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STARE DECISIS AND CONSTITUTIONAL ADJUDICATION

Henry Paul Monaghan*

Despite endless literature urging that constitutional adjudication be severed from explorations into the understandings at the creation of the Constitution, original understanding continues to play a prominent role in the Supreme Court's jurisprudence.¹ For the Court, originalism² seemingly provides a legitimate ground for decisionmaking; for the people, it provides assurances against judicial usurpation of power properly belonging to other branches of government, or retained by the people themselves.

But difficulties with originalism emerge once the existing constitutional order is actually examined. The Supreme Court's repeated invocations of the Framers' understanding notwithstanding, a significant portion of our constitutional order cannot reasonably be reconciled with original understanding. For example, it is now increasingly acknowledged "that those who wrote and ratified the Fourteenth Amendment believed that it would permit racial segregation in public schools."³ Consequently, unless they are willing to see it overruled, *Brown v. Board of Education*⁴ presents deep difficulties for those who insist upon original understanding as the only legitimate canon for constitutional adjudication.

Brown will not be overruled, just as the New Deal and the administrative state, both developments whose constitutionality—from an originalist's perspective—is also highly questionable, will not be declared unlawful. Thus, the originalist confronts a fundamental difficulty. Can originalism make sense out of a constitutional order that varies significantly from its core legitimating principle but that cannot

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1. I quite agree with Judge Easterbrook that we "cannot simply assume [judicial] review and then argue about [the Constitution's] meaning." Easterbrook, *The Influence of Judicial Review on Constitutional Theory*, in *A Workable Government?* 170, 175 (B. Marshall ed. 1987). Judge Easterbrook argues that, by ignoring text, structure, and history, much modern constitutional theory is incompatible with a system of judicial review.

2. In this essay, I use interchangeably the terms original understanding, originalism, and original intent.

3. Tribe, *How Relevant is "Original Intent" Doctrine?*, *The Legal Times*, Dec. 22, 1986, at 12, col. 1; see R. Dworkin, *Law's Empire* 360-61 (1986); H. Hyman & W. Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875*, 395-97 (1982). Professor Bickel's well-known effort to construct an originalism account for *Brown v. Board of Educ.*, 347 U.S. 483 (1954), in Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 59-60 (1955), is quite unpersuasive as a historical matter. See R. Berger, *Government by Judiciary* 100-110, 117-33 (1977). For further discussion of *Brown* and original understanding, see *infra* notes 24-27 and accompanying text.

4. 347 U.S. 483 (1954).

be judicially overruled in the name of a return to original understanding? This essay considers whether *stare decisis* can provide an acceptable ground for preserving the existing constitutional edifice without simultaneously licensing further departures from original understanding.

Part I of this essay defends the claim that there have been significant and irreversible departures from original understanding. In Part II, the essay begins exploring *stare decisis* as a way of resolving the normative implications of originalism's inability to provide a descriptively plausible account of much of the present constitutional order. Part II argues that originalists must acknowledge that in the process of constitutional adjudication *stare decisis* plays a very large role. Next, Parts III and IV examine the possible sources and content of a principle that would privilege precedent above original understanding as a rule of decision in constitutional adjudication. Finally, in Parts V and VI, the essay returns to originalism. These parts ask what remains of originalism's normative appeal if *stare decisis* is invoked to explain and legitimate so much constitutional change. Indeed, what remains of the fundamental idea of a written constitution? In sum, does our Bicentennial Constitution require that we rethink the very meaning of a written constitution? I am forced to conclude that the original understanding must give way in the face of transformative or longstanding precedent, a conclusion that in turn may make inevitable the unsettling acknowledgement that originalism and *stare decisis* themselves are but two among several means of maintaining political stability and continuity in society.

I. ORIGINALISM AND ITS DESCRIPTIVE INADEQUACY

A. *A Brief Exegesis of Originalism*⁵

Originalism insists that at a given point in time "We the People of the United States" can "ordain and establish" a fundamental and lasting framework of government and that the crucial task in any system of constitutional adjudication is to maintain that fundamental law. For originalists, the Constitution is the supreme law; as such, it must bind judges as well as other government officials.⁶ Thus, a necessary bond

5. What follows is intended only as a sketch of originalism's foundational principles; with regard to specific components of my own view of the ideal form of originalism, I am largely exclusive. I have yet to develop fully my own description and defense of originalism.

6. The "framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803). Originalists also emphasize the difficulties for current democratic theory if judicial control of the political branches lacks a clear textual warrant. See, e.g., Address by Judge Robert Bork, University of San Diego Law School (Nov. 18, 1985), reprinted in *The Great Debate: Interpreting Our Written Constitution* 43, 49-50 (Occasional Paper No. 2, Federalist Soc'y 1986); Address by Attorney General

exists between legitimate judicial decisionmaking and maintaining the original understanding.

The most frequent attacks on originalism maintain that the theory fails because, as applied to a two hundred year old document, the concept lacks a coherent methodology.⁷ Such an attack raises the problem of whose intent is relevant and asks if it is realistic to hope to divine an accurate and helpful version of that intent. This is a powerful criticism, and at a minimum makes clear that originalists should not seek any subjective understanding of original intent, such as attempting to aggregate the subjective preferences held by the Framers at the constitutional convention. Such "intentionalist" views, apparently held by some originalists,⁸ are an easy mark for most critics of originalism.⁹ But the Framers themselves did not intend that their secret deliberations at the constitutional convention would provide authoritative guidance;¹⁰ moreover, the goal of accurately aggregating the preferences of so many persons is an unrealistic one.¹¹ But the critics are wrong in believing that in discrediting intentionalism, they discredit originalism.¹² The relevant inquiry must focus on the *public* understanding of the language when the Constitution was developed.¹³ Hamilton put it well: "whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction."¹⁴

Edwin Meese, American Bar Association (July 9, 1985), reprinted in *The Great Debate*, *supra*, at 1, 9-10.

7. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 793-804 (1983).

8. See, e.g., R. Berger, *Federalism: The Founders' Design* 15-17 (1987).

9. See, e.g., S. Macedo, *The New Right v. the Constitution* 11-16 (1986).

10. See C. Warren, *The Making of the Constitution* 783-804 (1928); Powell, *The Modern Misunderstanding of Original Intent*, 54 U. Chi. L. Rev. 1513, 1531-42 (1987).

11. See R. Dworkin, *supra* note 3, at 320-21.

12. This is a common error. See, e.g., R. Dworkin, *supra* note 3, at 359-63; S. Macedo, *supra* note 9, at 13; Bernstein, *Charting the Bicentennial (Review Essay)*, 87 Colum. L. Rev. 1565, 1602-07 (1987); Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 948 (1985).

13. At least some of the Framers, including Madison, understood this point quite clearly by pointing to the State ratifying conventions for authoritative guidance beyond the text itself. C. Warren, *supra* note 10, at 793-801. Professor Clinton seems to me unconvincing in arguing that "the interpretive line between subjective and objective historical approaches to text appears illusory." Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 Iowa L. Rev. 1177, 1180 n.4 (1987).

14. A. Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (1791), reprinted in 8 *Papers of Alexander Hamilton* 97, 111 (H. Syrett ed. 1965); see also J. Story, 3 *Commentaries on the Constitution of the United States* ch. 5 (1987) (1st ed. 1833) (discussing the rules for interpreting the Constitution; published prior to Madison's Notes).

Thus, while the term original intent is commonly used, original understanding better conveys the public dimensions of originalism.

The level at which the original understanding is generalized is decisive in any theory of originalism. If it is not to be vacuous, originalism must refer to an understanding concrete enough to provide a real and constraining guidance. Moreover, if we want the American Constitution—not some other constitution¹⁵—to perform the function that the Founders envisaged, the original understanding must be understood in a certain way: the American Constitution was not designed to contain a plethora of dynamic provisions whose meanings evolve and change over time.¹⁶ Likewise, we must recognize that in interpreting the original understanding we cannot ignore the background assumptions as to how the constitutional system would work in practice. Judge Easterbrook thoughtfully insists that “[m]aintaining the line between the expected consequences of a rule and the contents of the rule itself is one of the most delicate tasks of the judicial system.”¹⁷ While this general distinction may apply to the Constitution, the crucial point is that Judge Easterbrook’s distinction is far softer than he supposes if one recognizes that “purpose” plays an important role in defining the content of the enacted norm. To know what the norm “means”, one must resort to inquiries about purpose and expected consequences.

Of course, arguments of this nature necessarily are anchored in a belief that we can know a good deal—not everything, but a good deal that counts—about the original understanding of those who ratified the 1789 Constitution (and the Civil War amendments). Naturally, in any effort to reclaim it, we necessarily “reshap[e] the past [because] no recognized vestige is devoid of present intentions.”¹⁸ But even in this era

15. See Van Alstyne, Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court, 72 Iowa L. Rev. 1281, 1289 & n.16 (1987) (the theory of justice contained in the U.S. Constitution, not some ideal theory of justice, furnishes the supreme law of the land).

16. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 366–67 (1981). I recognize this is not a universally held assumption. See, e.g., Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1164 (1987).

17. Premier Elec. Constr. Co. v. National Elec. Contractors Ass’n, 814 F.2d 358, 364 (7th Cir. 1987); see also American Jewish Congress v. City of Chicago, 827 F.2d 120, 137–39 (7th Cir. 1987) (Easterbrook, J., dissenting) (identification of the level of generality at which to interpret a text is a difficult judicial task); McConnell, Book Review, 54 U. Chi. L. Rev. 1484, 1490–91 (1987) (meaning of the words of the Constitution is not subordinate to the Founders’ intentions). For a related approach, though one that can yield results that Judge Easterbrook would reject, see Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. Rev. 800, 825–27 (1986) (Framers and Chief Justice Marshall intended the connotative or propositional form of the constitutional language to prevail over the denotative). For a discussion of the view advanced by Richards, see Monaghan, *supra* note 16, at 378–81.

18. D. Lowenthal, The Past Is a Foreign Country 411 (1985). See Nelson, History and Neutrality in Constitutional Adjudication, 72 Va. L. Rev. 1237, 1243–44 (1986) (a contextualist approach to history claims that historical inquiry is shaped by the historian’s value system or world view).

of deconstruction and other reader-centered theories of literary interpretation, observations of that character seem to me to have little purchase in the context of constitutional adjudication. To say that we must necessarily reshape the past does not establish a very different type of claim: that in trying to understand the past we must inexorably, totally, or even substantially reshape it.

B. *The Descriptive Inadequacies of Originalism*

My interest in stare decisis is driven by an important descriptive claim: insistence upon original intent as the only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order. This claim needs defense. Perhaps no reader will find persuasive all the claims of original understanding here tendered, and I confess to being of two minds about several of the examples cited. The relevant concern, however, is the weight of the general argument, not the validity of each supporting item. And the general argument is that much of the existing constitutional order is at variance with what we know of the original understanding.

In some areas, the Court itself can be said to have been the immediate cause of the departure from original understanding. *Brown* and *Roe v. Wade*¹⁹ are salient examples. More frequently, the Court has simply validated departures from original understanding initiated by the political branches. Nonetheless, these two situations possess an important commonality: the Court has not deemed the subjects under consideration to be beyond judicial cognizance.²⁰ Rather, the Court has purported to legitimate the changes; and with some notable exceptions,²¹ this legitimation has been cast in terms of consistency with original understanding.²²

I. *Civil Liberties*. — For most commentators, the civil liberties area has been the battleground on which the original understanding debate has been fought. *Bowers v. Hardwick*²³ can be understood to reassert some limitations of the constitutional text against further judicial creation of nontextual rights. Even so, no substantial argument is needed

19. 410 U.S. 113 (1973).

20. The expanded power of the Presidency is one possible exception to this point. See *infra* notes 78–100 and accompanying text.

21. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) (Court not “confined to historic notions of equality” in applying fourteenth amendment); *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (constitutional issues must be decided in light of country’s whole experience, not simply Framers’ intent).

22. *Wickard v. Filburn*, 317 U.S. 111 (1942) (regulation of production of wheat that never enters the market is within the commerce power of Congress and is consistent with early interpretation of the commerce clause), is perhaps the *locus classicus*. Sometimes the implausible efforts at reconciliation of the result with original understanding are painfully strained. See, e.g., *Williams v. Florida*, 399 U.S. 78, 98–100 (1970) (six-person jury not inconsistent with original intent).

