superprecedent?’*, N.Y. TIMES, Oct. 30, 2005, § 4, at 1 (“The term superprecedents first surfaced at the Supreme Court confirmation hearings of Judge John Roberts, when Senator Arlen Specter of Pennsylvania, the chairman of the Judiciary Committee, asked him whether he agreed that certain cases like *Roe* had become superprecedents or ‘super-duper’ precedents—that is, that they were so deeply embedded in the fabric of law they should be especially hard to overturn.”).

lettres cannot be unscrambled today, as even some devoted believers in originalism acknowledge. Likewise, it is far too late in the day to invalidate independent agencies, as some originalists would like, or to undo the twentieth century rulings that “incorporated” the Bill of Rights and made it applicable to the states, or to reconsider the constitutionality of segregation.²²

It is not just that overruling these precedents would be “imprudent.”²³ Farber further claims that, “in an important sense, it would run against the purposes of constitutionalism. Overruling these doctrines would create just the kind of uncertainty and instability that constitutions (even more than other laws) are designed to avoid . . .”²⁴

Moreover, he claims, “Legitimate or not, these modern constitutional doctrines are here to stay as a realistic matter.”²⁵ By this he means something more than “might makes right.” Rather, these super precedents are somehow “constitutional” in a way that even parts of the written Constitution are not:

Plenary federal power over fiscal and economic matters, independent agencies, and application of the Bill of Rights to the states are now integral parts of our system of government; *in some ways, they are more “constitutional” than some of the more obscure parts of the written Constitution.*²⁶

One possible “pragmatic” approach to “omelettes [that] cannot be unscrambled”²⁷ would be simply to refuse to revisit decisions justifying existing institutions and to consider these particular decisions to be settled by means of something like a constitutional “grandfather clause.” Like criminal convictions, existing government institutions and programs under this approach to precedent would not be declared unconstitutional after the fact. But the decisions by which they were upheld would, if found to conflict with the original meaning of the text, lose what Dworkin refers to as their “gravitational force.”²⁸ “This far but no farther” could be the gradualist way to reestablish the original meaning of the text as constitutional law.²⁹

22. Farber, *supra* note 13, at 1180 (footnotes omitted).

23. *Id.*

24. *Id.* at 1180–81.

25. *Id.* at 1181.

26. *Id.* (emphasis added).

27. *Id.* at 1180.

28. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 121 (1997); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1089 (1975).

29. To be clear, I am not endorsing this gradualist approach, but simply identifying it as a possible response to the concern about overly rapid change.

But Farber claims more for these super precedents than a gradualist approach to changes in constitutional law would provide.

[T]his is an untenable stance in a legal system that seeks some form of coherence. . . .

A sensible legal system can tolerate having a few small patches of doctrine retained because of practical imperatives but rejected in principle. But a legal system in which huge swathes of the law are considered unprincipled, while small corners are governed by principle, makes no sense at all. Bedrock rulings cannot be “limited to their facts” if the legal system is to have any claim to integrity; rather, they must be given generative force as precedents.³⁰

So these bedrock principles are pretty super indeed. They not only cannot be reversed, but they must be extended into the indefinite future. As Farber explains:

Adherence to precedent does not mean simply refusing to overrule past decisions—it means taking them seriously as starting points for analysis in future cases. This notion derives partly from reasoning by analogy based on similarities between the facts of cases, but more importantly, it reflects a need to give credence to the reasoning in earlier opinions.³¹

Wow. Whatever happened to the “living constitution”?

II. TWO FALLACIES OF SUPER PRECEDENT

Given the enormous potential practical and legal import of adopting a concept of super precedents, two obvious questions arise. What justifies super precedents trumping the original meaning of the text of the Constitution? How do we tell which precedents are super precedents? Given that Professor Farber is a pragmatist who has coauthored a wonderfully engaging book about the “misguided quest for constitutional foundations,”³² we should not really expect a theoretical answer to either of these questions. And in this regard, we are not disappointed.

