Essay

The Rule of Law and the Law of Precedents

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"History counts. The only significant question is how."[1]

The relationship between precedent and the rule of law is hotly contested.[2] On the one hand, consider the views of the late Justice Lewis Powell. According to Justice Powell, "[E]limination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law."[3] He added that the "inevitability of change touches law as it does every aspect of life. But stability and moderation are uniquely important to the law."[4] Powell concluded that "restraint in decisionmaking and respect for decisions once made are the keys to preservation of an independent judiciary and public respect for the judiciary's role as a guardian of rights."[5]

On the other hand, stare decisis has also been portrayed as a betrayal of the judge's duty to follow the law and thus of the rule of law itself. Here, consider the view of a current Justice,

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1. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 745 (1988).

2. For useful overviews, see generally Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); Monaghan, *supra* note 1; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). For insights into how precedent functions in other legal systems, see D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (1997).

3. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990).

4. *Id.* at 289.

5. *Id.* at 289–90.

Antonin Scalia. Rather than embracing precedent as critical to the rule of law, he views it as an obstacle to correct constitutional interpretation:

> In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible . . . , I agree with Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Or as the Court itself has said: "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[6]

In Scalia's view, when the Court is faced with an erroneous prior decision, "[w]e provide far greater reassurance of the rule of law by eliminating than by retaining such a decision."[7]

Although most originalists continue to give some weight to precedent, the tension between modern judicial doctrine and the original understanding may be profound. As Henry Monaghan explains, "[N]o satisfying conception of originalism seems capable of accounting for *Brown*."[8] He adds that "the abortion cases, the reapportionment cases, and the sex discrimination cases are also inconsistent with any constrained conception of the original understanding."[9] Overall, he says:

> [N]o acceptable version of original understanding theory can yield a convincing descriptive account of the major features of our 'Bicentennial Constitution': nontextual guarantees of civil liberties; a powerful, presidentially centered national government; a huge administrative apparatus; and national responsibility for what had long been conceived of either as local responsibilities or as not the responsibility of government at all.[10]

Monaghan sees in this conflict a serious problem that original-

6. South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) and Smith v. Allwright, 321 U.S. 649, 665 (1944)), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

7. *Id.*

8. Monaghan, *supra* note 1, at 728 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

9. *Id.* at 723. Monaghan also argues that the modern presidency is incompatible with the original understanding. *See id.* at 735–39.

10. *Id.* at 739.

ists must confront and solve: though "most, if not all" of these Supreme Court decisions are "highly suspect" on originalist grounds, it seems "almost unquestionable that these decisions are now beyond judicial recall."[11] Some originalists may disagree with the particulars or see more room for precedent to fill gaps in the original understanding, but the potential impact of rejecting precedent in favor of originalism is obviously great.[12]

This Essay explores this contested ground. I will begin with the familiar pragmatic case for stare decisis, particularly as the arguments apply to bedrock precedents. Originalists often concede the undesirability of overruling bedrock precedents. Yet, they fail to realize the implications of this concession when combined with the drive of the legal system toward consistency and coherence. I will then show how originalism itself needs to rely on a system of precedent in order to achieve the rule of law. As it turns out, originalists would have need for stare decisis even if originalism had been the entrenched method of interpretation from the beginning.

With that background in mind, I will turn to the issue of stare decisis and abortion, which has been the focal point of recent disputes over stare decisis. Although the Court has erred in viewing its earlier abortion precedents as having heightened immunity from overruling, it did give earlier precedent an appropriate place in formulating a standard governing the constitutionality of abortion restrictions. This brings me to the question of how to read precedents: as sources of rules or as sources of general principles and analogies? The choice is a pragmatic one, but contrary to the view of Justice Scalia and others, the presumption should be against viewing precedents as rules.

Stare decisis seeks to preserve stability, but the doctrine must also leave room for innovation and correction of error.

11. *Id.* at 740.

12. Like many who seek radical social change, beginning with Martin Luther, those who attack basic precedents claim only to be restoring a "true" but forgotten social order. For instance, in critiquing a Burkean defense of stare decisis, Steven Calabresi says: "The sweeping away of wayward practices and the restoration of fundamental constitutional traditions is a form of conservative revolutionary change, not French revolutionary change." Steven G. Calabresi, *Overrule* Casey*!: Some Originalist and Normative Arguments Against Stare Decisis in Constitutional Cases*, 22 CONST. COMMENT. (forthcoming Apr. 2006) (manuscript at 33, on file with author). Whether revolutionaries are inspired by memories of a glorious past or visions of an entrancing future, however, revolutions are likely to be just as dislocating and risky to bystanders.

Striking the right balance is not easy. In the end, I opt for a version of stare decisis in which rulings are not overturned except for strong reasons, and only for compelling reasons in the case of what I call "bedrock" precedents.[13] But this version of stare decisis is not rigid, because it sees doctrine as evolving over multiple decisions rather than "written in stone" in individual decisions. That is to say, my view of precedent disfavors overruling, especially of lines of precedent rather than individual cases,[14] but leaves more room than Scalia's does for good-faith reinterpretation.

I. THE PRAGMATIC CASE FOR STARE DECISIS

Stare decisis is not rocket science.[15] Many of the reasons for giving weight to precedents are easily grasped, particularly for those bedrock precedents that provide the clearest examples of the need for stare decisis. Nevertheless, even if they seem somewhat familiar, those reasons are worth reviewing given recent criticisms of stare decisis.

A. BENEFITS OF STARE DECISIS

Few lawyers deny that precedent plays some legitimate role in Supreme Court decisions.[16] Nevertheless, it is instruc-

13. The "compelling reasons" exception certainly covers the Court's rejection of the prior doctrine of "separate but equal" in *Brown*, 347 U.S. at 483. If nothing else, history had shown the old doctrine to be a chimera: there was plenty of "separate" but nothing "equal" in Jim Crow!

14. It is only fair to ask whether the category of bedrock doctrines coincides with my substantive preferences. The answer is, at least, not entirely. In my view, this approach to stare decisis would probably insulate a number of doctrines that I consider incorrectly decided as an original matter, such as the application of the Eleventh Amendment to federal question cases, the constitutionalizing of executive privilege, the regulatory takings doctrine, and the requirement of "injury in fact" as a basis for standing.

15. On the contrary, it takes much more intellectual ability to mount an attack on something that is so obviously in accord with common sense.

16. For an early counterexample, arguing that stare decisis is contrary to progressive thinking, see Boyd Winchester, *The Doctrine of Stare Decisis*, 8 GREEN BAG 257 (1896). An even earlier example is Chief Justice Taney's opinion in *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting). Even earlier, Jonathan Swift mocked stare decisis, describing it as an effort to preserve "'all the decisions formerly made against common justice and the general reason of mankind.'" *See* Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 67 (1988) (quoting JONATHAN SWIFT, GULLIVER'S TRAVELS 275 (Novel Library ed. 1947) (1726)).

tive to consider the reasons why precedent is so important, how precedent is used, and what the use of precedent tells us about the nature of constitutional law.