23. 106 S. Ct. 2841 (1986).

to show that major decisional lines are vulnerable to serious original understanding challenge.

Perhaps the most noteworthy claim concerns the school desegregation cases. For me, originalism's difficulties are intractable here: no satisfying conception of originalism seems capable of accounting for *Brown*. *Brown*'s discussion of the differences between education in 1868 and in 1954²⁴ is unpersuasive; public schooling was a practice clearly understood at the time and it is conceded that the claim that the practice was invalid would have been *rejected* by those who framed/ratified the fourteenth amendment.²⁵ In such a case, the practice does not become constitutionally invalid with the passage of time on the premise that its significance or meaning, not the meaning of the amendment, has changed over time.²⁶ And the argument that the Framers had two relevant and contradictory sets of intentions²⁷ lacks any historical foundation.

In addition to *Brown*, it seems evident that the abortion cases,²⁸ the reapportionment cases,²⁹ and the sex discrimination cases³⁰ are also inconsistent with any constrained conception of the original understanding.³¹

Nor is that the end of the difficulties. Even on the assumption, itself controversial, that the fourteenth amendment was intended to

24. *Brown v. Board of Educ.*, 347 U.S. 483, 489-90 (1954).

25. This conclusion is frequently denied by people most identified with originalism. For example, Attorney General Meese recently stated:

When the Supreme Court . . . sounded the death knell for official segregation in the country, it earned all the plaudits it received. But the Supreme Court in that case was not giving new life to old words, or adapting a "living," "flexible" Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The *Brown* Court was correcting the damage done 50 years earlier, when in *Plessy v. Ferguson*, [163 U.S. 537 (1896)], an earlier Supreme Court had disregarded the clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks, and had contrived a theory of the Constitution to support the charade of "separate but equal" discrimination.

Address by Attorney General Edwin Meese, D.C. Chapter of the Federalist Soc'y, Lawyers' Division (Nov. 15, 1985) [hereinafter Meese (D.C.)], reprinted in *The Great Debate*, supra note 6, at 31, 37-38.

26. Contra G. Jacobsohn, *The Supreme Court and the Decline of Constitutional Aspiration* 52-53 (1986) (segregation is invalid since it is currently viewed as incompatible with Framers' specific goal of guaranteeing blacks the status of full citizenship). For a critical analysis of this general problem, one that is sympathetic to but nonetheless challenges the views expressed in the text, see G. Bradley, *Church-State Relationships in America* 135-47 (1987).

27. See R. Dworkin, supra note 3, at 359-63 (contrasting "the Framers' concrete opinion about segregation . . . with their more abstract convictions about equality").

28. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

29. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

30. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

31. See generally R. Berger, supra note 3, 20-245; Monaghan, *Comment on Professor Van Alstyne's Paper*, 72 Iowa L. Rev. 1309, 1310-11 (1987).

make the Bill of Rights applicable to the states,³² much of the actual judicial development of the Bill of Rights has taken very little from original understanding. Here in particular, "the focus of professional and judicial attention [has shifted] from the . . . text and history to the . . . norm[s] to be derived by analysis and synthesis of the judicial precedents."³³ The result has been the adoption of the substance, as well as the method, of common-law adjudication: some form of interest balancing, with the constitutional guarantees treated simply as one of the interests at stake and assessed in functional rather than historical terms.³⁴ "The fact is," as the Court put it very recently, "that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable"³⁵ It may be, as Dean Wellington says, that "the universal practice of courts, when engaged in adjudication, is to acknowledge the power of the relevant text."³⁶ Yet, given existing interpretations of our civil liberties guarantees, precisely what does it mean to assert that there is a textual Bill of Rights, apart from fixing some outer perimeter limiting judicial decisionmaking?

2. *Structure and Relationship*. — Originalism's major inability to account persuasively for much that is central in the current constitutional order reappears when attention is focused upon the central structural aspects of the Constitution. Here, "it has become increasingly difficult to relate governmental structures and powers to the original Constitution."³⁷ For our purpose, the central institutional arrangements of the 1789 Constitution were state-centered federalism³⁸ and

32. Compare R. Berger, *supra* note 3, at 134–156 (no intention to incorporate the Bill of Rights) with M. Curtis, *No State Shall Abridge the Fourteenth Amendment and the Bill of Rights* 113 (1986) (drafters of the fourteenth amendment did intend to incorporate the Bill of Rights).

33. Jones, *The Brooding Omnipresence of Constitutional Law*, 4 Vt. L. Rev. 1, 28 (1979).

34. Monaghan, *supra* note 16, at 393; see also Brest, *supra* note 7, at 228–29. For a striking example, see *Williams v. Florida*, 399 U.S. 78, 102 (1970) (six-member jury consistent with functional view of jury). See generally Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987) (prevalence and dangers of interest balancing).

35. *Anderson v. Creighton*, 107 S. Ct. 3034, 3041 (1987).

36. Wellington, *Revisiting The People and the Court*, 95 Yale L.J. 1565, 1569 (1986).

37. Palmer, *The Federal Common Law of Crime*, 4 Law & Hist. Rev. 267, 269 (1986).

38. T. Lowi, *The Personal President* 23–28 (1985). This consensus was not materially altered by the Reconstruction amendments, even conceding their nationalistic implications. Even in the area of race, these features limited national regulatory authority. See B. Bailyn, D. Davis, D. Donald, J. Thomas, R. Wiebe & G. Wood, *The Great Republic* 735–41 (1977); Schmidt, *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1491–92 (1983) (state orientation prevented development of national institutions necessary to overcome racism). Contra Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and*

congressionally centered national government.³⁹ The New Deal transformed this entire system by putting pressure on a wide range of constitutional provisions that embodied the assumptions of the old order. Because they seldom have occasion to consider the changes in their entirety, lawyers often fail to appreciate that in virtually every instance the imperatives of the new administrative state triumphed over the apparently limiting constitutional provisions.

a. *Federalism*. — An introduction to the constitutional status of the modern administrative state begins with the problem of federalism. Here the received doctrine is to deny that any transformation has occurred.⁴⁰ The scope of national regulatory power finally sustained by the Supreme Court in the late thirties is said to find firm roots in 1789 understandings and early Marshall Court decisions construing the necessary and proper and commerce clauses, and the contrary intervening case law is dismissed as in error.⁴¹ Indeed, this proposition unites constitutional theorists who otherwise have little in common. For example, Attorney General Meese states:

Similarly, the decisions of the New Deal and beyond that freed Congress to regulate commerce and enact a plethora of social legislation were not judicial adaptations of the Constitution to new realities. They were in fact removals of encrustations of earlier courts that had strayed from the original intent of the

Reconstruction, 61 N.Y.U. L. Rev. 863, 877-78 (1986) (Republicans' creation of federal law, displacing state law, aided civil rights enforcement).

39. T. Lowi, *supra* note 38, at 28. Along a somewhat different plane, it bears noting that the emergence of the New Deal worked to destroy not only the once widely shared view of limited or passive government, but also its corollary assumption, that private property was a prepolitical institution that marked the boundary of legitimate governmental authority. The takings, contract, and due process clauses have almost completely failed to prevent redistributive national (and state) legislation. While at the time of the adoption of the Constitution redistributive legislation existed at the state level, see F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 155-57 (1985), as the nineteenth century wore on, the institution of private property was seen as a substantial limit on all governmental power. *Lochner v. New York*, 198 U.S. 45 (1905), is the culmination of that view. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 876-83 (1987).

40. See, e.g., Black, *On Worrying About the Constitution*, 55 U. Colo. L. Rev. 469, 472-76 (1984) ("Under the commerce power . . . the United States has acquired, by a process . . . infrequently and then very little checked since our beginnings, a national government."). On the issue of federalism, Professor Preyer's statement that there were "many 'original understandings,'" Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 Law & Hist. Rev. 223, 223 (1986), is a vast overstatement, at least if applied to the topics I am considering.

41. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) ("[a]t the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded") (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)). See generally Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. Chi. L. Rev. 504, 507-46 (1987) (reviewing New Deal cases confirming expansive federal power).

Framers regarding the power of the legislature to make policy.⁴²

These views are completely endorsed by leading nonoriginalist commentators.⁴³

This originalist justification for the New Deal is unconvincing.⁴⁴ Admittedly, the Framers were nationally oriented, particularly in foreign affairs. But it is vital not to exaggerate their nationalism, a common mistake caused by focusing on a few Framers such as Hamilton and Washington, and assuming not only that they would be right at home in the modern administrative state but, more importantly, that they were representative of the majority of those who ratified the Constitution.⁴⁵ Circa 1789, the internal orientation of the American people was state centered to a degree completely lost to modern constitutional law scholars. There is no historical basis for the proposition that the founding generation understood the power to regulate commerce "among the several states" to grant Congress unlimited power to regulate everything and anything it wished.⁴⁶ The core idea of a national government of limited powers is completely inconsistent with this idea.

Nor is the foregoing analysis altered if Chief Justice Marshall is thought to have substantially embodied the views of the ratifying generation. In 1824, in *Gibbons v. Ogden*, Chief Justice Marshall stated that Congress could regulate what "affected commerce."⁴⁷ We may assume that this standard was meant in an economic sense and that it reflected the original understanding,⁴⁸ although it is not clear that Congress was intended to have power to do much more than to prevent parochial and restrictive state trade barriers.⁴⁹ But it is beyond dispute that this

42. Meese (D.C.), supra note 25, reprinted in the Great Debate, supra note 6, at 38.

43. See, e.g., Black, supra note 40, at 472-76.

44. See T. Lowi, supra note 38, at 44-50.

45. See Powell, How Does the Constitution Structure Government?, in *A Workable Government?*, supra note 1, at 29-33 (nationalists were not the majority).

46. Professor Palmer writes, "The most striking instance [of federal government acting beyond constitutional bounds] is the extension of the interstate commerce power to the conditions of manufacturing. While the appropriate boundaries of commerce are hard to define, ordinary usage would never include everything now regulated as commerce." Palmer, supra note 37, at 269 n.13.

47. 22 U.S. (9 Wheat.) 1, 194 (1824).

48. But see R. Berger, supra note 8, at 133-36 (Marshall's interpretation of commerce clause departed from Framers' intent). Referring to Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), another instance where the Court validated an expansive view of the federal government's powers, Marshall's biographer wrote that "[i]n effect [he] rewrote the fundamental law of the Nation." A. Beveridge, 4 *The Life of John Marshall* 308 (1919).

49. See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 468-81 (1941); see also R. Berger, supra note 8, at 120-57 (Framers intended restrictive construction of commerce clause); Brown, Book Review, 67 Harv. L. Rev. 1439, 1446-55 (1954) (rebutting contention of unlimited federal regulatory power under commerce clause); Epstein, *The Proper Scope*

generation did *not* believe that everything affected commerce in a constitutionally relevant sense. Indeed, *Gibbons* itself referred to the "purely internal commerce"⁵⁰ of the states, and it cannot be asserted credibly that in 1789 (or in 1824) anyone thought that the "affecting commerce" rationale authorized direct federal regulation of the employer-employee relationship or of agricultural production. Certainly one *could* intend "affecting commerce" to have the limitless scope of its present construction, but a historically centered version of originalism demands that we look beyond *possible* constructions to the understanding—including the intended effects—at the creation.

I doubt whether any acceptable conception of original understanding can provide a satisfactory account of the New Deal. Moreover, in principle the question whether courts should keep out of federalism controversies given the "political safeguards of federalism,"⁵¹ is quite different from whether the Court should have pronounced these exercises of national regulatory authority consistent with original understanding. At most, the political safeguards argument makes a case for judicial declarations of nonjusticiability.⁵² It does not support affirmative judicial declarations that congressional legislation is consistent with the original constitutional design.⁵³

The Supreme Court decisions sustaining New Deal regulatory claims⁵⁴ constitute an important phase in the final victory of nation-centered federalism against the nineteenth century paradigm⁵⁵ of state-

of the Commerce Power, 73 Va. L. Rev. 1387 (1987) (an expansive construction of the commerce clause is "clearly wrong").

50. 22 U.S. (9 Wheat.) at 194-95.

51. Compare Wechsler, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543, 559-60 (1954) (states can protect their constitutional prerogatives in the political process) with *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part) (existence of amendment process presupposes some judicial limitation in name of federalism). But see Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 15-22 (1988) (criticizing political safeguards argument).