Although Farber’s Essay begins with the aforementioned paean to the six benefits of precedent, these benefits attach to the ordinary reversible precedents as well as to bedrock or super precedents. In other words, these benefits argue for a respect for precedents generally. They do not tell us when prece-

30. Farber, *supra* note 13 at 1183 (footnotes omitted).

31. *Id.*

32. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

dents can be overruled, as everyone concedes sometimes can and should be done. Nor does a list of these benefits help us distinguish mere ordinary precedents from those super precedents that, like Superman himself, “came to earth with powers and abilities far beyond those of mortal” cases.³³

So there must be something extra these super precedents possess that mere mortal precedents do not. While Farber is not entirely clear about this, I think two particular qualities emerge from his discussion. First, these precedents seem deeply embedded in current institutional practice, such that overruling them would wreak much social disruption.³⁴ Second, no one wants to see them overturned.³⁵

The fact that precedents are deeply embedded, however, only goes to their direct reversal, and does not argue for their continued application to new circumstances beyond their immediate application. It is one thing to uphold the Social Security system; it is another to create a new entitlement scheme on the same constitutional principle.

Any claim that no one wants to see these precedents overturned is of course an exaggeration. If no one wanted them overturned, they would never be challenged—and there would exist no fearless originalists doing the challenging. Of course, the end of much originalist scholarship is to *justify* rather than undercut super precedents such as *Brown* precisely because no one wants them reversed.³⁶ But other super precedents are more contested. For these we may say that some people do not want them reversed while others do.

Indeed, the very concept of super precedent has been invented to privilege the claims of the former, who would preserve controversial decisions, against the latter, who would see them reversed. Farber and others invoke the concept of super precedent on the basis of the rule of law or claim that doing so is necessary to avoid chaos, or they find some other criterion to

33. The Adventures of Superman!, <http://superman.ws/fos/thescreeen/tv1> (last visited Apr. 2, 2006) (quoting the opening to the 1950s Superman television series).

34. See, e.g., Farber, *supra* note 13, at 1180–81 (describing the impracticality of overruling these precedents and the instability that would result).

35. See *id.* at 1182 (claiming that “[v]irtually everyone” agrees that these precedents cannot be overturned).

36. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1131–40 (1995); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

avoid having to defend these precedents on their merits. This is powerful stuff, and there should be some very strong reason for taking the merits of prior constitutional decisions off the table, but I find no such compelling arguments in Dan Farber's Essay.

Nor does Michael Gerhardt's Essay for this symposium provide a credible justification for avoiding the merits of some precedents deemed "super." Instead, like Farber, Gerhardt says that:

[s]uper precedents are those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time. Super precedents are deeply imbedded into our law and lives through the subsequent activities of the other branches. Super precedents seep into the public consciousness, and become a fixture of the legal framework Super precedents are the clearest instances in which the institutional values promoted by fidelity to precedent—consistency, stability, predictability, and social reliance—have become irredeemably compelling. Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.³⁷

The rest of his Essay is an attempt to explain how some famous Supreme Court decisions qualify as super precedents based on one or another aspect of this definition.

Both Farber and Gerhardt want to claim that super precedents are somehow binding on courts in a way that ordinary precedents are not.³⁸ In essence, they are asserting that pre-

37. Gerhardt, *supra* note 21, at 1205–06 (footnotes omitted).

38. In a section replying to this Response and other criticisms of the concept of super precedent, *id.* at 1221–24, Professor Gerhardt seems not to appreciate fully the nature of his claim as he now characterizes the issue: "Super precedent is a construct employed to signify the relatively rare times when it makes eminent sense to recognize that the correctness of a decision is a secondary (or far less important) consideration than its permanence." *Id.* at 1221. But this is just a description of the normal doctrine of stare decisis—that the correctness of a decision is secondary to its permanence. Under the normal doctrine of stare decisis, however, the Court can reconsider a precedent when it decides that the incorrectness of a precedent overrides the various considerations that support stare decisis. Professor Gerhardt admits as much when he discusses the gradual erosion of the previously-super precedent of *Plessy*. *Id.* at 1222 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). For his thesis to have any normative bite, he needs to show why *some* precedents are entitled to more weight—so much weight, in fact, that no Court may *ever* reconsider them no matter how wrong they may be—than current notions of stare decisis provide. He needs to show why the original meaning of the Constitution can be superceded by judicial opinions that change with the times, but certain judicial opinions are fixed