Although precedents seem to have special force for the judiciary, consideration of past decisions is important in other settings. We can divide the reasons for respecting precedent into three groups: (a) those that apply to every decision maker, judicial or otherwise; (b) those that particularly apply to courts; and (c) those that are especially linked with the nature of constitutional law.[17]

There are obvious reasons why any decision maker should consider the views of her predecessors. These reasons apply as much to a low-level officer such as a school principal as to a Justice or a President.[18] One of these universal justifications is efficiency: it saves time and trouble to rely on earlier decisions.[19] To reconsider all of our commitments and practices on a daily basis would ensure paralysis.

It is simply unworkable to leave everything up for grabs all of the time.[20] Imagine if, in every First Amendment case, the lawyers had to reargue basic questions such as whether the First Amendment applies to the states or whether it covers nonpolitical speech (both of which have been debated by scholars). Every brief would have to be a treatise, arguing every point of First Amendment doctrine from scratch. Moreover, different judges could adopt completely different First Amendment theories, so a lawyer in a case before the Supreme Court might have to write nine different briefs based on inconsistent theories of the Constitution. Similarly, dialogue between the Justices themselves would be stymied because they would be operating within different conceptual frameworks. Unless most issues can be regarded as settled most of the time, coherent discussion is simply impossible. Surely "it would overtax the

17. A good summary of the standard arguments for respecting precedent can be found in Maltz, *supra* note 2, at 368–72.

18. This aspect of stare decisis is explored in Schauer, *supra* note 2, at 572. As he says, "In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again." *Id.*

19. This efficiency justification is explained in Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102 (1989).

20. On the agenda-control function of stare decisis, see Fallon, *supra* note 2, at 573; Monaghan, *supra* note 1, at 744–46.

Court and the country alike to insist . . . that everything always must be up for grabs at once."[21]

A second reason is humility. It would be arrogant to assume that we alone have access to wisdom. The views of earlier decision makers are entitled to a respectful hearing for that reason alone. Some of those judges are entitled to particular respect—John Marshall, Oliver Wendell Holmes, Jr., and Louis Brandeis come immediately to mind as great figures in the history of the Supreme Court.[22] The argument based on humility does not support adherence to precedents that are now known to be clearly wrong, but it does support some degree of deference when we are unsure of the merits of an issue.[23] As even one of the sharpest critics of stare decisis concedes, *some* degree of respect for prior decisions is warranted even if precedent is not considered binding:

> Abrogating *stare decisis* . . . is not inconsistent with according appropriate respect to *precedent*. "Respect" implies an obligation of due consideration, careful reflection, and deference to the fact that other intelligent and reflective judges have thought about an issue before and taken care to express their reasoning in writing. . . . According precedent proper respect could entail simply giving the decisions of prior courts respectful consideration and deference—perhaps even the benefit of the doubt in cases of uncertainty.[24]

It is true that this kind of "respect" is less than what strong versions of stare decisis might call for, but respect can easily shade into a habit of deference, and deference can solidify into obedience.

Another set of reasons applies, to some extent, to the school principal, but much more to the judge. One is the moral desir-

21. Fallon, *supra* note 2, at 584; *see also id.* at 593 ("And so the process would continue, literally without surcease, for no question ever could be deemed to have been settled definitively.").

22. *Cf.* Macey, *supra* note 19, at 111 ("Well known jurists such as Henry J. Friendly, John Harlan, and Richard Posner are distinguished for their love of the law as well as for their reasoning ability. Their name on an opinion has a signaling effect that magnifies its value.").

23. Moreover, earlier judges operated in a different context, so their decisions provide a check on what might be the influence of biases and wishful thinking on our own decisions. Furthermore, older decisions have stood the test of time—we generally know that they have not caused big problems, whereas a change in rules might have unforeseen consequences. For example, the shift from coinage to paper money does not seem to have caused economic problems, but it is less clear what a reversal might do.

24. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1545–46 (2000).

ability of equal treatment. 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.[25] This call for uniformity is not an unshakeable imperative, but it does caution against departing from precedent too quickly. Given the critical issues that often come before the courts, consistency seems especially important.

A related reason for adhering to precedent is that only 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. If all we know is that a court affirmed some convictions and reversed others, we can have very little confidence in guessing what rule applies in the future.[26] By articulating standards that are binding for the future, courts can offer some semblance of what has been called the "law of rules,"[27] which is one aspect of the rule of law.[28]

Also relating specifically to the judiciary is the discipline imposed on decision making by the knowledge that a decision will function as a precedent.[29] In deciding a particular case, a judge must provide reasons that will have precedential effect on later cases (both in the same court and in lower courts). Thus, the 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. "If the future must treat what we do now as presumptively binding, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of

25. For a discussion of the "argument from fairness," see Schauer, *supra* note 2, at 595–97.

26. For a discussion of the predictability argument, see *id.* at 597–98.

27. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

28. *See* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 494 (1987) ("*[S]tare decisis* is of fundamental importance to the rule of law.").

29. This may even be true if the decision is unsupported by explanation:

> [A]wareness of the future effect of today's decision pervades legal and nonlegal argument. Lawyers and others routinely deploy a battery of metaphors—the slippery slope, the parade of horribles, the floodgates, the foot in the door, and the entering wedge are but a few—to urge decisionmakers to consider the future effect of today's decisions. Undergirding each of these metaphors is the belief that even an uncharacterized precedent can influence the future.

Schauer, *supra* note 2, at 574.

other . . . cases."[30] It is in this sense that "neutral principles" are important to judicial opinions. Thus, respect for precedent pushes judges to seek generality and coherence in their decisions.

B. BEDROCK 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.[31] 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 omelettes cannot be unscrambled today, as even some devoted believers in originalism acknowledge.[32] Likewise, it is far too late in the day to invalidate independent agencies, as some originalists would like,[33] 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.

It is not simply that it would be imprudent to overrule these doctrines, though obviously it would be. But in an important sense, it would run against the purposes of constitutional-

30. *Id.* at 589.

31. Schauer suggests that stability is a particularly important value for law:

> Perhaps we should view legal institutions, including lawyers and law schools, as part of a larger mechanism—call it society—that needs some institutions that are creative, speculative, adaptive, and risk-taking, and other institutions that are cautious, predictable, and risk averse. These latter institutions might act as stabilizers and brakes, rather than as engines and accelerators, and it may be that both forms of institution together constitute, or at least approach, the ideal mix of decisionmaking structures. Within this mix of structures it should be apparent that precedent, as an inherently constraining form of argument, is more suited to some forms of decision than to others.

Id. at 604–05.

32. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990); Monaghan, *supra* note 1, at 723–24.

33. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post–New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

ism. Overruling these doctrines would create just the kind of uncertainty and instability that constitutions (even more than other laws) are designed to avoid:

> Stability and continuity of political institutions (and of shared values) are important goals of the process of constitutional adjudication, particularly "in a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." Moreover, these values are in part at least among the values that the new constitutional order was specifically designed to secure, as the Preamble to the Constitution itself makes plain. Indeed, the Federalist No. 49 even decried appeals to the people in order to "maintain[] the constitutional equilibrum of government."[34]

Legitimate or not, these modern constitutional doctrines are here to stay as a realistic matter. 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. Consider the following question: Which would be more shocking, a Supreme Court decision invalidating the Social Security system, or one upholding a requirement to rent vacant rooms to soldiers in peacetime? Yet the Third Amendment speaks plainly to the latter situation, in a way that cannot be said of Social Security.

Along these lines, one of the most vehement critics of stare decisis in the Reagan era allowed for an exception when overruling a precedent would cause a national crisis. "Surely," he said, "a judge need not vote to overrule an erroneous precedent if to do so would pitch the country into the abyss—if . . . it would be on the order of killing the body to save a limb."[35] He pointed to the *Legal Tender Cases*,[36] which upheld the constitutionality of paper money,[37] as an apt example.[38] And admittedly, whatever the Framers might have thought about the matter, it is hard to see how a modern economy could survive if

34. Monaghan, *supra* note 1, at 748–49 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) and THE FEDERALIST NO. 49, at 341 (James Madison) (J. Cooke ed., 1961)).

35. Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 410 (1988). Cooper was the Assistant Attorney General heading the Office of Legal Counsel at the time. *Id.* at 401. Interestingly, the article does not contain the customary disclaimer of nonofficial status: "The views expressed here are solely those of the author."

36. 79 U.S. (12 Wall.) 457 (1870).

37. *Id.* at 540–44.

38. Cooper, *supra* note 35, at 410.

only metal coins could be used as a medium of exchange.

The example of paper money also suggests another reason for respecting bedrock precedents. Imagine that the Supreme Court did overrule itself and held that only coins could be constitutionally used as a medium of exchange. One possible result would be an immediate economic crisis, especially given the widespread use of American currency abroad. But perhaps such a crisis would not occur if the political system responded quickly enough. Maybe Congress and the states could drop all other business to pass an immediate constitutional amendment. Or some ingenious solution could be adopted to support a modern economy while restricting "money" to metal coinage, such as creating a computerized barter system that would minimize the need to use money at all. Still, even assuming a happy ending, the issue would necessarily consume the public agenda until Congress implemented the solution. Thus, the Court would have preempted legislative attention from other, more urgent social problems. Should curing a possible error in an 1870 case really push off the legislative agenda such current issues as the Iraq War, rebuilding the Gulf after Hurricanes Katrina and Rita, or the threat of terrorism? Preempting the normal process of government for such a purpose seems misguided, to say the least.

Virtually everyone, including nearly all originalists, acknowledge that certain precedents cannot be undone. Robert Bork, for instance, concedes that some judicial practices are "so accepted by the society, so fundamental to the private and public expectations of individuals and institutions" as to be immune from judicial revision.[39] But the significance of this point should not be underestimated. Unlike the doctrine of adverse possession in property law, which is peripheral to the system of property ownership, stare decisis in constitutional law changes the nature of the enterprise.[40] Bedrock precedents cannot be quarantined; instead, they inevitably affect the system of constitutional law as a whole.

39. BORK, *supra* note 32, at 158.

40. For analogies between adverse possession and stare decisis, see *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 33 (1994) ("If judges are going to continue to employ precedent, there is value in acknowledging that the practice is nothing more than 'a sort of intellectual adverse possession'—and that the territory adversely possessed is nothing less than the Constitution.").

The originalist impulse regarding these bedrock but allegedly "wrong" precedents is to say "this far, but not an inch farther." Under this view, the court should not overrule key precedents, but it should always return to first principles in considering new issues. But this is an untenable stance in a legal system that seeks some form of coherence. What sense does it make to say that Congress may give legal sanction to paper money but not to electronic transfers? What sense would it make to say that Social Security is constitutional, but that expanding the program to cover expenses for prescription drugs or transforming it into a program of private accounts would not be? Or to try to limit the racial equality principle of *Brown v. Board of Education* to the Jim Crow laws of the 1950s?

A sensible legal system can tolerate having a few small patches of doctrine retained because of practical imperatives but rejected in principle.[41] 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.[42]

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. The willingness of judges to defer in this way to their predecessors—and their expectation of similar deference from their successors—transforms the Court from an ever-changing collection of individual judges to an institution capable of building a continuing body of law rather than merely a succession of one-time rulings. This kind of decision making, which is familiar to students of the common law system,[43] is structured enough to pro-

41. For example, Monaghan suggests that *Roe* might fall into this category. Monaghan, *supra* note 1, at 759.

42. *See* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. (forthcoming Apr. 2006) (manuscript at 4, on file with author) (arguing that precedent necessarily takes on a life of its own, corrupting the purity of interpretative theories).

43. As one legal philosopher has put it,

> Given all the strange twists and turns of common law reasoning, one might be tempted to conclude that this seems an utterly bizarre way to run a legal system, were it not for the fact that common law rea-

vide stability and coherence, but flexible enough to allow improvisation and growth.[44]

Like the common law, constitutional law is able to grow and change because of its reliance on precedent, and as with the common law, these changes generally occur incrementally. We should resist, however, a simple equation between the common law and constitutional law. Constitutional law does not rely purely on judicial precedents in the same way as the common law.[45] In particular, as we will see in the next section, other forms of constitutional history also play an important role.

C. NONJUDICIAL PRECEDENTS

Nonjudicial precedents can also play a significant role in constitutional law. Perhaps the best illustration involves the scope of executive power. As this example shows, respect for precedent need not be based on judge-worship. A consistent line of interpretation by Congress and the President is also deserving of respect.[46]

The extent of executive power is hotly disputed,[47] so what is presented here will be a set of conclusions rather than a full-fledged argument on the subject. On a fair reading, the historical record fails to settle what the Framers meant by the "executive power" or how that phrase related to specific grants of

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soning seems to reflect at a more public level the way people develop their own moral principles and views on life.

BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 149 (3d ed. 2004).

44. The analogy between common law and constitutional law has been most fully explored by David Strauss. *See, e.g.*, David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

45. Documents such as the *Federalist* papers seem to be given something of the same weight as judicial precedents. Moreover, the text is not a negligible factor, though it does not always seem to trust the weight of subsequent practice. For an example of the latter, consider the constitutional requirement that the Senate give "Advice *and* Consent" to treaties. U.S. CONST. art. II, § 2 (emphasis added). When was the last time a President ever asked for the Senate's prior advice about a possible treaty?