52. See J. Choper, *Judicial Review and the National Political Process* 175-90 (1980). Professor Wechsler's initial formulation of the argument is to the contrary: "This is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation; the supremacy clause governs there as well." Wechsler, *supra* note 51, at 559. Wechsler advocates limited review, but seems unable to formulate any measurable limit. Dean Choper seems to me to carry the political safeguards argument to its ultimate conclusion: nonjusticiability.

53. This distinction is frequently denied, at least implicitly, see *Garcia v. San Antonio Metro. Auth.*, 469 U.S. 528, 555-57 (1985) (claiming that the political safeguards of federalism argument suggests an expansive view of the commerce clause), or ignored, see Scheiber, *Federalism and the Constitution: The Original Understanding*, in *American Law and Constitutional Order* 85, 89 (M. Friedman & H. Scheiber eds. 1978).

54. E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

55. See J. Calhoun, *A Discourse on the Constitution and Government of the United States* (1853), reprinted in *A Disquisition on Government and Selections from the*

centered federalism. The modern exercises of the national taxing and spending powers cement that victory.⁵⁶ These include not simply Congress' well-known ability to extract state compliance with national policy objectives through conditional spending,⁵⁷ but also the various objects and expansive scale of modern federal spending "for the . . . general Welfare."⁵⁸ For example, federal spending has resulted in extensive federally financed, regulated, or operated programs in education, medicine and public health, local law enforcement, crop control, social security, and welfare.⁵⁹ The scale of this spending reflects a fundamental transformation in the federal/state balance.⁶⁰ Moreover, the very transfer of money from the national government to state governments and their political subdivisions⁶¹ undercuts the historical fiscal premises of 1789 federalism, which presupposed a "clear separation between state and federal governments, with each provided with the sources of public revenue for the support of functions assigned to it."⁶²

The eclipse of the constitutional theory of Our Federalism⁶³ circa 1789 can be viewed in two ways.⁶⁴ One can emphasize the collapse of

Discourse 85, 86 (C.G. Post ed. 1953) (emphasizing "federal", in contrast to national, nature of U.S. government).

56. See Monaghan, *The Burger Court and "Our Federalism,"* 43 *Law & Contemp. Probs.* 39, 41-42 (1980).

57. See generally Rosenthal, *Conditional Federal Spending and the Constitution*, 39 *Stan. L. Rev.* 1103 (1987) (describing increased imposition of conditions on federal funds recipients and arguing that Congress should not be able to coerce indirectly what it cannot require directly).

58. U.S. Const. art. I, § 8, cl. 1. The Court has said that "[t]he level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." *South Dakota v. Dole*, 107 S. Ct. 2793, 2796 n.2 (1987).

59. For a striking recent example of federal regulation in a traditional state domain, see *Honig v. Doe*, 108 S. Ct. 592 (1988) (considering federal spending statute's prescribed standards for state schools' treatment of handicapped children).

60. As late as 1928 Charles Warren argued that the spending power was intended to be confined to "carrying out those enumerated and limited powers vested in Congress—and no others." C. Warren, *supra* note 10, at 475. He thought it peculiar to argue that Congress could fund—and thereby create and control—activity that it could not reach directly under its regulatory authority. Raoul Berger reiterates this argument in *R. Berger*, *supra* note 8, at 100-19. But Warren's view did not wholly reflect the early practice of governmental spending, which at times at least, reflected spending for objects not defended as within national regulatory competence. See I Corwin on the Constitution 253-70 (R. Loss ed. 1981); Currie, *supra* note 41, at 535-36 n.148. In any event, Warren himself recognized that it was too late for his view, see C. Warren, *supra* note 10, at 475-79, thereby correctly anticipating *United States v. Butler*, 297 U.S. 1, 64-66 (1936).

61. See T. Lowi, *supra* note 38, at 24.

62. Hamilton, *On Nonconstitutional Management of a Constitutional Problem*, *Pub. Interest*, Winter 1978, at 111, 113; see also Monaghan, *supra* note 56, at 41.

63. For a discussion of the term "Our Federalism," see *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

64. I emphasize here constitutional theory. Politically, federalism is by no means dead.

the eighteenth century concept of a national government of limited powers. Madison's assurance that the powers of the new national government would be "few and defined [while] [t]hose which are to remain in the State governments are numerous and indefinite"⁶⁵ no longer casts even a faint shadow, and originalists cannot ignore the current legal hegemony of the national government.⁶⁶ An alternative approach is to see the new federalism not in terms of enlarged national powers, but of enlarged national responsibilities. The Constitution of 1789 emerged towards the end of an agricultural age, at only the very beginning of a manufacturing one. One could ask: In 1789, what internal tasks were contemplated for the new national government? As already described, they included only the regulation of commerce "among the several States," and other commerce-centered activities in a largely nonindustrial economy. While no one foresaw the massive scale of federal intervention, or the various federal attempts to alleviate the market and nonmarket consequences of the new industrial and postindustrial order, perhaps all this national activity can be squared with original understanding through a "changed circumstances" argument.⁶⁷ Such an argument differs from the one that must be rejected in *Brown* because the fundamental premise here—the structure of the nation's economy—had changed. But what is the content of a theory of original understanding that warrants national concern with social welfare, education, health and medical research, and local political corruption, all matters understood by the Framers, but probably not included as objectives within the federal government's spending powers?⁶⁸ Defense of the national *regulatory* state through a changed circumstances argument is one thing; defense of the national *welfare state* quite another.⁶⁹

65. The Federalist No. 45, at 313 (J. Madison) (J. Cooke ed. 1961); see R. Berger, *supra* note 3, at 59–76.

66. At bottom, the now judicially discredited doctrine of "dual federalism," see, e.g., *United States v. Butler*, 297 U.S. 1, 63 (1936); *Hammer v. Dagenhart*, 247 U.S. 251, 275–76 (1918), represented efforts at attempting to prevent federal power from wholly displacing state regulatory power. See R. Berger, *supra* note 8, at 49–76; Epstein, *supra* note 49, at 1427–28.

67. The political existence of state-centered federalism during the nineteenth century is not logically inconsistent with the existence of a constitutional design that contemplated the appearance of an omniscient national regulatory authority should such a need arise. But as I have said, I doubt that this design reflects the original understanding.

68. The relevant history is untidy here, and the issue is complicated. It may be that responsibility is a term with significance for what Congress can regulate, but *not* relevant for spending (at least noncoercive spending). The fact is that some early exercises of the federal power, fairly read, go beyond the understood reach of national regulatory authority or of national "responsibility." See *supra* note 60. Yet these early illustrations cannot fairly be seen to prefigure the existing order, given its present scale.

69. But see Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 *Colum. L. Rev.* 1103, 1114–15 (1986) (ninth amendment now imposes welfare responsibilities on the national government).

b. *Separation of Powers*. — More striking than the transformation in Our Federalism is the extent to which the 1789 version of separation of powers gave way to the necessities of the new administrative and bureaucratic order.⁷⁰ The best known casualty here is the Lockean axiom that the grant of legislative power is only to make laws, not to make other legislators,⁷¹ and thus Congress cannot delegate legislative power.⁷² Likewise, the President's executive power and his corresponding duty to "take [c]are that the [l]aws be faithfully executed"⁷³ were weakened in principle by the rise of the independent regulatory agencies.⁷⁴ Perhaps even more importantly, though little appreciated, is the demise of the apparent premise of several constitutional provisions—article III, the due process clause, and the jury trial provisions of the sixth and seventh amendments—that most adjudication implementing national regulatory policy would occur before judicial tribunals.⁷⁵ This premise failed to prevent extensive administrative determination of the rights and duties created by the modern state.⁷⁶ Finally, the transformation extends to the administrative state's enormous and insatiable appetite for information. The appetite rages unrestrained by the constitutional prohibitions against unreasonable searches and seizures and self-incrimination.⁷⁷

70. For a recent and exhaustive analysis of the emergence and possible decline of the New Deal ideal of an autonomous administration, see Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987); see also Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 Am. U.L. Rev. 295, 309-14 (1987) (discussing Reagan administration's approach to administrative agencies).

71. J. Locke, *Of Civil Government*, Second Treatise § 141, at 118 (Gateway ed. 1955).

72. See Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 25-26 (1983) (collecting sources).

73. U.S. Const. art. II, § 3, cl. 4.

74. See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). Moreover, the unitary executive concept of *Myers v. United States*, 272 U.S. 52 (1926), is a problematic idea when asserted as a limit on congressional power to determine how the laws should be implemented. See Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285, 302-04 (1950).

75. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 247-59 (1985); see also Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 937-43 (1988).

76. *Id.* For a more recent example, see *Commodity Future Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3259-61 (1986) (Commodity Future Trading Commission's assumption of jurisdiction over state law counterclaims does not violate article III). See also Currie, *The Distribution of Powers after Bowsher*, 1986 Sup. Ct. Rev. 19, 37-40. Displacement of judicial adjudication by the administrative process coincided with the collapse of substantive constitutional protection against redistributive legislation. It should be noted that the administrative process is not confined to adjudication. Important individual interests are determined by licenses, inspections, testing, etc., and of course by standards set out in administrative codes.

77. See K. Davis, 1 *Administrative Law* §§ 4.7, 4.16 (2d ed. 1978) (summarizing cases).

c. *The Presidency*. — The transformation of the Constitution of 1789 is seen nowhere more clearly than in the modern Presidency. One hundred years ago, Woodrow Wilson published *Congressional Government*,⁷⁸ and the title made the centrally relevant point: national government was congressional government, or more precisely, government by the chairmen of the standing committees of Congress.⁷⁹ Wilson put aside the President with the dismissive observation that his "business . . . occasionally great, is usually not much above routine."⁸⁰ Such a description of the federal government at least could be defended until the New Deal. But crucial and irrevocable changes began at that point: the consolidation of power in the national government served as the predicate for the consolidation of power within the Presidency. And with national governmental hegemony came the Executive Office of the President, now a significant bureaucracy and an institution that itself marks the vast gulf between 1789 and 1988.⁸¹ Of course, this institutional change was an administrative imperative if the President (or, more accurately, the Executive Office) was to exercise effectively vast new powers. Presidential power was further enhanced as the result of the Second World War and the emergence of the United States as a world leader.⁸²

There is no need to labor the familiar: the President today plays a dominant role in the national government completely beyond the understanding in 1789. Perhaps modern Presidents are bound to fail in their ambitious new role; perhaps of necessity they generate unfulfillable expectations.⁸³ But for us it is the very existence of the new presidential role that is of interest. Even acknowledging that the President's veto power contemplated some policy-making role for the Chief Executive,⁸⁴ the current "imperial" Presidency is characterized by its "appropriation . . . of powers reserved by the Constitution and by long historical practice to Congress."⁸⁵ The Constitution invests the

78. W. Wilson, *Congressional Government* (1956) (1st ed. 1885).

79. *Id.* at 82.

80. *Id.* at 170.

81. For a trenchant analysis of the evolution of the Executive Office "at the sacrifice of its fundamental principles," see D. Price, *America's Unwritten Constitution* 99-128 (1983).

82. A. Schlesinger, *The Imperial Presidency* 100-26 (1973).

83. T. Lowi, *supra* note 38, at 11. But see Schlesinger, *After the Imperial Presidency*, 47 *Md. L. Rev.* 54, 68-72 (1987) ("bound to fail" thesis is unpersuasive as applied to foreign policy).

84. See L. Fisher, *Constitutional Conflicts Between Congress and the President* 140-47 (1985).

85. A. Schlesinger, *supra* note 82, at viii. Cf. Black, *The Presidency and Congress*, 32 *Wash. & Lee L. Rev.* 841, 842 (1975) (except for presidential veto, Constitution could have ended after article I). This shift in historical understanding is ignored in Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 *Ga. L. Rev.* 171, 172 (1987), which proffers a strained reading of the basic constitutional language and ig-

President with "the executive Power,"⁸⁶ but modern Presidents are judged by the success of their "legislative" programs. Indeed, so deeply ingrained is this feature that constantly we hear worries about this or that incident impairing the President's—not Congress's—power to govern.⁸⁷ Wholly unnoticed by such commentary is the fact that the Constitution of 1789 did not give governing power to the President.⁸⁸

Presidential ascendancy has been assisted by a series of fundamental, and still ongoing, changes in the mode of Presidential selection. The commonplace observation that, from its inception, the electoral system failed to function as intended has uncommon consequences for originalists.⁸⁹ For many, the 1789 design reflected the then still powerful belief that political leadership was properly a function of character, and the process specified in article II was designed to implement that view.⁹⁰ Others believed that (after Washington) the electoral vote would seldom succeed in such an effort; for them, the electoral vote would simply mark the end of the nomination process, with the actual election taking place in the House.⁹¹ But in both views the election of the President was not designed to vest him with any popular mandate. By contrast, the modern Presidency draws powerful support from the President's claim that by virtue of his election he has received precisely such a mandate. With the decline of the role of political parties in the national election, the advent of the direct primary, and the ever increasing impact of television, we are now firmly in the grip of the plebiscitary presidency.⁹² Indeed, "the president [has] finally approached an un-

nores original understanding in positing shared decisionmaking rather than division of power.