sent day courts are to be ruled by the “dead hand” of previous courts. They want to claim that the Supreme Court ought not to revisit a super precedent from its past, and should adhere to the original meaning of the prior decision when it conflicts with the original meaning of the text of the Constitution. When it comes to these previous decisions of the Supreme Court, these scholars reject a “living constitution.” Or perhaps the better imagery is that, when it comes to super precedent, the Constitution itself must die so that super precedential decisions may live on.

Such a normative claim would require considerable justification, but what both Farber and Gerhardt present is, if anything, a mere statement of fact. And the fact is this: for a variety of reasons, some previous decisions by the Court are not likely to be reversed anytime soon. In Gerhardt’s words, they are “so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.”³⁹ But who would ever deny the truth of this sociological fact?

An explanation of why a particular decision *will not* soon be overruled, however—and different explanations are offered by Farber and Gerhardt on behalf of different super precedential decisions—is distinct from an argument for why it *ought not* one day be reversed when the time is ripe. Although I hesitate to claim this about two scholars of whom I think so highly, it strikes me that, in their defense of the irreversibility of super precedents, both Farber and Gerhardt seem to be committing two fundamental fallacies.⁴⁰ The first is the conflation of the

forevermore. This he still fails to do. Simply reasserting the values that support “normal” stare decisis, such as they are, is inadequate to support his normative argument. Nothing in his reply to this Response addresses the objections that follow in this Response to his argument for a constitutional doctrine super precedent (as distinct from the descriptive claim that some cases are very widely accepted).

What explains the failure even to see the need for a normative argument on behalf of “super” as opposed to ordinary precedent? I suspect that both Gerhardt and Farber implicitly accept the present-day rejection of a “formalist” commitment to stare decisis, so “precedent” to them means merely a previously decided case that can be easily reversed whenever we conclude it is wrongly decided. They then invoke the traditional formalist rationale for the stability provided by stare decisis on behalf of so-called “super precedents,” which are actually just “precedents” within the more formalist, traditional approach to stare decisis. But this is merely speculation on my part.

39. *Id.* at 1206.

40. Perhaps this is a product of the phenomenon known as “the normative power of the factual.” See Adrian Vermeule, *Political Constraints on Supreme*

“is” with the “ought”; the second is the conflation of the “actual” with the “necessary.” Let me consider each fallacy in turn.

As I have already said, it is a sociological fact that some cases are, as a practical matter, irreversible today. Observing the existence of this fact, and even explaining why it is so, without more, says nothing about whether such a case ought to be reversed. To illustrate this, consider the history of racism in this country. For well over two hundred years, the existence of chattel slavery in America was a sociological fact. There are many explanations for why this institution was “so encrusted and deeply embedded” that it could not be abolished. Indeed, the tragedy of the founding is that, notwithstanding the widespread concession by the founders that slavery was unjust, they felt that, as a practical matter, they could do nothing to end it, except perhaps put it on some long road to extinction. We all know this story.

Given the practical irreversibility (at the time) of slavery, *Prigg v. Pennsylvania*⁴¹ was a super precedent. Was *Prigg*’s reading of the Fugitive Slave Clause of Article IV inevitable? Hardly. Projecting ourselves back then, would anyone alive today reach the same result in *Prigg*? I think not. But as Robert Cover tells the story, the judiciary back then—including even some judges who favored abolition—decided that, for a variety of reasons, they simply could not get in the way of slavery.⁴² If there was any institution in our history that had insinuated itself into every corner of American institutions it was slavery and the racism upon which it was based. The institutional and economic “reliance” upon the constitutional law that sanctioned slavery makes undoing the New Deal seem like child’s play.

So we got *Prigg* and *Dred Scott*.⁴³ Both were super precedents that it took a Civil War and the resulting constitutional amendments to reverse. Why amendments? Well, the Court was not going to reverse itself. Even after the Civil War, these cases were, after all, *super precedents*. Does their status as super precedents, standing alone, make these decisions normatively right as a matter of constitutional law and theory? The undefended normative implication of Farber and Gerhardt’s invocation of the concept of super precedent is that *Prigg* and

Court Reform, 90 MINN. L. REV. 1154, 1162 (2006).

41. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

42. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 8–30 (1975).

43. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

Dred Scott ought not have been reversed by the Supreme Court.

Indeed, it is not entirely clear why, on their argument, these super precedents ought to be reversed even by a constitutional amendment. After all, changing these institutions by means of constitutional amendment would be just as wrenching to the institutions that grew up in reliance on the system of slavery and racism as would a judicial overruling. On their analysis of super precedent, it should make no difference that a super precedent's reversal comes by means of constitutional amendment rather than judicial overruling. By virtue of their embeddedness and whatever other qualities render them super precedent, they ought not be reversed. Period.

As a purely descriptive matter, Farber and Gerhardt's approach may not be that wide of the mark. Even after the Constitution *was* formally amended, the Supreme Court refused to enforce those amendments according to their original meaning, because doing so would yield too radical a change to the existing institutions. In the *Slaughter-House Cases*,⁴⁴ the 5–4 majority's reading of the Privileges or Immunities Clause of the Fourteenth Amendment was based almost exclusively on the consequences of upholding the original meaning of the Privileges or Immunities Clause, much to the consternation of the dissent who denied that consequences determined the meaning of the text.⁴⁵ The racism responsible for *Prigg* and *Dred Scott* was so encrusted and embedded in practice that the Supreme Court was prepared to ignore even a written amendment, designed by radicals in Congress to end the legal infrastructure perpetuating the racial subordination of recently emancipated blacks. And the same pragmatic considerations that gave us *Prigg*, *Dred Scott*, and *Slaughter-House*, gave us the mother of all super precedents, *Plessy v. Ferguson*.⁴⁶

Can you imagine the Supreme Court in 1896 acting on its own to end or even begin to undermine the apartheid system that was Jim Crow, given the national consensus that devel-

44. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

45. *See id.* at 124 (Bradley, J., dissenting) ("The great question is, what is the true construction of the amendment? When once we find that, we shall find the means of giving it effect. The argument from inconvenience ought not to have a very controlling influence in questions of this sort.")

46. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

oped in the wake of the Compromise of 1877?⁴⁷ Thanks to Justice Harlan's dissenting opinion in *Plessy*⁴⁸—like the three dissenting opinions in *Slaughter-House*⁴⁹—we can imagine it. By this I mean that *we* can imagine it. The problem was that the majority could not. It took fifty years before the super precedent of *Plessy* was replaced by *Brown v. Board of Education*,⁵⁰ and as we know all too well, *Brown* itself did not spell the end of Jim Crow. That took decades of political struggle and physical resistance to accomplish, only after which did *Brown* itself become anything like a “super precedent.”

That the rightly-despised *Prigg*, *Dred Scott* and *Plessy* qualify descriptively as super precedents because of their embedded nature and the social disruption their reversal would have engendered is significant. For it reveals that the normative force of Farber and Gerhardt's argument rests largely on the fact that they, and presumably their readers, approve of the cases they have chosen to call “super precedents.” Change the subject to cases we all abhor and the challenge is then to find pragmatic ways to reverse or limit embedded super precedents, rather than perpetuate them.

The descriptive truth at the heart of Farber and Gerhardt's claim is that, for a variety of reasons, some decisions are not going to be changed anytime soon. Calling these decisions “super precedents” does not add any weight to the argument that these decisions *ought not* to change. Without an additional normative reason why any particular super precedent is also *good*, its mere practical irreversibility tells us nothing about whether it should be overturned when the situation is ripe.

To be sure, some precedents could be super, in part, because they are constitutionally correct. I put *Marbury*,⁵¹ *Brown*, and *Griswold*⁵² into this category. But simply identifying these cases as super precedents is no substitute for showing why they are rightly decided. And such a showing may very well require the sort of foundational constitutional theory that Dan Farber

47. See C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 3 (Oxford Univ. Press 1991) (1951) (“The compromise laid the political foundation for reunion. It established a new sectional truce that proved more enduring than any previous one . . .”).