46. Randy Barnett's Response seems to indicate a degree of agreement with this view. *See* Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Superprecedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232 (2006).

47. The reader who cannot resist the temptation to delve further would do well to consult Steven Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); Lawson, *supra* note 33; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

presidential power. As Justice Robert Jackson said in a famous opinion on presidential power, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."[48] He added that a "century and a half"—today, two centuries—"of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question."[49] It is an exaggeration to say that the historical record teaches us nothing, but it clearly fails to provide any precise guidance about the boundaries of presidential power.[50]

As Madison recognized at the time, there is no way of deducing the precise limits of executive power from general principles. In *Federalist No. 37*, he said, "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative

48. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

49. *Id.* at 634–35. The history, of course, is controversial, and the debate is far too complex to enter into here. My own views are close to those expressed in Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (arguing that history does not support many of today's formalist assumptions in this area). Even those who believe that history and text theoretically provide a definitive answer about presidential power must concede that in practice they have failed to do so.

50. This is not to say that presidential power was a complete constitutional cipher. The specific grants of power to the President, as well as related grants of power to Congress in military and foreign affairs, give some guidance. The Framers built on a history of disputes about executive power. We know that they considered the postrevolutionary governors too weak. *See* THE FEDERALIST NO. 15, at 140–45 (James Madison) (Isaac Kramnick ed., 1987) (discussing the problems with the Articles of Confederation). We also know that they considered the prerevolutionary governors and the English monarch too strong. *See* THE FEDERALIST NO. 69, at 396–402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (comparing the President with the King of England). Like Goldilocks, they wanted something that was "not too strong" and "not too weak" but "just right." They wanted as much executive energy and initiative as possible without upsetting the proper balance of republican government. *See* THE FEDERALIST NO. 77, at 435–36 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (arguing that the President has as much energy "as Republican principles will admit" without compromising his accountability). But these principles were too general to resolve hard cases. Thus, when particular questions about executive power arise, text and original understanding can provide only limited guidance.

branches."[51] He sagely added that "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[52]

The difficulty, then, lies in finding the right balance between energy and efficiency, on the one hand, and legal restraint on the other. The President must be free to respond to emergencies, but not too free, lest the category of emergency action swallow up too much of public policy and individual liberty. Deductive logic cannot set this balance. Somehow, we have managed over the course of our history to find an acceptable balance, and the best the Court can do is to try to maintain that balance. It is for this reason that the *Steel Seizure* case, the leading authority on presidential power, puts so much stress on the practical accommodations reached between Congress and the President over the years.[53]

Nonjudicial precedents, like settled practice by the other branches, are important for the present discussion because they illustrate the pull of precedent even outside of the courts. Consideration of nonjudicial precedents also reinforces the significance of bedrock precedents. The post–New Deal understanding of federal power received the support of the President and Congress over a long period of time. So has the racial integration mandate of *Brown*, which was stirringly endorsed by Congress and the President in the Civil Rights Act of 1964.[54] These actions by the "democratic branches" rebuff any argument that these precedents represent a judicial power grab, and such actions thereby help place the precedents' legitimacy beyond question.

II. ORIGINALISM AND STARE DECISIS

Reliance on precedent seems to be here to stay, as even its fiercest critics regretfully concede. But this does not answer the

51. THE FEDERALIST NO. 37, at 244 (James Madison) (Isaac Kramnick ed., 1987).

52. *Id.* at 245.

53. See Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952), which provided the analytic framework for *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

54. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (2000)).

question of whether we should view stare decisis as strengthening or weakening the rule of law. *Federalist No. 78* says that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents . . . ."[55] Yet stare decisis has also been attacked for being a source of undue discretion. As one critic put it, stare decisis "is inherently subjective, and few judges, including Supreme Court Justices, can resist the natural temptation to manipulate it."[56]

For originalists, stare decisis seems in tension with the paramount status of the written Constitution. As one critic says, "If the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution."[57] Or as another critic has said, "[N]o court should ever deliberately adhere to what it is fully persuaded are the erroneous constitutional decisions of the past. To do so is to act in deliberate violation of the Constitution."[58] It is easy to understand the dissatisfaction of originalists with stare decisis. By allowing the views of five Justices to displace the "true" meaning of the Constitution, stare decisis seems to authorize a covert form of constitutional amendment. At the same time, it elevates the mistaken views of five individuals above the true meaning of the law, thereby in a sense replacing the rule of law with the "rule of men." Or so it appears to some originalists.

Rejection of stare decisis, while appealing to originalists, poses a practical problem for them, most clearly in the instance of the bedrock precedents discussed earlier. It also presents a bit of a political problem to the extent they are forced to treat just rulings such as *Brown* like unwelcome house guests, who should never have been allowed admission but can no longer be

55. THE FEDERALIST NO. 78, at 442 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

56. Cooper, *supra* note 35, at 404.

57. Lawson, *supra* note 40, at 27–28. As Lawson puts it,

> If a statue, enacted with all of the majestic formalities for lawmaking prescribed by the Constitution, and stamped with the imprimatur of representative democracy, cannot legitimately be given effect in an adjudication when it conflicts with the Constitution, how can a mere judicial decision possibly have a greater legal status?

Id. at 27. Thus, he says, "What's sauce for the legislative or executive goose is also sauce for the judicial gander." *Id.* at 28.

58. Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 681 (1995).

evicted. On a deeper level, rejection of stare decisis presents a theoretical conundrum for originalism. Although the two are not necessarily linked, originalism in practice is linked with a type of formalism that celebrates the value of clear rules. Justice Scalia, the leading proponent of originalism, provides the best illustration of the claim that originalism depoliticizes constitutional law by providing a more rule-like framework.

Even a cursory acquaintance with Justice Scalia's opinions reveals his passion for order and logic.[59] As one leading constitutional scholar has said, "for Justice Scalia, the rule's the thing; originalism and traditionalism are means, not ends."[60] She goes on to observe what she calls "the codifier at work":

> [F]irst, state the general rule; second, rationalize the existing messy pattern of cases by grandfathering in a few exceptions and doing the best you can to cabin their reach; and third, anticipate future cases in which the rule might be thought problematic and dispose of them in advance by writing sub-paragraphs and sub-sub-paragraphs qualifying the rule with clauses beginning with 'unless' or 'except.'[61]

This passion for rules is tied to Scalia's desire for consistency, which he views as the first of all legal virtues, the "very foundation of the rule of law."[62]

Because of his desire for clarity, certainty, and consistency, Justice Scalia has mixed feelings about the common law. He is uneasy about the common law process, in which law grows, "not through the pronouncement of general principles, but case-

59. For an overview of Scalia's jurisprudential thinking, combined with some speculation about its biographical origins, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990). For recent critiques of Scalia's jurisprudence, see Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997)).

60. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 78 (1992).

61. *Id.* at 87.

62. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1989–90). Consistency is even more important in the work of judges than it is for legislators and administrators:

> Besides its centrality to the rule of law in general, consistency has a special role to play in judge-made law . . . . The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic. . . . [C]ourts apply to each case a system of abstract and entirely fictional categories developed in earlier cases, which are designed, if logically applied, to produce "fair" or textually faithful results.

Id. at 588–89.

by-case, deliberately, incrementally, one-step-at-a-time."[63] But the common law process is inherently inconsistent with the ideal judicial role, according to Scalia: only by announcing and following clear rules can judicial decisions merit respect, and only so can they provide certainty, limit future judicial discretion, and provide uniformity.[64] Indeed, he maintains, judges who do not provide abstract rules but instead rely on the totality of the circumstances, are "not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding."[65]

No wonder another leading advocate of the "law of rules" was moved to ask whether the common law qualifies as law at all.[66] Indeed, Scalia himself seems to view the common law with some suspicion, and he regrets that it receives so much attention in law schools. Because law school begins by studying the common law, he says, the students' "image of the great judge—the Holmes, the Cardozo" is one "who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule."[67] The judge manages this task by "distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law."[68]

Thus, in an ideal world, where the Court was not already hemmed in by precedents, the right approach would apparently be to base every decision solely on the original meaning of the Constitution. It is easy to see, however, that this would result in the loss of such virtues as stability, consistency, and clarity—the very virtues that the law of rules is supposed to promote. On the contrary, to achieve the Scalian vision of the rule of law, originalists also need stare decisis to protect the decisions of today's originalists against their successors.

63. Scalia, *supra* note 27, at 1177.

64. *See id.* at 1178–79.

65. *Id.* at 1180–81. On Scalia's views regarding the importance of rules, see *id.* at 1176, 1178, 1181. I return to Scalia's views about the power of individual rulings to "legislate" rules of law later in this Essay. *See infra* notes 119–23 and accompanying text.

66. Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455 (1989) (reviewing MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988)).

67. SCALIA, *supra* note 59, at 9.

68. *Id.*

There is no reason to expect originalism, unaided by stare decisis, to lead to a stable, definitive set of answers to constitutional questions. To begin with, views of history, even by professional historians, are subject to revision over time.[69] Shifts in constitutional interpretation would reflect these historiographical views. To take the example discussed earlier, views of the executive power in the framing period may change among historians; so unvarnished originalism would result in the waxing and waning of presidential authority along with the latest trends in history departments.

Even among like-minded judges, difficult cases will inevitably arise, where the original meaning of the constitutional provision is debatable in its application. These cases may turn on the basis of a single judicial vote, and will therefore be subject to revision whenever a Justice approaches the issue anew. Judges are not clones, and originalist judges with different political inclinations will, despite their best efforts at objectivity, be influenced on occasion by their preconceptions. This would remain true even if all of the judges were "conservatives" because some might be social conservatives, while others might be libertarians. Such individuals could subscribe to strikingly different interpretations of original meaning. Indeed, one recent defense of textualism (as opposed to precedent) comes perilously close to admitting that the constitutional text has often functioned historically merely to provide an excuse for politically motivated decisions by the Court.[70]

Even assuming the absence of any ideological divisions whatsoever, judges could still have methodological divisions. For example, some judges might find the *Federalist* papers a more persuasive source of evidence than other documents, or at an even finer level of detail, some might view Madison as more reliable than Hamilton, or vice versa. When these methodological differences became outcome determinative, the Court's rulings would be no more predictable or consistent than they are today when precedent is ignored. Jurists might also differ in

69. For a discussion of this problem, see Emil A. Kleinhaus, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121, 125–28 (2000).

70. *See* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 686 (2006) ("In launching these new doctrines, the Court sometimes lies about its precedents . . . . As I argued above, the Court has also often used the rhetoric of textualism or originalism in major cases to displace what it thought were wayward practices or precedents.").

terms of the level of generality with which they defined the original understanding. Again, inconsistent outcomes would result, depending on the identity of the judges and how their methodological positions aligned with substantive outcomes in specific cases. Even in the most pristinely originalist judiciary, conflicts would still exist between different schools of originalism. Without stare decisis, these methodological disputes would never be settled definitively.

Some textualists view elaborate recourse to history as unnecessary because they view the text itself as clear.[71] They seem unfazed by the fact that people have been arguing for decades (and in some cases for centuries) about the meaning of phrases such as "the executive power," "due process of law," and "equal protection."[72] Perhaps each textualist simply assumes that judges will inevitably adopt his or her own preferred reading of these phrases. What textualism promises is not consensus but a cacophony of confident proclamations about the plain meaning of the document. Expecting these disputes to be miraculously settled, when they have existed for such long periods, is simply unrealistic.

Legal clarity would also suffer from unalloyed originalism. True, individual opinions might lay down clear rules of law based on interpretations of original meaning. But different judges on the same court could well articulate different "clear rules," and today's clear rules might not be those followed in tomorrow's opinions. In practice, if the law at any one time consists of overlapping versions of different Justices' clear rules, or if the rules mutate over time, this "rule-based" approach might be incapable of creating clear law.

The rule-of-law deficiencies of originalism are clearest when originalists disclaim any belief in precedent. But the problem also arises in more nuanced versions, as exemplified by a recent argument that precedent can continue to play a vital role for originalists.[73] On this view, clear constitutional

71. *See, e.g.*, SCALIA, *supra* note 59, at 38.

72. *See* THE FEDERALIST NO. 67, at 389–96 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (debating the scope of executive power as allocated under the Constitution); Strauss, *supra* note 44, at 1718 (posing the problem of why original understanding matters to the interpretation of constitutional provisions such as the Equal Protection Clause and the Due Process Clause).

73. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. (forthcoming Apr. 2006) (manuscript at 13), *available at* http://www.bu.edu/law/faculty/papers/pdf_files/BarnettR050205.pdf.

meaning remains controlling and precedent is, to that extent, irrelevant. But when original constitutional meaning is vague, precedent may govern application to specific cases so long as those precedents are not inconsistent with original meaning. Moreover, practice can settle the meaning of ambiguous provisions, and sufficiently strong reliance interests can block recourse to original meaning.

This more nuanced version of originalism does not, however, avoid the problem of instability. Without stare decisis, there will be no stability at the "meta" level: in determining which constitutional provisions are vague or the extent of their vagueness, in locating ambiguity, or in deciding whether one interpretation implements original meaning more faithfully than another. Different judges applying the same basic approach to interpretation will reach different conclusions about when meaning is vague or ambiguous and about the extent of the permissible leeway in interpretation. These differences will produce interesting theoretical debates on the bench but little in the way of reliable law.