86. U.S. Const. art. II, § 1.

87. But D. Price, *supra* note 81, is a valuable antidote against exaggerating the demise of the congressional role in government. He recognizes that presidential government need not necessarily mean "strong" government. *Id.* at 124–28. More importantly, he describes just how much power Congress has to impede coherent, centralized government. "Congress is a collective noun, not a disciplined entity." *Id.* at 92. Price argues that the defects in American government are subconstitutional in nature. *Id.* at 9.

88. Whether this decision was or is a good or bad idea is a different inquiry. See Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 *Cornell L. Rev.* 430, 437–38 (1987); Wilson, *Does the Separation of Powers Still Work?*, 86 *Pub. Interest* 36 (1987); see also *Reforming American Government: The Bicentennial Papers of the Committee on the Constitution* (D. Robinson ed. 1987); D. Robinson, "To the Best of My Ability" 267–81 (1987) (advocating constitutional reform focusing on powers of President).

89. For the best account of the quick collapse of the Framers' design, see R. McCormick, *The Presidential Game* 16–40 (1982).

90. See G. Wood, *The Creation of the American Republic, 1776–1787*, at 506–18 (1969).

91. *The Federalist* No. 39, at 252 (J. Madison) (J. Cooke ed. 1961), hints at this. See T. Lowi, *supra* note 38, at 33–35.

92. J. Ceasar, *Presidential Selection* 5–6 (1979). For an illuminating analysis, see J.

mediated relationship with the masses,"⁹³ precisely what was not intended by the 1789 Constitution. And as a result of this transformation the congressional role in the process of government has been rendered so problematic that Presidents feel free to appeal to the people (not to mention foreign governments) to fund foreign policy initiatives that Congress has refused to fund.⁹⁴

The Court has yet to validate explicitly the Presidency's expansive accumulation of power. Frequently, the Court has declared challenges to the scope of presidential power nonjusticiable,⁹⁵ and on occasion it even has decided cases on the merits against the President.⁹⁶ The Court has, however, affirmatively contributed to enlarged presidential powers: the Presidency has been a major beneficiary of the legitimation of the vast, open-ended delegations of legislative power,⁹⁷ and the Court has employed broad language to describe presidential authority in foreign affairs.⁹⁸ Moreover, the Court has recently indicated that it can be quite deferential when considering presidential interpretations of law and consequent exercises of power.⁹⁹ If ever forced to take a stand, it seems unlikely that the Court would act to constrain the powers of the Presidency in any significant way.

The transfer of power to the Presidency may be important to the originalist in yet another way. The tripartite framework for the federal

Tulis, *The Rhetorical Presidency* 118-32 (1987) (popular presidential leadership involves a fundamental transformation of original constitutional design).

93. T. Lowi, *supra* note 38, at 121.

94. For example, Assistant Attorney General Elliott Abrams asked, "Is there something wrong with the Administration, having lost the vote in Congress, appealing directly to the American people?" *N.Y. Times*, Jan. 20, 1987, at A1, col. 4; see also *N.Y. Times*, Aug. 27, 1987, at A1, col. 2 (Reagan administration used \$2 million in private funds to gain the release of two U.S. hostages in Lebanon). On the related issue of presidential use of "private armies" in covert actions, see generally Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 *U. Pa. L. Rev.* 1035 (1986) (covert war should be subject to congressional control via letters of marque and reprisal—authorized by art. I, § 8—rather than executive control).

95. See, e.g., *Burke v. Barnes*, 107 S. Ct. 734 (1987) (mootness of challenge to pocket veto); *Goldwater v. Carter*, 444 U.S. 996, 1002-04 (1979) (Rehnquist, J., plurality opinion) (congressional challenge to President's cancellation of treaty is a nonjusticiable political question).

96. The most important, at least theoretically, is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating President Truman's seizure of steel mills to prevent strike during Korean War).

97. See *supra* notes 71-72 and accompanying text.

98. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm . . . the President alone has the power to speak or listen as a representative of the nation.")

99. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (construing presidential action as authorized by statute); *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc) (same), cert. denied, 443 U.S. 915 (1979) (three justices dissenting); cf. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (declining to invalidate affirmative action executive order of questionable legality). Furthermore, the practical effect of judgments of nonjusticiability, see *supra* note 95 and accompanying text, is to enhance presidential power.

government created by the Framers contemplated a Presidency balanced, if not dominated, by Congress. This intended distribution of power infuses important principles of separation of power with the imprimatur of the Framers. But it may be critical to understand that these principles of separation of power are premised on a conception of the interaction between the Presidency and Congress that is no longer descriptively accurate. With the failure of the fundamental premise, the originalist must ask if the principles derived from that premise must fail as well.¹⁰⁰ And if they do, what is the source and content of any new principles that should be substituted?

In sum, no 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. Together these features necessarily pose a formidable challenge to originalists, who cannot reasonably argue that these transformative changes should now be judicially overthrown.

II. STARE DECISIS AND CONSTITUTIONAL CHANGE

One could respond to this originalist critique of our present constitutional order, and legitimate the transformative changes experienced by that order, with a number of arguments. For example, an originalist could treat any one—or all—of the developments described above as entirely unproblematic by formulating the relevant original understanding at a very high degree of generality.¹⁰¹ In question-begging

100. The question of the constitutionality of the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), provides a good example of this problem. Even if one assumes the resolution is unconstitutional as a matter of original intent, the Presidency's accumulation of power and the consequent deterioration of Congress' ability to check the President's warmaking powers may suggest that the resolution should now be upheld by the Supreme Court.

Another example can be found in *INS v. Chadha*, 462 U.S. 919 (1983). There the Court's sweeping condemnation of legislative vetoes surely reflects original understanding. But how can the Court apply original intent theory to legislative vetoes while continuing to sustain open-ended delegations of legislative power to executive and administrative agencies to which the legislative veto is a response? The decisions sanctioning such delegations are surely inconsistent with original understanding. If the latter decisions are protected from re-examination by *stare decisis*, what is the content of a theory that applies original understanding to one set of concerns but *stare decisis* to a set of closely related concerns?

Finally, *In re Sealed Case*, Nos. 87-5261, 87-5264, 87-5265, Misc. Nos. 87-00197, 87-00205, 87-00215 (D.C. Cir. Jan. 22, 1988), the recent decision by a panel of the D.C. Circuit striking down the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III 1985), can be criticized on the same grounds.

101. This I take it is the crux of R. Dworkin, *supra* note 3, at 355-99, and Richards,

fashion one might even point to the changes themselves as requiring precisely that approach. This approach does have the appealing advantage of dissolving at least most of the supposed conflict between the original understanding and our existing constitutional order.¹⁰²

Alternatively, one could deny that original understanding should play any decisive role in constitutional adjudication. Typically, this claim has been advanced to support judicial supplements to textually based civil liberties.¹⁰³ If invoked to validate the massive transformations heretofore described, this approach can only mean that original understanding rightly plays only a marginal role in constitutional adjudication. Yet again, one could acknowledge that some of these developments, such as the rise of the New Deal, did fundamentally transform the constitutional order, but attempt to justify them as legitimate constitutional "amendments," even though the amendments occurred outside the framework prescribed by article V.¹⁰⁴

For me, each of these approaches presents intractable difficulties, the development of which are beyond my purpose in this essay. But if one accepts the argument that none of the approaches legitimates our constitutional order, one must consider a different inquiry. While most, if not all, of the Supreme Court's decisions noted above are highly suspect, it seems almost unquestionable that these decisions are now beyond judicial recall. This raises questions about whether anything meaningful can be said for—and about—a principled role for *stare decisis* in constitutional adjudication. Should the Court adhere to a prior controlling decision even though a majority of the Court now believes the precedent to be inconsistent with original understanding (or wrong on some other theory of what constitutes appropriate criteria for constitutional adjudication)? Put differently, for judges concerned with the process of constitutional adjudication, can *stare decisis* properly provide a sufficient justification for a result?¹⁰⁵ In addition, if *stare decisis* can legitimately be invoked to insulate the major underpinnings

supra note 17, at 822-25. A variant of the high level of abstraction approach is the argument that, advertently or inadvertently, the Framers delegated open-ended decisionmaking power to future judges. See, e.g., Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 Nw. U.L. Rev. 191, 203 (1987). Closely related to these approaches, even if analytically distinguishable, are those theories which insist that the Framers contemplated shifting interpretations based on social change. See Richards, *A Theory of Free Speech*, 34 UCLA L. Rev. 1837, 1858 (1987).

102. But see Monaghan, supra note 16, at 378-81 (criticizing those who conceptualize original intent at such a level of abstraction that for all practical purposes it is removed as an interpretive constraint).

103. E.g., Brest, supra note 7, at 226-28.

104. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1053-57 (1984). Professor Ackerman will more fully develop this theme in a forthcoming book.

105. See Schauer, *Precedent*, 39 Stan. L. Rev. 571, 591-95 (1987).

of the existing order, what is now appropriately left for the role of original understanding?

A. *The Apparent Failure of Stare Decisis*

Resort to stare decisis presents formidable problems. In the common-law area, the doctrine has been the target of unremitting attack throughout this century.¹⁰⁶ These attacks have generated an attitude that the law must be argued for, with the inevitable result that any simple justificatory appeal to authority possesses little innate attractiveness.¹⁰⁷ If stare decisis cannot maintain a powerful grip on the common-law system that spawned it, it is not surprising that it appears to have fared still worse in the highly charged atmosphere of constitutional adjudication.¹⁰⁸ There the conventional wisdom is that stare decisis should and does have only limited application.¹⁰⁹ The prescrip-

106. This attack antedates the Realists. E.g., Whitney, *The Doctrine of Stare Decisis*, 3 Mich. L. Rev. 89, 94 (1904) (doctrine of stare decisis "must disappear through the inevitable course of human progress"). The attack reflects more than the need perceived by courts to respond effectively to rapidly accelerating social and economic change; it also reflects a centuries old and accelerating decline in beliefs of permanent ordering with respect to any form of social or intellectual activity. See F. Baumer, *Modern European Thought, Continuity and Change in Ideas, 1600-1950*, at 20-23 (1977). In the United States, this decline has been sharply reinforced by the emergence and dominance of pragmatism in philosophy and instrumentalism in legal thinking. "Pragmatic instrumentalism" has been described as America's dominant philosophy of law. Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 Harv. L. Rev. 433, 435-36 (1978). See generally Aleinikoff, *supra* note 34, at 955-58 (discussing growth and tenets of pragmatic instrumentalism).

107. Rather, precedent will only prevail after there has been analysis of the "disadvantages of making [the particular] change." Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 12 (1966).

108. In my view, the currently disfavored status of precedent in constitutional adjudication is also strongly reinforced by the fundamental premises of what I have elsewhere described as "perfectionist" constitutional theory. Monaghan, *supra* note 16, at 356. But, it must be noted, the disfavored status of precedent is not confined to perfectionists, as the attitude of Chief Justice Rehnquist towards precedent illustrates. See, e.g., *Garcia v. San Antonio Metro. Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (advocating future reversal of the case). Some writers have thought that the background of members of the Court has contributed importantly to attitudes towards precedent. Armstrong, *Mr. Justice Douglas on Stare Decisis: A Condensation of the Eighth Cardozo Lecture*, 35 A.B.A.J. 541, 543 (1949). My own belief is that stare decisis is undercut by law teachers and their deep-rooted belief that lawyers are social engineers.