48. See 163 U.S. at 552–65 (Harlan, J., dissenting).

49. See 83 U.S. at 83–111 (Field, J., dissenting); *id.* at 111–24 (Bradley, J., dissenting); *id.* at 124–30 (Swayne, J., dissenting).

50. 347 U.S. 483.

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

52. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

considers to be a “misguided quest.”⁵³ Even if he is right about foundational constitutional theories, however, the case for continuing to respect some precedents while discarding others still requires *some* normative constitutional argument besides the claim that a particular decision cannot, as a practical matter, be reversed overnight.

What would it take to make an irreversible super precedent like *Plessy* reversible? Well, what *did* it take? As already noted, the reversal of *Plessy* required a sustained constitutional and political assault, and perhaps also the intervention of a world war, the prosecution of Nazi war criminals for genocide, and a world-wide ideological struggle against Communism.

Does the fact that the apartheid system it sanctioned was so deeply entrenched in American institutions as to render *Plessy* the mother of all super precedents provide any normative argument whatsoever for refraining from changing it? Of course not. Would the proper way of changing it include arguing how it conflicts with the original meaning of the Fourteenth Amendment and trying to get Justices on the Supreme Court to agree? If such a constitutional claim is valid, why not? Certainly the fact that *Plessy* was a super precedent would provide no valid argument against such an argumentative strategy.

What then does the fact that the cases cited by Farber and Gerhardt are super precedents (if they are) tell us about their constitutional correctness? Not a thing. What does their super precedent status tell us about whether we should work to change them by appointing Justices to the Court who do not accept them as foundational? Not a thing. Does it even tell us whether one day they will be changed? Perhaps, but by no means does it guarantee anything about their continued vitality. *Plessy* is dead. Its death was hastened in *Brown* by Justices who rejected its inevitability, despite the continued presence of embedded and encrusted racist social institutions.

Which brings me to Farber and Gerhardt's second basic fallacy. They confuse “the actual” with “the necessary.” Assuming they have identified cases that, for the variety of reasons they discuss, are not actually going to be overruled tomorrow, does this entail that these cases were *necessarily* decided the way they were, are *necessarily* to be preserved, or will *necessarily* survive? Of course not.

53. See FARBER & SHERRY, *supra* note 32.

Take the *Legal Tender Cases*,⁵⁴ a decision that both Farber and Gerhardt think is an obvious candidate for super precedent status because *they* cannot imagine a world without paper money issued by the government that is required by law to be accepted in payment of debts.⁵⁵ There is, however, nothing necessary about government-issued fiat money unbacked by specie. For over one hundred years (1715–1845), while England was in the grip of the Bank of England, Scotland got along just fine with a system of free banking in which competing banks issued their own private notes that the general public could either accept or reject in tender of debts.⁵⁶ As F.A. Hayek argued in his book, *Denationalisation of Money*,⁵⁷ there is no economic imperative for central banks to issue notes that are declared by law to be legal tender.⁵⁸ Indeed, he contended that greater monetary stability would be achieved with privately issued currency.⁵⁹ With the enormous growth of electronic transfer payments, we may fast be approaching the day when central banks will completely lose control of the money supply in favor of competitively-issued financial instruments.

Now I am not qualified to debate the merits of free competitive banking versus central banking, but I certainly can imagine such a system. Both Lawrence White and F.A. Hayek are respected economists who contended that it would be superior to the remnants of central banking with which we live today.⁶⁰ With this shift in factual assumptions, what now becomes of the necessity of maintaining the *Legal Tender Cases*? This precedent does not seem so super anymore precisely because Farber and Gerhardt offer no constitutional or normative argument on its behalf. Their only claim in support of its super precedent status is that it is embedded in the current economy and that they and others cannot imagine doing without government-issued paper money that was designated as legal ten-

54. *Knox v. Lee (Legal Tender Cases)*, 79 U.S. (12 Wall.) 457 (1870).