This proposal essentially amounts to giving the Supreme Court the scope of authority in interpreting the Constitution similar to what the *Chevron* doctrine gives agencies in interpreting statutes.[74] Under *Chevron*, roughly speaking, a court will uphold an agency interpretation of the statute if it is a reasonable interpretation of an ambiguous statutory provision.[75] Yet the *Chevron* doctrine would rest on slippery foundations if every application of the doctrine by the courts were subject to de novo reconsideration. Questions of how to apply *Chevron* in particular settings are often difficult and divisive, and the same would be true for the proposed scheme. The statute that looks unambiguous to one judge is utterly opaque to another. Similarly, judges will predictably differ in their views about the analogous issues in constitutional interpretation, producing wobbling legal interpretations. For the scheme to provide legal stability, it needs to be backed with second-level stare decisis, in the same way that judicial decisions applying the *Chevron*

74. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."). For some complications regarding the scope of the doctrine, see *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding that *Chevron* applies only when agency action has the force of law and that other agency actions may receive some lesser degree of deference).

75. *See Chevron*, 467 U.S. at 843.

doctrine must be binding precedents. Otherwise, the borderline cases would remain forever unsettled, with no one quite sure whether an interpretation that was acceptable yesterday would remain there tomorrow, or instead would be found to be in tension with the text.

The dependency of formalism on stare decisis surfaces most strikingly in Justice Scalia's writings. Justice Scalia has been, on the whole, no fan of stare decisis. Yet he also believes in the primacy of rules in judicial decisions:

> [W]hen in writing for the majority of the Court, I adopt a general rule, and say, "This is the basis of our decision," I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. . . . Only by announcing rules do we hedge ourselves in.[76]

Of course, an individual judge might always feel some reluctance to stray from his own prior pronouncements, but note that Justice Scalia is speaking here only of the cases in which he writes for the majority. Thus, he is bound by the previous decision not only by personal embarrassment over changing his mind, but because the Court's pronouncements are binding rules of law. Otherwise, it would not matter whether he was "writing for the majority of the Court" or dissenting alone. Indeed, the whole point of the article in which he wrote those words was that law ought, whenever possible, to consist of binding rules.

Yet, without stare decisis, the Court's pronouncements—even when grounded in a vision of original meaning—could not possibly constitute a rule binding on the Justices in the future, but would only be, at most, a revocable command to the lower courts. Lower court judges themselves would hardly be motivated to follow these temporary promulgations to the letter, knowing that whether their decisions were affirmed or reversed would depend instead on a de novo investigation by the Supreme Court of each new case as it arose.

Thus, even if we could somehow miraculously rewind the clock and ensure that every Justice in history practiced the most currently trendy form of originalism, we would still find that we needed stare decisis—if not for legal issues, then at least for the specific tenets of originalist methodology and their application in critical disputes cases.

76. Scalia, *supra* note 27, at 1179–80.

III. PRECEDENT AND LEGITIMACY: THE CASE OF ABORTION

Discussing stare decisis today without mentioning *Casey*[77] is like presenting *Hamlet* without Hamlet—or, some might say, *Harry Potter* without the evil Voldemort. *Casey* is by far the most notable and controversial application of the doctrine in recent years. In part, this is because the Court's willingness to stand by precedent came as such a surprise. After all, in words of one sage observer, "The last thing one would have expected the Rehnquist Court to do was to reaffirm *Roe v. Wade*."[78]

Casey is notable because of its very self-conscious application of stare decisis. In particular, the *Casey* opinion by Justices O'Connor, Kennedy, and Souter[79] placed considerable stress on the notion that part of *Roe* was entitled to special precedential force.[80] To understand *Casey*, it is important to keep in mind that this enhanced version of stare decisis was applied only to one part of *Roe*. This was the "central holding" that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[81] According to *Casey*, the only debatable aspect of that holding was the "strength of the state interest in fetal protection," *not* "the recognition afforded by the Constitution to the woman's liberty."[82] Thus, the *Casey* Court

77. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (declining to overrule the "central holding" of *Roe v. Wade*, 410 U.S. 113, 163–64 (1973)).

78. Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 67 (1993). For other discussions of stare decisis and the abortion issue, see William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey*,* Dickerson*, and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 81–89; Dawn Johnsen, *Abortion: A Mixed and Unsettled Legacy*, *in* THE REHNQUIST LEGACY 301, 303 (Craig Bradley ed., 2006). On Rehnquist's own view of stare decisis, see Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 RUTGERS L.J. 669 (1994).

79. This portion of their joint opinion represented a majority of the Court. *See Casey*, 505 U.S. at 833.

80. *Id.* at 869. On the "normal" factors to be considered in determining whether to overrule a case, see Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of* National League of Cities, 2 CONST. COMMENT. 341, 342–45 (1985); Philip P. Frickey, *Stare Decisis in Constitutional Cases: Reconsidering* National League of Cities, 2 CONST. COMMENT. 123 (1985). Those factors are discussed in the *Casey* opinion, 505 U.S. at 854–61.

81. *Casey*, 505 U.S. at 860.

82. *Id.* at 858.

relied on stare decisis to shore up its finding that the interest in fetal life is insufficiently compelling to overcome a woman's fundamental right.

The *Casey* opinion emphasized:

> [The] Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[83]

Hence, "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[84]

The Court then explained why, in its view, overruling *Roe*'s holding about fetal life would impair judicial legitimacy:

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.[85]

In such circumstances, the Court said, "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision" would appear simply to be "a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance."[86]

The main dissent, written by Chief Justice Rehnquist, took quite another view. "Our constitutional watch," Rehnquist said, "does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question."[87] "[J]ust as the Court should not respond to [public] protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the decision at all costs lest it *seem* to be retreating under fire."[88] Justice Scalia was even more forthright: "I cannot

83. *Id.* at 865–66.
84. *Id.* at 866.
85. *Id.* at 866–67.
86. *Id.* at 867.
87. *Id.* at 955 (Rehnquist, C.J., dissenting).
88. *Id.* at 959–60.

agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling no less—by the substantial and continuing public opposition the decision has generated."[89] Justice Scalia said, "Indeed, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening."[90]

Even before the Court's reaffirmation of *Roe* in *Casey*, Henry Monaghan, a leading scholar of conservative bent had argued that *"Roe* provides a ready example" of why "departure from precedent may sometimes threaten the stability and continuity of the political order and should therefore be avoided."[91] More generally, he argued, "[A]dherence to precedent can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a 'law which binds [it] as well as the litigants.'"[92] For, he said, the Court's "institutional position would be weakened were it generally perceived that the Court itself views its own decisions as little more than 'a restricted railroad ticket, good for this day and train only.'"[93] The question then is whether "judicial self-protection is a legitimate criterion that should be taken into account in deciding whether to adhere to a challenged precedent,"[94] a question Monaghan tentatively answered in the affirmative.[95]

Under this view, deviation from precedent may cast doubt on the Court's integrity, particularly when the precedent has come under heavy political fire. Indeed, for some Justices, this may be more than just a question of institutional stature. A

89. *Id.* at 998 (Scalia, J., dissenting).