109. See, e.g., *United States v. Scott*, 437 U.S. 82 (1978), which contains the canonical reference:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Id. at 101 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932)) (Brandeis, J., dissenting).

tive side of this claim is usually rested on the Brandeisian assertion that "correction through legislative action is practically impossible."¹¹⁰ But the argument that judicial change is the only possible means to achieve social improvement is badly overstated. Its undifferentiating character is apparent—no distinction is made among constitutional provisions, and certain applications of some are plainly less important than those of others.¹¹¹ More significantly, the argument's central factual premise is overdrawn, at least regarding the decisions to which current commentators seem most anxious to deny binding authority: those *rejecting* autonomy or equality claims. In almost every instance, the results (if not the decisions) can be "overruled" by statute.¹¹²

Descriptively, however, the conventional wisdom seems to rest on firmer ground.¹¹³ *Garcia v. San Antonio Metropolitan Transit Authority*¹¹⁴ is only the most dramatic illustration of the view held by some commentators¹¹⁵ that the Supreme Court is largely unconstrained by its own precedents. In *Garcia*, a 5-4 majority overruled its well-known 5-4 majority decision rendered one decade earlier in *National League of Cities v. Usery*,¹¹⁶ which in turn had overruled a 6-2 decision itself only eight years old.¹¹⁷ The *Garcia* majority brushed aside any supposed precedential compulsion in the penultimate paragraph of a lengthy opinion,¹¹⁸ and at least two dissenting Justices said that *Garcia* should be

110. *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting).

111. For example, the fact that legislative action cannot shift the point at which double jeopardy attaches from the impanelment of the jury to presentation of evidence, *Crist v. Bretz*, 437 U.S. 28, 38 (1978), does not support the argument for a dilution of stare decisis in constitutional adjudication. The issue is simply not important enough.

112. Were the Court to sustain, after a fourteenth amendment challenge, discrimination against women or illegitimates, nothing would prevent the states from passing corrective legislation to secure the claimed rights. Congress possesses similar competence by virtue of its regulatory authority under the commerce clause and the fourteenth amendment, to say nothing of its power to extract adherence to nationally formulated norms through conditional spending. See, e.g., *Honig v. Doe*, 108 S. Ct. 592 (1988). Much civil rights law is statutory in character, and these statutes impose norms not required by the Constitution standing alone. Affirmative action might be an exception to this argument.

113. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 467 ("It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe."); see also *id.* at 494-96 (listing cases from 1960-1979 in which the Supreme Court overruled itself). This fact is apparent not only from the freedom with which the Supreme Court overruled precedents, but in the often cavalier way in which they are "distinguished." Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1, 2-3 (1979).

114. 469 U.S. 528 (1985).

115. See, e.g., Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 Const. Commentary 341, 345 (1985); Maltz, *supra* note 113, at 467.

116. 426 U.S. 833 (1976).

117. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

118. *Garcia*, 469 U.S. at 557.

overruled at the first opportunity.¹¹⁹ Decisions like *Garcia* have led thoughtful commentators to assert that constitutional law would be better off rid of any formal legal concept of stare decisis.¹²⁰ To these commentators it would come as no surprise that in four cases during the last few days of its 1986 Term the Court overruled prior decisions,¹²¹ and in only one of these did it purport to give any serious attention to the question of stare decisis.¹²²

Nonetheless, some important and controversial civil liberties cases are still decided on the basis of prior authority and, perhaps, secure acceptance on that basis.¹²³ But this fact further diminishes the appeal of decisions resting on stare decisis. Because a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations. As a result, stare decisis seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact. A satisfactory theory of constitutional adjudication requires more than that.

119. *Id.* at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

120. See Note, *The Power That Shall Be Vested In a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. Rev. 345, 371-75 (1986); Giraudo, *Realism, Positivism and Adherence to Stare Decisis: Has the Doctrine Outlived Its Usefulness?* 37-39 (on file at Columbia Law Review).

121. See *Welch v. Texas Dep't of Highways and Pub. Transp.*, 107 S. Ct. 2941 (1987) (overruling the "quasi-constitutional" holding in *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)); *Solorio v. United States*, 107 S. Ct. 2924 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987) (overruling *General Motors Corp. v. Washington*, 377 U.S. 436 (1964)); *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2807-10 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861)).

122. In *Branstad*, the Court elaborated how *Dennison* was "fundamentally incompatible with more than a century of constitutional development." *Branstad*, 107 S. Ct. at 2809. While the Court in *Welch* did not address issues of stare decisis in its decision to overrule *Parden*, it was quick to rely on the force of precedent to refuse to overrule *Hans v. Louisiana*, 134 U.S. 1 (1890). *Welch*, 107 S. Ct. at 2948-49. Such selective reliance does little to enhance the Court's reputation as an objective or principled arbiter.

123. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986) (refusing to abandon rule that discriminatory selection of grand jurors cannot be harmless error); *Harris v. McRae*, 448 U.S. 297, 316-18 (1980) (holding, on basis of *Maher v. Roe*, 432 U.S. 464 (1977), that states participating in Medicaid program are not obligated under the Social Security Act to continue to fund medically necessary abortions for which federal reimbursements are unavailable); *Wolman v. Walter*, 433 U.S. 229, 251 n.18 (1977) (refusing on grounds of stare decisis to presume that state-supported educational materials for private schools would not be used for religious purposes); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), discussed *infra* notes 136-138 and accompanying text. A cognate, but not identical problem arises in the area of statutorily based civil liberties. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1458-60 (1987) (Stevens, J., concurring) (Title VII of Civil Rights Act, 42 U.S.C. §§ 2000e-2(a)); *id.* at 1460-61 (O'Connor, J., concurring) (same); *Runyon v. McCrary*, 427 U.S. 160, 189-92 (1976) (Stevens, J., concurring) (§ 1981 of Civil Rights Act, 42 U.S.C. § 1981).

B. *The Strengths of Stare Decisis*

1. *Agenda Limitation.* — Closer examination of the descriptive side of the conventional wisdom shows that, at least from an originalist's perspective, it is deeply wrong: *stare decisis plays a very large role in constitutional law.* Many constitutional issues are so far settled that they are simply off the agenda. For example, it seems clear that under the 1789 Constitution only metal could constitute legal tender.¹²⁴ In fact, until driven to do so by the exigencies of the Civil War, the national government never attempted to impart that quality to paper. When the government did take this step the result was a series of post-Civil War decisions, collectively known as the Legal Tender Cases.¹²⁵ While they "have [now] disappeared below the surface of American constitutional law . . . [m]easured by the intensity of the public debate at the time, [these cases raised] one of the leading constitutional controversies in American history."¹²⁶ Following this painful conflict and one of the most widely criticized overrulings of precedent,¹²⁷ use of paper money as legal tender was sustained.¹²⁸ Over one hundred years later, in our age of checks, credit cards and electronic banking, the issue is off the agenda: no Supreme Court would now reexamine the merits, no matter how closely wedded it was to original intent theory and no matter how certain it was of its predecessor's error.

124. See Dam, *The Legal Tender Cases*, 1981 Sup. Ct. Rev. 367, 389 ("In short, although it may have been inconvenient to the proponents and constitutional defenders of legal tender paper money, it is difficult to escape the conclusion that the Framers intended to prohibit its use."). Mr. Dam points out that the Framers intended to prohibit paper money altogether, but by the time of the legal tender cases only the issue of investing paper with the quality of legal tender was effectively open. *Id.* at 390; see also B. Siegan, *The Supreme Court's Constitution* 30 (1987) (reaching similar conclusions).

125. See Dam, *supra* note 124, at 367 n.1 (collecting cases).

126. *Id.* at 367.

127. See *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871) (overruling *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870)). In *Knox*, the Court described *Hepburn* as a case that "was decided by a divided court, and by a court having a less number of judges than the law . . . provided this court shall have." *Knox*, 79 U.S. (12 Wall.) at 553-54. Moreover, overruling was not "unprecedented," and this was not a case of "private right," but one that involved "far-reaching consequences." *Id.* at 554. Concurring, Justice Bradley said:

On a question relating to the power of the government, where I am perfectly satisfied that it has the power, I can never consent to abide by a decision denying it, unless made with reasonable unanimity and acquiesced in by the country. Where the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision.

Id. at 569-70.

128. This line of decision culminated in *Julliard v. Greenman*, 110 U.S. 421 (1884), and generated the first law review essay on *stare decisis* in constitutional law. See Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 Harv. L. Rev. 125 (1889).

The fourteenth amendment provides other examples. Could the Court now be persuaded even to consider the view that section 1 of the fourteenth amendment was intended to reach only "civil"¹²⁹—not social and political—rights and therefore that *Brown* and the reapportionment decisions must be repudiated? What of the objection that the fourteenth amendment is itself not law at all? Professor Ackerman argues that this amendment was adopted in an extra-constitutional manner.¹³⁰ If the rebellious states possessed sufficient political capacity to ratify the thirteenth amendment, how could they legitimately be excluded from the process of formulating the fourteenth amendment, asks Professor Ackerman? For many (though not for Professor Ackerman) the force of this reasoning, if accepted, would necessarily mean that the amendment is not validly part of the Constitution. Can it seriously be thought that the Supreme Court would fairly consider such a claim?

Finally, many of the fundamental transformations in our governmental structure legitimated by the Supreme Court in this century are unquestionably above challenge. Is it conceivable that the Court would outlaw the administrative state? Certainly administrative legislation, in some substantial form, is a permanent feature of our constitutional order. And while the Court may or may not honor *Garcia* in the future, it cannot be doubted that as a constitutional matter the federal government's regulatory power is more aptly described as limitless than limited. The constitutional law, if not the political dimensions of the New Deal, is here to stay.

The operation of stare decisis in these contexts is agenda limiting in nature. The Court could not fairly look at these issues *res nova*. Regardless of whether the Court thought these issues rightly decided, consciously or unconsciously any challenge would be screened out *in limine*. History counts.¹³¹ The only significant question is how.

Were the official theory that stare decisis has no formal role to play in constitutional adjudication, the pressure on originalism would be unremitting—and distorting. Standing alone, originalism can absorb

129. While a distinction between civil rights and social and political rights cannot be maintained today, to the Framers of the fourteenth amendment the distinction was all-important. The amendment was intended to apply only to "civil" rights: personal security, personal liberty (freedom from bodily restraint), and private property. R. Berger, *supra* note 3, at 20–36.

130. Ackerman, *supra* note 104, at 1063–70.

131. As Justice Holmes put it,

With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Missouri v. Holland, 252 U.S. 416, 433 (1920).

transforming historical reality in only two ways: original understanding simply could be misstated, or it can be stated at such a level of generality that it becomes operationally empty. Either approach drains originalism of integrity. Thus, the important question is how *stare decisis* is to count, not so much in understanding the present, but in guiding action in the future.

2. *Contested Matters*. — Many constitutional issues currently remain contested despite relevant, if not definitive, Supreme Court pronouncements regarding the subject. In the absence of those factors that coalesce to remove an issue from the agenda, judicial closure seems impossible. Sometimes the Court's continuing divisions simply mirror deep public rifts (abortion, busing), sometimes not (*National League of Cities* and *Garcia*, search and seizure). Of course, as the history of racial segregation itself shows, no sharp distinction can be made between the agenda-limitation and contested-matters categories: the categories are only relatively stable points on a continuum, issues move between them, and many matters not only fall in between the two points but at different times can be at different ends of the continuum.¹³² Nonetheless, certain issues clearly fall within the contested category.¹³³

At this juncture the pertinent question is whether *stare decisis* should have any substantial role in cases where the issues remain contested. Here originalists are divided, but many seem to assume that a negative answer is required.¹³⁴ Recently, however, interest has surfaced for a potentially stronger role for *stare decisis* in this area. This interest has been spurred on by the possibility that the Court might soon be composed of a majority who are of the view that *Roe v. Wade*,¹³⁵ considered *res nova*, is insupportable. The very problematic congressional efforts to "overrule" that decision have now visibly waned. But

132. Perhaps there is still a third category: weak precedents—not really controversial, but not strong enough to hold their own once reexamined. At present, this category, if it exists, seems to add nothing distinctive beyond the contested category, and I subsume it there.

133. There is a separate group of agenda-limitation cases not directly dealt with in this essay. These cases are off the agenda not because of their importance but because they involve issues about which there is no current interest. The constitutionality of the remittitur practice may be one example. I have treated these as raising issues not different from the contested area.

134. Typical is the attitude of Attorney General Meese. Apparently, he has endorsed a 128 page report urging that *Miranda v. Arizona*, 384 U.S. 436 (1966), be overruled. So far as presently appears, no attention is given to the systemic implications of overruling well-known decisions. Instead, the focus is solely on the obnoxious precedent and on the assumed immediate need to set right the constitutional law. See Shenon, Meese Seen as Ready to Challenge Rule on Telling Suspects of Rights, *N.Y. Times*, Jan. 22, 1987, at A1, col. 2 ("The interesting question is not whether *Miranda* should go, but how we should facilitate its demise, and what we should replace it with. . . . We regard a challenge to *Miranda* as essential.") (quoting report).