55. See Farber, *supra* note 13, at 1181–82; Gerhardt, *supra* note 21, at 1213–14.

56. See LAWRENCE H. WHITE, *FREE BANKING IN BRITAIN: THEORY, EXPERIENCE, AND DEBATE, 1800–1845*, at 21–40 (2d ed., rev. and extended, Institute of Econ. Affairs 1995) (1984).

57. F.A. HAYEK, *DENATIONALISATION OF MONEY* (1976).

58. *Id.*

59. *Id.* at 78.

60. *Id.* at 99–101; WHITE, *supra* note 56, at 137–49 (concluding that free banking “might perform better” than our system).

der. Shift that factual assumption and the argument for super precedent, such as it is, collapses.

One final point. While faint-hearted originalists accept some precedents as done deals that cannot and ought not be reversed, even fearless originalists do not propose the wholesale revolution of reversing all precedents that conflict with original meaning overnight. There is nothing about a fearless commitment to uphold the text of the Constitution over inconsistent prior decisions of the Court that commits one to rapid, as opposed to gradual, change that happens one case at a time.

Besides, even if they did advocate this, the descriptive truth at the heart of the assertion of super precedents would make immediate and disruptive change impossible. Exactly how would overnight change happen within our system? Would the seven full-time nonoriginalist Justices and one faint-hearted (and part-time) originalist Justice all awaken one morning determined to enforce the limits on government power provided by the Commerce Clause, the Necessary and Proper Clause, the Second Amendment, the Ninth Amendment, and the Privileges or Immunities Clause of the Fourteenth Amendment?

No. In our constitutional system, the only way this sort of change would happen is if the President nominates and the Senate confirms enough Justices who are explicitly or implicitly committed to originalism; the only way that will happen is after a political struggle. It is in the nature of the political process by which Supreme Court Justices are confirmed that, if this happens at all, it will happen exceedingly gradually. I suppose we can also imagine persuading already sitting nonoriginalist Justices of the merits of originalism, but no originalist I know—whether faint-hearted or fearless—pins their hopes on this ever happening.

So then what are we arguing about? The answer is simple: Whether this change *should* happen. Whether this way of interpreting the Constitution is the best. Whether the alternative ways of “interpreting” the text—by ignoring just those passages that restrict federal and state power—are legitimate. Engaging in arguments like these is an essential part of a political process by which people are moved to change the status quo. Persuading people that the currently embedded constitutional law is wrong because it conflicts with the actual Constitution, properly interpreted, is a necessary step to achieving a change in the law, however gradual.

In defense of originalism, I have argued that a government that lacks the actual unanimous consent of the people is illegitimate unless there are some procedural assurances that its nonconsensual commands have not violated the rights retained by the people. I have argued further that a written constitution is a structural feature whose function is to subject nonconsensual government to a rule of law that limits its powers to actions that do not violate the rights of the people; that this structural feature is destroyed if the very persons on whom written constraints are imposed can alter or gut their meaning as they desire so as to expand their coercive powers over the people; that for these reasons, the meaning of the written Constitution must remain the same until it is properly changed by an equally written amendment.⁶¹

Against this argument for originalism, the assertion of the existence of so-called super precedent is simply nonresponsive. It is, in short, a nonargument. But suppose we grant Farber and Gerhardt their normative inference from their descriptive claim. Then I posit the existence of a rule of law that precedes any of the super precedents they cite—a rule of law that might be called “super-duper precedent”: the text of the Constitution itself.

At the heart of the intuition that a particular case is a super precedent is the truism that no one will get confirmed to the Supreme Court who denies its binding force. So be it. Now let’s see someone get confirmed to the Supreme Court who denies the binding force of the text of the Constitution. Or who asserts that the Supreme Court has the power to change, alter, amend, or “update” the text; or to replace the text with something he or she thinks works better; or to “interpret” the text into oblivion to meet the needs of changing circumstances. In short, let some judicial nominee claim the power to change the preexisting meaning of the text without a formal constitutional amendment.