90. *Id.*

91. Monaghan, *supra* note 1, at 751.

92. *Id.* at 752 (quoting ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 50 (1976)).

93. *Id.* at 753 (quoting Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting)).

94. *Id.* at 762.

95. *Id.* at 763. Monaghan reached this conclusion partly because he thought it was almost inevitable that judges would consider this factor, and partly because political protection for the Court is closely related to the need to maintain the Court's legitimacy. *Id.* Compare this view with Schauer's assertion that "[i]f internal consistency strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an institution." Schauer, *supra* note 2, at 600.

plausible suggestion is that in authoring the joint opinion in *Casey*, Justices O'Connor, Kennedy, and Souter were "concerned, perhaps above all else, with public perceptions of their personal integrity: They wanted to make it clear that their votes were never precommitted to overruling *Roe*."[96]

Yet, such reference to political factors in applying stare decisis is also troubling. Apart from the empirical question of whether the Court's public legitimacy would indeed be threatened by a reversal of course, it is paradoxical to give the most controversial decisions additional precedential weight. For, the more questionable a decision and the more contrary to public opinion, the more the Court would cling to it.

One could argue with at least equal justice that heated public controversy should lead the Court to reconsider its constitutional position with particular care. Such controversy demonstrates that the issue is one where the political process might well reach conclusions at odds with the Court's, making more crucial the question of whether to block that process. Furthermore, political controversy may be a sign that the societal stakes are high, so that an error is especially undesirable. Understandably, individual Justices may be troubled by the perception that they are acting in response to political pressure or to undisclosed commitments to the Presidents who appointed them. The proper response, however, is for those Justices to consider the merits of the case with particular care, to guard against any unconscious influences from political pressures one way or the other, and then to explain their reasoning with clarity to the public.[97]

On the whole, *Casey* seems to have gone too far in its argument for giving special weight to precedents such as *Roe*. This did not mean that stare decisis was irrelevant in *Casey*. Despite the *Casey* Court's inflated description of stare decisis as applied to the case before it,[98] it is important to note the limited way in which *Casey* actually applies stare decisis. On perhaps the most fundamental question before it, whether liberty

96. Paulsen, *supra* note 24, at 1551. Historians will be in a better position to judge the truth of this assertion, but it does not seem at all implausible that concerns about personal integrity played a role. No Supreme Court Justice wants to be seen as a mere toady to the President who made the appointment.

97. *Roe* does not quite fit the category of bedrock precedents, given its relatively recent vintage, its limited subject matter, and its continuing rejection by substantial minorities on the Court.

98. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–79 (1992).

encompasses a woman's decision to carry or not carry a pregnancy to term, the Court did not rely on stare decisis. The *Casey* Court's view was that women's reproductive autonomy is constitutionally protected, not simply because previous precedents had said so, but because that was actually the best interpretation of the Constitution.[99] If, as Justice Scalia and others have argued, this aspect of *Roe* had been based on a completely unfounded conception of constitutional liberty,[100] respect for the *Roe* opinion should not have been enough to save it. But the Court did not agree on the merits of that constitutional issue with the dissenters, regardless of precedent.[101]

Rather, the Court applied stare decisis only to the subsidiary holding in *Roe* that the state's interest was insufficiently compelling to justify a complete ban on abortion.[102] Here, stare decisis seems to have a greater rule. Determining the weight of a government interest inevitably involves an element of judgment. The fact that many Justices over a prolonged period of time have assessed an interest as noncompelling makes that judgment more plausible. Perhaps not plausible enough to survive if a Justice was unshakably convinced to the contrary, but at least plausible enough to be entitled to the benefit of the doubt. Thus, the way the *Casey* Court actually deployed stare decisis was a good deal sounder than some of the rhetoric the Court used to describe what it was doing.

IV. APPLYING PRECEDENTS

The *Casey* Court's treatment of precedent was disputed for reasons going beyond its refusal to overrule the "central holding" of *Roe*. Chief Justice Rehnquist's dissent berated the majority for claiming to be following *Roe*, while in reality deviating in critical respects, particularly through a rejection of *Roe*'s trimester system.[103] Rehnquist wrote:

99. *See id.* at 846–54.

100. *Id.* at 979–81 (Scalia, J., dissenting).

101. *Id.* at 846–53 (majority opinion). Nevertheless, it is significant that this aspect of *Roe* was rooted in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a ban on contraceptives), which does seem to have acquired canonical status.

102. *Casey*, 505 U.S. at 869–73.

103. *See id.* at 957 (Rehnquist, C.J., dissenting). Actually, *Roe*'s trimester system had eroded well before *Casey*. *See* Daniel A. Farber & John E. Nowak, *Beyond the* Roe *Debate: Judicial Experience with the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519, 522–23 (1990).

> *Stare decisis* is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.[104]

It is one thing to say that a precedent should be followed. It is another to say precisely what it means to follow precedent.[105] This is not an easy question to answer. As a writer of an earlier generation remarked, "Yet when one asks, how does one determine the legal significance of judicial precedents?—one finds only fragmentary answers in authoritative materials and no entirely satisfactory theory offered by the writers who have dealt with the subject."[106] That seems to remain true today.

In various legal systems, precedent may be used as the basis for an analogy, or seen as exemplifying a general principle, or as establishing a binding rule.[107] Anglo-American law has also been unclear: "The precedent has been viewed as limited to the 'decision' on the 'material facts' as seen by the precedent court, or the same as seen by the nonprecedent court; for others, the term means the 'rules' formulated by the precedent court; for still others, the term includes the reasons given for the rules formulated."[108]

In rough terms, the dispute over the treatment of precedent can be seen in the familiar distinction between legal rules and standards.[109] This distinction itself is not razor sharp, but the gist can be seen by comparing "do not exceed 65 m.p.h." (a rule) with "do not drive faster than conditions allow" (a standard). Thus, the Wisconsin Interstate's speed limit is a rule; the Autobahn follows a standard.

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104. *Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting) (quoting BLACK'S LAW DICTIONARY 1406 (6th ed. 1990)).

105. For some reflections on this issue, see Maltz, *supra* note 2, at 376–83; Neil MacCormick, *The Significance of Precedent*, 1988 ACTA JURIDICA 174, 178–87.

106. EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 300 (1953).

107. *See* MacCormick, *supra* note 105, at 181.

108. Monaghan, *supra* note 1, at 763. The description in PATTERSON, *supra* note 106, at 300–20, while several decades earlier, is to the same effect.

109. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing the distinction between rules and standards and the policies favoring rules versus standards); Sullivan, *supra* note 60, at 56–69 (same).

Justice Scalia's view of precedent calls on courts to lay down clear-cut dictates whenever possible; those rules are then binding as rules on later courts until overruled.[110] If precedents are viewed as more fact-bound or as relating to general principles rather than to specific rules, they begin to look much more like legal standards.[111] In contrast to Scalia, the majority in *Casey* viewed *Roe* as creating a standard with flexibility around its "core," rather than as an ironclad rule.[112]

The general outlines of the standards/rules debate are familiar to lawyers and legal scholars. By creating sharp boundaries, rules have the advantage of being easy to apply and highly predictable. Their application also is supposedly more objective, in the sense that the varying perspectives of decision makers are less likely to affect the outcome. Rules are also more readily applied by lower-level decision makers, an important consideration in cases like *Miranda*[113] where the law must be implemented by low-level officials such as police officers.

But rules also have the defects of their virtues. Creating sharp, easily applied lines comes at the cost of unfair treatment of unusual or borderline cases, which might otherwise warrant individualized treatment.[114] Predictability comes at the expense of learning from experience, since new insights can only be incorporated in the law through the relatively radical step of changing the entire rule. "Objectivity" in applying rules may mean that disputes about constitutional values are often disguised as semantic arguments about the meaning of the rule.[115]

110. SCALIA, *supra* note 59, at 7–9. The trimester system in *Roe* is plainly an effort to establish such a binding rule. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1993). As one advocate of the theory of precedent concedes, this theory cannot be reconciled with the conventional legal view that distinguishing a precedent is different from partially overruling it. *See* Larry Alexander, *Precedent*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 503, 507 (Dennis Patterson ed., 1996).

111. For some recent defenses of standards as opposed to rules in constitutional law, see Toni M. Massaro, *Constitutional Law as "Normal Science,"* 21 CONST. COMMENT. 547, 556 (2004); Suzanna Sherry, *Hard Cases Make Good Judges*, 99 NW. U. L. REV. 3, 15 (2004).

112. *See* Sullivan, *supra* note 60, at 70–74 (characterizing the dispute over the use of precedent in *Casey* in terms of rules and standards).

113. Miranda v. Arizona, 384 U.S. 436 (1966).

114. *See* Daniel A. Farber, *Legal Formalism and the Red-Hot Knife*, 66 U. CHI. L. REV. 597, 601 (1999).

115. There are limits to how far a rule-based approach can go to limit judicial discretion. *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 542–43 (1992).

Surely, constitutional interpretation should not turn on dueling dictionaries or fine-grained word splitting.

Moreover, in the setting of a judicial body, treating precedents as creating rules rather than principles or analogies increases the demands on the Court as a collective institution.[116] The members of a majority must not only be able to agree on the outcome or on a general principle, but on the precise contours of a rule of law. The foreseeable result of a rule-oriented approach to precedent is more fractured courts, with fewer majority opinions.

Moreover, treating precedents as rules requires future judges to defer more completely to their predecessors, a degree of self-abnegation that may not come easily. Judges must feel a strong sense of commitment to precedent in order to follow not only the outcome and principle of an earlier case, but the precise legal test articulated by the court in that case. The temptation to abandon the rule will be correspondingly greater, especially when the follow-on case involves circumstances that were not contemplated when the rule was established or when a new judge does not agree with the original decision. This makes rules more brittle than standards, since they cannot be bent but only broken and recast. Thus, because a rule is less flexible than a standard, it is less likely to maintain the allegiance of later judges.[117] Perhaps for this reason, rule-like precedents have a tendency to evolve into standards. This is exemplified by the way *Casey* reworked the rule-oriented *Roe* opinion, with its rigid trimester system, into the standard-like undue burden test.[118] Rules have a way of weathering poorly as precedents.

This is a lesson that Justice Scalia has learned, to his evident discomfort. In some important majority opinions, he has tried to create strong rules, only to discover that other Justices regarded these precedents merely as standards. For example, in *Lujan v. Defenders of Wildlife*,[119] he attempted to establish sharp limits on standing,[120] only to see the Court move back to a standard-like approach in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[121] Similarly, he at-

116. *See id.* at 538–39.

117. *See* Sullivan, *supra* note 60, at 90.

118. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–79 (1992).

119. 504 U.S. 555 (1992).

120. *Id.* at 560–62.

121. 528 U.S. 167, 181–83 (2000). Justice Scalia promoted a more rule-like approach to takings law in *Lucas v. South Carolina Coastal Council*, 505 U.S.

tempted to move takings law away from the standard-based approach of *Penn Central Transportation Co. v. New York City*,[122] only to see that approach triumphant again a few years later.[123] Judicial announcements of rules do not work unless judges are motivated to stick with them faithfully; otherwise, they are merely misleadingly emphatic ways of creating standards.

The choice between rules and standards is ultimately a pragmatic one. In the setting of constitutional doctrine, however, standards often have a strong advantage over rigid rules simply because it is easier to gain and then maintain majority support for them. Thus, there is much to be said for treating constitutional precedents as sources of principles or of fruitful analogies rather than as entrenching rigid rules of law, except in unusual cases like *Miranda* where there is a special need for sharp boundaries to guide government officials.

It may seem that treating precedents as standards rather than rules undercuts the very stability that stare decisis was supposed to provide. But there is a difference between stability and rigidity. Maximizing stability may call for flexibility, as the familiar comparison between the storm-resistant qualities of oaks and willows reminds us.

CONCLUSION

Stare decisis limits the extent to which any vision of constitutional meaning can be incorporated into the law. The body of existing law is simply too unwieldy to fit any tidy theoretical scheme, whether based on maximizing social welfare, respecting original meaning, or upholding ethical theories. And yet, without stare decisis, none of these other sources of constitutional meaning can effectively be transformed into *law*. If precedent carried no weight, whatever the Court might say about constitutional meaning today would be up for grabs tomorrow.

While precedent can help stabilize law, it is a mistake to expect too much from it. Notwithstanding some of the loose language of the *Casey* opinion, no one prior decision can be

1003 (1992), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

122. 438 U.S. 104, 123–27 (1978).

123. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336–37 (2002).

completely sacrosanct. Moreover, the effort to make precedents a source of bright-line rules is often apt to fail. Precedents more often serve as a source of principles and a basis for analogy, uses that make them less decisive but more rugged than most efforts at judicial "rulemaking." There are limits to how much a court, especially in a constitutional case, can act like a legislature, laying down clear rules that will govern the future.

Thus, precedent provides incomplete constraint, but real guidance nonetheless. At the same time, it provides a foundation for an evolving body of doctrine. Consequently, it gives us a constitutional regime stable enough to support the rule of law, but flexible enough to adapt to changing constitutional visions.