135. 410 U.S. 113 (1973).

what of an attack from within the Court itself? One decade after *Roe*, a majority of the Court invoked stare decisis to reject such a challenge:

And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*.¹³⁶

Quite plainly, the Court does not purport simply to reexamine and revalidate *Roe*. Rather, stare decisis is invoked as a powerful justification for adherence to the decision. This is made even clearer by an accompanying footnote in which the Court adds two "especially compelling reasons": first, "[t]hat case was considered with special care," and second, "the Court repeatedly and consistently has accepted [*Roe*'s] basic principle."¹³⁷ Three dissenting justices discounted the importance of stare decisis, but they stopped short of calling for *Roe*'s overruling.¹³⁸ More recently, however, while the Court rejected efforts by the Solicitor General to have *Roe* overruled, Justice White and Chief Justice Rehnquist expressly issued such a call.¹³⁹

Suppose that the Court were composed of a solid majority who believe that *Roe* was incorrectly decided. What *should* happen? Whether *Roe* should be overruled is a question not reducible to whether *Roe* was decided correctly.¹⁴⁰ One can imagine the Court drawing precisely such a distinction and refusing to overrule *Roe*. Of course, to make this distinction one needs a general theory of constitutional interpretation that includes some account of precedent. Why, for example, is it proper to overrule *National League of Cities, Kentucky v. Dennison*,¹⁴¹ and *General Motors Corp. v. Washington*,¹⁴² but not *Roe*?¹⁴³ Once we acknowledge *some* role for stare decisis in constitutional adju-

136. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 (1983).

137. See *id.* at 420 n.1.

138. See *id.* at 458 (O'Connor, J., dissenting).

139. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169, 2193 (1986) (White, Rehnquist, JJ., dissenting); see also Myers, *Pro-life Litigation and Civil Liberties, in Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* 32 (D. Horan, E. Grant & P. Cunningham eds. 1987) (discussing Justice White's opinion in *Thornburgh*).

140. See Schauer, *supra* note 105, at 587.

141. 65 U.S. (24 How.) 66 (1861) (overruled by *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2809-2810 (1987)).

142. 377 U.S. 436 (1964) (overruled by *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 107 S. Ct. 2810, 2817 (1987)).

143. The need for a theory is true even were one to posit stare decisis as a wholly discretionary political doctrine, permitting the Court to maintain past decisions that it likes. That, of course, is a theory, but it is a theory about the judicial process that would make many people uncomfortable, at least those who believe that the Court is something other than a power organ and that doctrine is not simply a rhetorical mask obscuring this reality.

dication—in the agenda-limitation context—it becomes more plausible for an originalist to consider a more generalized role for *stare decisis* in constitutional adjudication. The problem then becomes explicating that role.

III. NOTES TOWARD A THEORY OF STARE DECISIS: JUSTIFICATION

Precedent is, of course, part of our understanding of what law is. But that acknowledgment does not resolve the question why it plays such an important role. Generally, judicial adherence to precedent is defended by pointing to the important values in decisionmaking that are promoted thereby: consistency, coherence, fairness, equality, predictability and efficiency.¹⁴⁴ Perhaps, as is sometimes suggested, these values are largely obtainable without any formal doctrine of *stare decisis*.¹⁴⁵ Be that as it may, I believe that any meaningful role for *stare decisis* in constitutional adjudication must draw on more powerful considerations, weighty enough to predominate even when the constitutional issues involved are of the first order. For us, those considerations are bottomed upon the concept of legitimation.

John Rawls writes that “[i]n a constitutional democracy one of [political theory’s] most important aims is presenting a political conception of justice that can not only provide a shared basis for the justification of political and social institutions but also helps ensure stability from one generation to the next.”¹⁴⁶ For Rawls, these are especially vital needs given the ineradicable pluralism of American society. Such a society faces seemingly perpetual centrifugal forces undermining the socially necessary stability. Rawls’ analysis is also pertinent to constitutional theory. 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.”¹⁴⁷ Moreover, these values are in part at least among the values

144. For an evaluation of how well these values are achieved by judicial adherence to precedent, see R. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* 60–81 (1961).

145. See Giraudo, *supra* note 120, at 57–67; Note, *supra* note 120, at 371–75.

Code countries operate without any formal doctrine of precedent. Moreover, for judges who would overrule precedent, any significant reliance claims can be substantially accommodated through the now common device of prospective overruling. Justice O’Connor overlooked that possibility in *American Trucking Ass’n v. Scheiner*, 107 S. Ct. 2829, 2849 (1987) (dissenting opinion) (“reliance interest sought to be protected by the doctrine of *stare decisis* has grown up around the settled rule. . . . [when the state] has collected some \$300 million in axle taxes.”).

146. Rawls, *The Idea of an Overlapping Consensus*, 7 *Oxford J. Legal Stud.* 1, 1 (1987).

147. *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 415 (1819). Of course, I do not claim that the values I identify are unique to constitutional law, but only that they have greater purchase there.

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 equilibrium of government."¹⁴⁸

Achievement of these values depends at least in part upon ideology, particularly the idea of legitimate government. From the very beginning—indeed from pre-Revolutionary War days—Americans have been deeply concerned with the question of the legitimacy of their political institutions.¹⁴⁹ Although considerable controversy exists over both the content and utility of "legitimacy" theory as a way of understanding the legal order,¹⁵⁰ legitimization ideology can make certain modest claims as a valid and important construct,¹⁵¹ particularly given my narrow focus: I am not concerned with the relationship between legitimization ideology and popular culture,¹⁵² but only at the narrower level of elite groups, such as lawyers, public officials, and judges. For these members of the "reasoning class,"¹⁵³ the Supreme Court functions as the central means "for bringing about a consensus on the legitimacy of important governmental measures."¹⁵⁴

A. *System Legitimacy*

At its most general level, stare decisis operates to promote system-wide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society. Such norms include the freedom from racial discrimination by the gov-

148. The Federalist No. 49, at 341 (J. Madison) (J. Cooke ed. 1961). The Federalist No. 50, at 343-47 (J. Madison) (J. Cooke ed. 1961), also discourages periodic appeals to the people.

149. See J. Greene, *Peripheries and Center* 65-68 (1986) (describing disputes on the nature of the Imperial Constitution as distinguished from the Constitution of Great Britain); J. Reid, *Constitutional History of the American Revolution* (1987) (describing colonists' perception of the sources and nature of their rights to refuse taxation by British); see also Kay, *The Illegality of the Constitution*, 4 Const. Commentary 57, 71 (1987) ("[T]he political actors who brought the Constitution into effect were well aware of the need for political, non-legal justifications for their actions.").

150. See Chase, *Toward a Legal Theory of Popular Culture*, 1986 Wis. L. Rev. 527, 528-29 ("quotidian experience of law and lawyers [is] an appropriate, indeed central, subject of radical and systematic contemporary legal theory" if the legal theory is to be culturally legitimate); Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379, 419 (current legitimacy theory "explain[s] neither obedience, revolt, nor legal behavior").

151. See M. Kelman, *A Guide to Critical Legal Studies* 262-68 (1987).

152. See Chase, *supra* note 150, at 543-45 (no adequate reception theory exists for popular culture).

153. J. Ely, *Democracy and Distrust* 59 n.** (1980).

154. C. Black, *The People and the Court* 38, 51 (1960). The Supreme Court is not the exclusive mechanism. The amendment process is another. Professor Ackerman's constitutional moments would also qualify. See also Rawls, *supra* note 146, at 13-20 (an "overlapping consensus" on a political conception of justice controls the public agenda by establishing common ground and placing certain issues outside public debate).

ernment, the general reach of the commerce clause, and even the legality of paper money. Expectations, tangible and symbolic, have developed around the critical decisions; the massive destabilization following a successful attack on any of these would threaten the functioning of the federal government, if not the viability of the constitutional order itself.¹⁵⁵

But the question of criteria remains. For the Court to invoke a system-legitimacy justification to explain its use of *stare decisis* in any given instance, it must feel that the consequences of overruling settled precedent are quite serious. Of course, the nation's stability need not be imminently threatened every time such a system-legitimacy justification is appropriate. But this justification supports the use of *stare decisis* only to prevent disruption of practices and expectations so settled, or to avoid the revitalization of a public debate so divisive, that departure from the precedent would contribute in some perceptible way to a failure of confidence in the lawfulness of fundamental features of the political order.¹⁵⁶

Because credible justification in system-legitimacy terms for adherence to precedent is so restricted, it seems likely that this justification will roughly correspond to those issues where *stare decisis* performs an agenda-limitation function. Such issues are too central to our society to overrule, if not simply to question. To permit or vindicate challenges to these traditions would "incite radical and even revolutionary attacks on the legal status quo."¹⁵⁷ Consequently, the Court must remove the issue of constitutional validity from public debate and keep the book closed on the questions. *Stare decisis* performs that office: to the extent that it restricts judicial reconsideration of legitimacy questions, *stare decisis* operates to keep issues off the constitutional, if not the political agenda, thereby leaving open for debate only less threatening issues. Accordingly, in part at least, it seems fair to say that the stability of our legal system depends on the doctrine of *stare decisis*.

The agenda-limiting phenomenon could be viewed in purely Bickelian terms: agenda-limiting *stare decisis* is a "passive virtue," en-

155. This result cannot be avoided simply by saying that the Court could stay any particular judgment until an amendment were passed and that corrective amendments would be enacted. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982) (giving only prospective effect to holding that bankruptcy courts established by Congress were unconstitutional). Perhaps that would suffice, perhaps not. But I am concerned with a different order of magnitude.

156. Moreover, while my general inclination is to think about legitimation theory within the framework of elite theories of democracy, see Monaghan, Book Review, 94 Harv. L. Rev. 296, 308 n.42 (1980), judicial repudiation of any fundamental feature of current constitutional order would extend my concern about the legitimation crisis to the general public.

157. Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 Iowa L. Rev. 1427, 1433 (1986).

tirely political in nature.¹⁵⁸ Believing that in the popular mind Supreme Court decisions legitimated governmental decisions not only as valid, but as desirable public policy, Professor Bickel argued that the Court might properly manipulate jurisdictional doctrines to avoid principled merit holdings that would uphold and thereby legitimate undesirable legislation.¹⁵⁹ However, the central function of agenda-limiting stare decisis is different. Its office is not to maintain principles politically favored by the Court, but to avoid delegitimation of deeply entrenched governmental arrangements.¹⁶⁰

Of course, even when expectations or practices are not deeply entrenched, if serious public debate still surrounds an issue, departure from precedent may sometimes threaten the stability and continuity of the political order and should therefore be avoided.¹⁶¹ *Roe* provides a ready example. However, the contested area will include few cases with *Roe*'s significance. More typically the public will not be sufficiently concerned that the Court is of two minds about the matter.

Stability and continuity, however, are not the only important constitutional values, and sometimes even these values cannot be achieved without change. Thus, even this argument cannot establish the absolute priority of precedent over text. But constitutional law is in the end a matter of government, and the Court is a part of that government.¹⁶² Although *Brown* will forever remind us that the Supreme Court can occasionally act as a catalyst in generating profound social change,¹⁶³ the Court also plays an important role in our government by conserving and perpetuating shared values. In that respect, the very existence of a body of precedent is a conservative, stabilizing force, as Ronald

158. A. Bickel, *The Least Dangerous Branch* 200-01 (1962).

159. *Id.* at 204-07. In this regard Bickel followed C. Black, *supra* note 154, at 56-86 (judicial review legitimates governmental action among the general public).

160. Rather than declining jurisdiction, the Court ordinarily uses precedent to avoid delegitimation by refusing to hear cases, or by considering the merits without advertng to any lower court challenge to foundational principles. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 48-50 (1985) (summarily rejecting the district court's "remarkable conclusion" that the establishment clause does not restrict the states).

161. Rawls, *supra* note 146, at 12-15.

162. No sound assessment of our Supreme Court can treat it as an isolated, self-sustaining, or self-sufficient institution. It is a unit of a complex, interdependent scheme of government from which it cannot be severed. Nor can it be regarded merely as another law court. The Court's place in the combination was determined by principles drawn from a philosophy broader than mere law.