I would like to see what would happen if a judicial nominee candidly asserted the theory that lies beneath the concept of super precedent—or for that matter candidly asserted any nonoriginalist method of interpretation that would elevate the precedents of the Supreme Court above the text of the Constitution itself. You won’t see that testimony because the text of the Constitution is Kryptonite to super precedents, which is

61. See BARNETT, *supra* note 7, at 1–86.

why legal academics and judges alike have to keep our written Constitution confined to its lead-lined box in the National Archive.

CONCLUSION: THE IRONY OF SUPER PRECEDENT

The fact that two scholars as prominent and insightful as Dan Farber and Michael Gerhardt have both advanced the super precedent idea just now suggests that super precedent may be in line to supplant “popular constitutionalism” as the constitutional theory *du jour*. But perhaps both approaches have something in common. Both want to take the Constitution away from the current sitting Supreme Court. Whereas popular constitutionalists want to give the power of interpretation either to the legislature (in Mark Tushnet’s version)⁶² or to “the People themselves” (in Larry Kramer’s version),⁶³ Farber and Gerhardt both want to give the power of interpretation to past Supreme Court Justices.

Unlike popular constitutionalists, however, Farber and Gerhardt are all in favor of being ruled by the “dead hand” of the past, provided the hand is that of dead Justices and not the founders. Despite this difference, one gets the sneaking suspicion that the common objective of both approaches is to diminish the discretion of this particular Supreme Court—in particular its discretion to restore the lost clauses of the Constitution, assuming it had any inclination to do so. If it ever did have such a notion, the existence of super precedent—at least as currently defended—provides no reason for it to refrain.

The concept of super precedent creates one final and delicious irony. If it really has become unthinkable to reverse some particular policy for the reasons stressed by Farber and Gerhardt, then it would not ultimately matter if the Justices ruled on a modern case in a way that would reiterate their support of the original meaning of the text. The only thing that the famous super precedents have accomplished is to mandate or forbid governmental policies, and these positions have come to be so widely accepted that no one would politically challenge

62. See MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 33–53, 177–94 (1999).

63. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 73–92 (2004). *But see* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing and critiquing KRAMER, *supra*).

them, *even if they were now free to do so under a corrected interpretation of the Constitution.*

Consider, for example, the case of *Bolling v. Sharpe*,⁶⁴ which held that segregated schools in the District of Columbia violated the Due Process Clause of the Fifth Amendment.⁶⁵ Imagine that this case was wrongly decided because the Equal Protection Clause (and the Privileges or Immunities Clause) applies only to the states and there is no comparable constitutional requirement of racial equality imposed on the federal government.⁶⁶ If this were the case, under a corrected reading of the Constitution, the federal government would be free legally to segregate the public schools in the District of Columbia (though states would still be barred from doing so). Given the embeddedness of the norm against racial segregation, however, is it imaginable that any Congress would resegregate the D.C. public schools? Not if Farber and Gerhardt are correct in their descriptive claim about super precedents. Assuming they are right, the only practical consequence of reversing *Bolling* today would be to remove a barrier in current constitutional law to federal racial preferences aimed at assisting rather than subordinating African Americans.

In other words, while the sociological existence of super precedent provides no normative barrier to restoring the original meaning of the Constitution's famous lost clauses,⁶⁷ it would severely mitigate any practical harm of doing so. Adopting the original meaning of the Constitution, therefore, would in no way "turn back the clock" on the substantial moral progress we have made over the past fifty years. And for this everyone who, like Superman, believes in the "never-ending battle

64. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

65. *Id.* at 500.

66. I express no opinion on the merits of this claim—which confronts all textualists, whether or not they are originalists. See generally David Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253 (2005) (explaining the problem and defending the correctness of *Bolling* on originalist-textualist grounds).

67. The Famous Lost Clauses are the Commerce Clause, Necessary and Proper Clause, Second Amendment, Ninth Amendment, and Privileges or Immunities Clause of the Fourteenth Amendment. See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 243–77 (2004) (discussing the original meaning of the Second Amendment) (reviewing H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* (2002)); BARNETT, *supra* note 7, at 153–334 (discussing the original meaning of the rest).

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for Truth, Justice, and the American Way,"⁶⁸ including originalists, should be grateful.

68. The Adventures of Superman!, *supra* note 33.