R. Jackson, *The Supreme Court in the American System of Government* 2 (1963); see also O. Holmes, *The Common Law* 36 (M. Howe ed. 1963) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.").

163. But it bears emphasis that it acted as a catalyst only. The case-by-case method was ultimately replaced by political action. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313-15 (1966) (describing the limits of the case-by-case method as a vehicle for eliminating voting discrimination).

Dworkin observes.¹⁶⁴ A practice of judicial adherence to this body of precedent will further foster conservative values.¹⁶⁵ In the end, therefore, stare decisis reflects a political conception of the nature of our constitutional government, and it must be defended in those terms.

B. *Legitimizing Judicial Review*

Focus on system legitimation convincingly underpins only some aspects of stare decisis. For example, the wisdom of judicial reconsideration of a whole series of "small" constitutional questions—such as whether jeopardy attaches when a jury is sworn rather than when it actually hears evidence, or whether remittitur is consistent with the common-law trial by jury—is not determined by system-maintenance concerns. Of greater note, it seems that most issues one would consider "currently contested"¹⁶⁶ are not easily disposed of by appeals to system legitimacy. There is, however, a second, and perhaps more universal justification for the application of stare decisis to contested matters, one that also arises from a rationale concerned with stability and continuity. Namely, the Court must strive to demonstrate—at least to elites—the continuing legitimacy of judicial review. A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law. At first blush it may seem perverse to defend the idea that the Court maintains its subservience to the fundamental law by upholding decisions that depart from that law. But this difficulty is not insurmountable. What the Constitution requires is often a matter for debate, and once having been adequately canvassed and resolved by the Court, an issue might presumptively remain at rest. Even when the prior judicial resolution seems plainly wrong to a majority of the present Court, adherence 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."¹⁶⁷ In listing "the weighty considerations" supporting

164. R. Dworkin, *supra* note 3, at 88.

165. A. Cox, *The Court and Constitution* 69–71 (1987). This is an avowedly conservative conception of the judicial office—conservative in a Burkean, not libertarian sense. There is an important and wide difference between the two. See, e.g., S. Macedo, *supra* note 9, at 21–31 (a libertarian criticism of Judge Bork's "New Right" belief that the animating principle of the Constitution is majority rule).

166. See *supra* notes 132–33 and accompanying text.

167. A. Cox, *The Role of the Supreme Court in American Government* 50 (1976). Nearly 50 years ago, Roscoe Pound argued that some conception of stare decisis was vital to the concept of limited government and the rule of law by restricting judicial "absolutism." Pound, *What of Stare Decisis?*, 10 *Fordham L. Rev.* 1, 5 (1941). For the—to my mind doubtful—suggestion that the lack of effective stare decisis in constitutional cases blurs any distinction between a written and unwritten Constitution, see Brown, *Construing the Constitution: A Trial Lawyer's Plea for Stare Decisis*, 44 *A.B.A.J.* 742, 743 (1958).

adherence to precedent, Justice Harlan included "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."¹⁶⁸ While it is quite clear to any observer that the Court has no coherent or stable conception of the appropriate role of precedent in constitutional adjudication, Justice Harlan's theme is something of a decorative favorite, especially among dissenters who object to an overruling decision¹⁶⁹—and it is certain the theme is sensible beyond mere decoration.

To my mind, this rule of law argument does not suffer from criticism that the man in the street is unaware of the overruling of "small" precedents and that, in any event, he would expect the Constitution and not the Court's precedents to control adjudication.¹⁷⁰ For me, the real focus of rule of law theories about the Supreme Court in the main is elites, at least "the reasoning classes." The concern is to contain, if not minimize, the existing cynicism that constitutional law is nothing more than politics carried on in a different forum.¹⁷¹ In a recent work, Professor Cox states that the future of judicial review turns largely on whether law is seen by the profession as only judicial policymaking, or "whether room is left for the older belief that judges are truly bound by law both as a confining force and as an ideal search for justice."¹⁷² Perhaps it goes too far to tie the whole future of judicial review to this distinction, but Professor Cox's point does have merit. My submission is that 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."¹⁷³ If courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened.¹⁷⁴

168. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970).

169. E.g., *Solorio v. United States*, 107 S. Ct. 2924, 2941 (1987) (Marshall, J., dissenting) ("bedrock principles are founded in law rather than in the proclivities of individuals") (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

170. Note, *supra* note 120, at 353–56; see also Haltom & Silverstein, *The Scholarly Tradition Revisited*: Alexander Bickel, Herbert Wechsler, and the Legitimacy of Judicial Review, 4 *Const. Commentary* 25, 32–40 (1987) (person in the street generally unaware of basis of Court's decisions). Recently, Judge Posner expressed his opinion that a general failure to adhere to precedent in constitutional cases would weaken the legitimacy of the federal judiciary by weakening the popular acceptance of judicial decisions. *Harv. L. Record*, Nov. 21, 1986, at 5, col. 3; at 13, col. 1.

171. Professor Cox speculates about the possibility of the "reformist" Warren Court decisions being overruled by a future "reformist" Court, and ponders the "effect of a succession of reforms and re-reforms upon the position of the Court and the idea of law." A. Cox, *supra* note 167, at 111.

172. A. Cox, *supra* note 165, at 377.

173. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

174. See A. Cox, *supra* note 165, at 364.

C. *The Uncertain Constitutional Source of Stare Decisis*

Once it is acknowledged that stare decisis should play a role in constitutional adjudication, the intriguing question arises as to the constitutional source of this doctrine. Presumably there are two leading possibilities. One could argue that the principle of stare decisis inheres in the "judicial power" of article III. Alternatively, stare decisis could possess the nature of constitutional common law: not a constitutional imperative, but simply the natural result of judicial powers and duties established in the text and ultimately subject to the control of Congress.¹⁷⁵

While in most circumstances identification of the precise source of stare decisis is not critical, in one important category of cases the difference could be crucial. If stare decisis is part of the judicial power of article III, it is an inalienable command binding the Court;¹⁷⁶ its demands remain authoritative in the face of competing demands by the other branches. Constitutional common law, however, is subject to congressional control.¹⁷⁷ Thus, the question arises whether Congress could demand that the Court reconsider its precedents, free of any supposed compulsion introduced by stare decisis.

The general issue might be sharpened by considering the following hypothetical. While Congress cannot "overrule" *Roe* and its companion, *Doe v. Bolton*,¹⁷⁸ could it require the Court to reconsider the rule laid down in those cases *res nova*?¹⁷⁹ Is such a statutory directive valid?¹⁸⁰ Indeed, isn't such a precedent-reconsidering demand implicit

175. See generally Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975).

176. Of course, to say that stare decisis is binding on the Court does not specify the content of the command.

177. Monaghan, *supra* note 175, at 29.

178. 410 U.S. 179 (1973).

179. For example, suppose that Congress enacted a comprehensive criminal code for the District of Columbia enforceable in the United States District Court, in which Congress restricted abortions in a manner similar to that done in the Model Penal Code § 230.3 (1985). Substantially such a statute was struck down in *Doe*, 410 U.S. at 193–200, and the new congressional statute would thus be subject to similar condemnation. Even if the new statute were accompanied by a congressional finding of constitutionality, that would be of no avail, since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), makes plain the judicial duty of independent judgment in these circumstances. See Monaghan, *supra* note 72, at 12. Nor could *Doe's* authority be avoided by denying the district court "jurisdiction" to consider the constitutionality of the statute. So long as a federal court is called upon to enforce a statute, the federal court system cannot be foreclosed from examining its validity. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 336–41 (2d ed. 1973) [hereinafter *Hart & Wechsler*]. Accordingly, unless *Doe* were overruled, the new statute would be invalid. See generally Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 Ga. L. Rev. 57, 98–101 (1986) (Congress not presently structured to make challenges to judicially declared constitutional government).

180. Such a statutory directive does not purport to dictate the outcome of the re-

in any congressional statute: Congress wishes its enactment to stand unless the Court finds that something in the Constitution bars it? Surely, if there is a reasonable chance that the Court would reverse itself on the merits, Congress is not disregarding its duty to obey the law in enacting a new abortion statute.¹⁸¹ Yet one can anticipate the reaction: many who have never uttered a kind word for stare decisis would rise against the congressional "usurpation" of judicial authority. Apparently, for them stare decisis resides in the judicial power: the Court may act entirely free of any constraint from its precedents, but Congress cannot insist that it do so. But even if such an argument is correct and Congress cannot "require" judicial reappraisal, do the small-letter working assumptions of our constitutional order presuppose that the Court will reexamine controversial and contested precedents when requested to do so by Congress?¹⁸² Putting the issue in these ways is a matter of great significance for judges who would adhere to *Roe* but would not have decided it the same way initially.

IV. NOTES TOWARD A THEORY OF STARE DECISIS: CONTENT

This section explores some possible aspects of a theory of stare decisis, starting from the proposition that stare decisis must require more of a court than simply exploring the precedents as possible models for current decisionmaking.¹⁸³ In some sense, the second court must feel *bound* by the *precedent*.¹⁸⁴ Quite plainly, a good deal turns on

consideration, it simply directs the Court to consider the issue *res nova*. Thus, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), which held that legislation aimed at dictating a court's rule of decision is unconstitutional, is not on point. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 402-05 (1980) (*Klein* not applicable when "Congress was [not] attempting to decide the controversy at issue in the Government's own favor" and when Congress does not attempt to dictate a rule of decision). Moreover, if traditional requirements of justiciability have a textual source, such requirements would also have to be met before the Supreme Court would grant review on the merits.

181. See Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1008 (1965).

182. This point seems to me to be ignored by those who rather peremptorily dismiss congressional expressions on the meaning of the Constitution. See, e.g., Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. Chi. L. Rev. 819, 853-56 (1986).

183. See Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 Colum. L. Rev. 199, 200-01 (1933).

184. This discussion focuses on stare decisis in terms of the Court rather than in terms of the obligation of an individual member of the Court towards precedent. The latter may well present quite different issues. My own view is that justices are members of a Court, a collective body designed to reach collective judgment, not individual monads that collide only in the process of voting. See Monaghan, *supra* note 113, at 12-25. I quite agree with Justice Powell that individual justices "have an institutional responsibility not only to respect *stare decisis* but also to make every reasonable effort to harmonize our views on constitutional questions of broad practical application." *Robbins v. California*, 453 U.S. 420, 436 n.4 (1981) (Powell, J., concurring). The increasing tendency to submit individual views on the merits is, I think, quite deplorable. See also

the content of the italicized words. But these concepts do not possess fixed and immutable essences that, like Platonic forms, can be apprehended in their universal states. Binding authority and precedent are simply constructs fashioned from and designed to make sense of our legal order. Moreover, while the content of binding authority seems more readily derivable from the underlying legitimacy justifications for *stare decisis* than from the content of precedent, the two concepts are closely intertwined. The compulsive aspect of precedent is itself in part a function of what constitutes a precedent, and vice versa. For clarity, however, each term is examined separately.

A. *Binding Authority*

Professor Goodhart insisted that for the English courts precedents constituted judge-made statutes: "The prior case, being directly in point, is no longer one which *may* be used as a pattern; it is one which *must* be followed in the subsequent case. It is more than a model; it has

Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 72 (1980) ("Continuous fragmentation could well diminish not only the influence of the Court but the ideal of the rule of law."). As both a theoretical and a practical matter this view may improperly discount the individuality of each member of the Court. See Kelman, *The Forked Path of Dissent*, 1985 Sup. Ct. Rev. 227, 228–29 ("In none of the highest courts . . . have the obligations of collegiality or the limits of individuality ever been precisely defined."); see also Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949) ("personal matter for each judge"). Be that as it may, my emphasis on the Court suggests there are limits imposed on individual dissents based upon original understanding (or any other basis). These limits seem to follow not from *stare decisis* but from the ongoing commitments one assumes in becoming a member of an institution. For this reason, Justice Harlan's dissenting opinion in *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part), has always struck me as among the most troubling in constitutional law. Justice Harlan cast a fifth vote against a congressional act lowering the voting age in state elections to eighteen. Most of his elaborate opinion was designed to show that voting was not an interest intended to be protected by section one of the fourteenth amendment, a position which I think is historically correct, but which seemed foreclosed by a long and unbroken line of Supreme Court authority. Justice Harlan conceded that were he to have followed the precedents he would have upheld the federal legislation. *Id.* at 152. Nonetheless, he devoted but a few paragraphs to the claims of *stare decisis*, ultimately rejecting it on this fundamental matter. *Id.* at 218–19. I think he was mistaken on this point. I have grave doubt that a judge should cast a deciding vote on the basis of a theory, however historically correct, that is unacceptable to his own colleagues, has long been unacceptable to his colleagues, and that has no reasonable likelihood of being acceptable to any future justice. By contrast, Justices Brennan and Marshall's continuous refusal to be bound by the Court's holding that the death penalty is not per se invalid seems more defensible. See, e.g., *McCleskey v. Kemp*, 107 S. Ct. 1756, 1781 (1987) (Brennan, J., dissenting); *Alford v. Florida*, 436 U.S. 935, 938 (1978) (Marshall, J., dissenting from denial of certiorari). Though I disagree with them on the merits, their institutional commitments as members of the Court cannot yet be invoked to silence their dissents, because it cannot fairly be said that within some reasonable future their view will not commend itself to some future court.

become a fixed and binding rule."¹⁸⁵ The view that a judicial precedent is the equivalent of a legislative act has never existed in American law,¹⁸⁶ and no one has proposed that it should. Yet in a well-known essay Max Radin invoked this rigid conception in order to attack the doctrine root and branch. For him, the strict view of stare decisis means adherence to precedent simply because the precedent exists. Thus, he excluded from stare decisis following a previous case "because it accords with the weight of authority, because it has been generally accepted and acted on."¹⁸⁷ Indeed, for Radin, if the court is bound by precedent, "it is bound by one decision. A second decision adds nothing."¹⁸⁸ Accordingly, judicial adherence to a long line of decisional authority was not an example of stare decisis, but rather of "estoppel or the force of custom."¹⁸⁹

Radin's attack was designed to make palatable what he claimed was the more liberal (and progressive) theory of American precedent. According to Radin, stare decisis in America is nothing more than "a matter of technique" requiring of courts only that they "place the situation they are judging within the generalized class of some existing decision."¹⁹⁰ But Radin presents us with a false choice. Stare decisis need not be viewed as either a theory about judge-made statutes or as simply a matter concerning the expository style of judicial opinions.¹⁹¹

In the American common law, stare decisis states a conditional obligation: precedent binds absent a showing of substantial countervailing considerations.¹⁹² This formulation is not vacuous, or rather, it need not be. Nearly one-half century ago, Dean Pound wrote:

Just how binding is "binding authority" in our common-law

185. Goodhart, *Precedent in English and Continental Law*, 50 *Law Q. Rev.* 40, 41 (1934).

186. See, e.g., *Hudson v. Guestier*, 10 U.S. (6 Cranch) 281, 285 (1810) (overruling in part *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808)).

187. Radin, *supra* note 183, at 200. I agree with Radin's assertion that stare decisis is not involved if the court "follows a previous decision . . . because it is the right decision, because it is logical, because it is just." *Id.*

188. *Id.* at 201.

189. *Id.* On this view, Radin would certainly deny that my agenda-limitation illustrations, see *supra* notes 124-31 and accompanying text, are examples of stare decisis at all.

190. Radin, *supra* note 183, at 212. Obviously this conception could—and did—serve as a predicate for a powerful criticism that the doctrine of stare decisis was an absurd way of decisionmaking because it meant that courts "are principally engaged in doing things they know to be irrational for no better reason than that they have seen some one else do them." *Id.* at 199.

191. It seems more accurate to say that in the American experience "[t]he institution of precedent is not a single doctrine but a whole cluster of doctrines which, taken together, leaves far more room than is commonly supposed for development and change." Jones, *Precedent and Policy in Constitutional Law*, 4 *Pace L. Rev.* 11, 19 (1983).

192. See generally Schauer, *supra* note 105, at 591-95 (discussing strength and breadth of precedents).

technique? A single decision has never been regarded as absolutely binding at all events. But, on the other hand, it had become established that nothing less than an overriding conviction that a precept fixed by a prior decision was contrary to the principles of the law so that it had an ill effect upon the process of determining new questions by analogical reasoning and was, as Blackstone puts it, "flatly" unjust in its results, could justify judicial rejection of it.¹⁹³

A similar formulation seems appropriate for constitutional adjudication. Even an "overriding conviction" of prior error is not enough;¹⁹⁴ the precedent must have some palpable adverse consequences beyond its existence.¹⁹⁵ Thus, stare decisis is not simply a tiebreaker, such that the precedent need be followed only if matters otherwise stand evenly in balance. While a distinction must be made between rules and standards as against the principles and reasonings given in a case, at least as to the former stare decisis requires a more solid justification for ignoring a precedent.¹⁹⁶

Pound mentions two such general factors bearing on adverse consequences: the importance of the decision for determining new questions by analogical reasoning and "flatly unjust" results. These factors are not of equal weight in constitutional adjudication. The first has a scope more limited than in the common-law area.

1. *Analogical Reasoning.* — This aspect of precedent is concerned not so much with the judicially formulated rule or standard in a given case as with the grounds of the decision—the underlying reasoning or principles that generated the rule or standard. It reflects the fact that the still-dominant mode of judicial reasoning is analogical:¹⁹⁷ the reasoning of the precedent is extended until interests sufficiently powerful

193. Pound, *supra* note 167, at 6.

194. I assume that the precedent-setting court is itself "fully committed to [the] principle [of the decision]." Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 335 (1944). If this assumption does not hold true in any specific instance, a precedent's force may be less binding. See, e.g., *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2806, 2809 (1987) (rejecting *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), and suggesting that *Dennison* itself was a decision significantly explicable by the political pressures on the Court).

195. See *Fitzleet Estates Ltd. v. Cherry*, 3 All E.R. 996, 1000 (H.L. 1977) (Viscount Dilhorne) ("If the decision . . . was wrong, it certainly was not so clearly wrong and productive of injustice as to make it right for the House to depart from it."); *Israel, Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 219–26 (precedent is generally overruled on the basis of changed conditions, the lessons of experience, or the existence of inconsistent precedent). On the current attitude of the House of Lords towards overruling precedent, see A. Paterson, *The Law Lords* 156–57 (1982).

196. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 Oxford J. Legal Stud. 215, 221–22 (1987) (comparing strong and weak forms of stare decisis); see *infra* notes 202–203, 238 and accompanying text.

197. Some constitutional decisions seem to have little analogical impact—whether, for example, the double jeopardy protection commences when the jury is sworn or when evidence is heard.

cluster to halt further expansion.¹⁹⁸ This phenomenon is true of constitutional no less than common law, as the case law under the first and fourth amendments amply illustrates. Thus *Bowers v. Hardwick* is a hard case for any Court committed not only to *Roe* and its progeny but also to the standard mode of analogical elaboration.¹⁹⁹ Doctrinally it is difficult to reconcile *Roe* and *Bowers*, and doctrinal inconsistency is no more desirable in constitutional adjudication than elsewhere.²⁰⁰

But here, as elsewhere, doctrinal consistency is only one value, not the ultimate value.²⁰¹ The precedential status of the Court's reasoning need not be equivalent to that of the Court's rule or standard. Surely some measure of doctrinal inconsistency is tolerable in the name of larger interests, particularly in the name of a document that itself is a "bundle of compromises."²⁰² Accordingly, even if *Roe*'s rule is preserved, the question whether its reasoning should be extended or is rightly halted in the name of the original understanding presents a quite different issue.²⁰³

198. The importance of reasoning by analogy was clear to Bracton in the thirteenth century. "If like matters arise let them be decided by like, since the occasion is a good one for proceeding *a similibus ad similia*." 2 Bracton, *On the Laws and Customs of England* 21 (G. Woodbine ed. 1968).

199. Lord Devlin remarked of the common law that it "is tolerant of much illogicality, especially on the surface; but no system of law can be workable if it has not got logic at the root of it." *Hedley Byrne & Co. v. Heller & Partners Ltd.*, 1964 App. Cas. 465, 516.

200. See R. Dworkin, *supra* note 3, at 217–21. Precedents that, for one reason or another, are inconsistent with wider principles are vulnerable to overruling. See, e.g., *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2808 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), because "basic constitutional principles now point as clearly the other way," and thus the "fundamental premise of the holding in *Dennison* . . . is not representative of the law today").

201. See R. Dworkin, *supra* note 3, at 219–24 (consistency may sometimes be required to give way to integrity or even pragmatic concerns); Coons, *Consistency*, 75 *Calif. L. Rev.* 59, 98–113 (1987) (discussing problems with consistency and finding utility in inconsistency).

202. M. Farrand, *The Framing of the Constitution* 201 (1913).

203. In a different context, Justice Scalia put a similar distinction well:

The Board's approach is the product of a familiar phenomenon. Once having succeeded, by benefit of excessive judicial deference, in expanding the scope of a statute beyond a reasonable interpretation of its language, the emboldened agency presses the rationale of that expansion to the limits of its logic. And the Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the statute. Some distance down that path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic.

NLRB v. International Bhd. of Elec. Workers, Local 340, 107 S. Ct. 2002, 2016 (1987) (Scalia, J., concurring).

2. *Harmful Results.* — Inevitably, the actual consequences of a prior decision will play a major part in any American theory of stare decisis. Here some concession may perhaps be given to those who insist that stare decisis in constitutional adjudication should be relaxed because of the difficulty of amendment. By replacing Pound's "flatly unjust" criterion with that of "substantial" or "significantly" harmful effect, this factor can be accommodated.

The most difficult question in identifying the harmful effects due to a wrongly decided controlling precedent is whether this criterion can be rendered sufficiently principled so that it is not simply a euphemism describing decisions that a Court majority very much dislikes.²⁰⁴ Some may insist that any use of stare decisis is necessarily "contentless and subjective"—it is a "discretionary" doctrine inevitably employed "as a means of selectively leaving in place just those decisions which [the commentators] think wrong but whose overruling even they find unthinkable."²⁰⁵ This challenge is confused. To be sure, the fact that overruling a precedent is "unthinkable" involves judgments concerning the need for stability and continuity that possess, if not subjective, certainly unquantifiable dimensions. Necessarily, the fundamental reference points for these determinations will be legislative in their grounds. But that does not mean that such determinations are thereby "contentless," "discretionary," or unprincipled. Determinations of this nature inhere in the judicial process, as Judge Cardozo long ago reminded us.²⁰⁶

Many, if not all the off-the-agenda illustrations previously discussed should be protected by stare decisis simply because (in stability and continuity terms) it is "unthinkable" that they be overruled. The effects of the precedents are not harmful, and overruling the precedents would produce exceptionally harmful effects. Moreover, a significant number of decisions exist that should not be overruled, even though their overruling is entirely thinkable. For example, no reason exists for disturbing a controlling decision that the practice of remittitur is consistent with the constitutional guarantee of trial by jury,²⁰⁷ or that jeopardy attaches when the jury is sworn rather than when it begins to hear evidence.²⁰⁸ The results of these precedents are not significantly harmful (and neither decision seems to carry much significance for the process of analogical reasoning).

204. Compare, for example, the efforts by former Justice Goldberg, a justice who viewed the key clauses as open textured, to protect the expansive holdings of the Warren Court with a strong theory of stare decisis. A. Goldberg, *Equal Justice: The Warren Era of the Supreme Court* 74, 80-81 (1971).

205. L. Tribe, *American Constitutional Law* 2 (Supp. 1979).

206. B. Cardozo, *The Nature of the Judicial Process* (1921).

207. See *Dimick v. Schiedt*, 293 U.S. 474, 482-85 (1935) (remittitur practice probably unconstitutional as a matter of original understanding, but followed as a matter of stare decisis).

208. See *Crist v. Bretz*, 437 U.S. 28, 38 (1978).

But some wrongly decided precedents should be subject to recall. Two important illustrations come to mind. If the Court came to believe (as it did in 1937) that the commerce clause justified direct federal regulatory control over manufacturing, mining, and agriculture, contrary decisions should not stand in the way, even if those decisions reinforced the Court's private judgment about the social undesirability of national regulatory controls.²⁰⁹ The human cost stemming from the lack of national regulatory controls was very great, and few could pretend that the desirability *vel non* of national controls was a consideration constitutionally assigned to the determination of judges. Likewise, when the Court became convinced that the fourteenth amendment was intended to prohibit racial segregation generally, stare decisis should not have saved the practice. Indeed, it did not. In *Brown*, John W. Davis, representing South Carolina, placed great weight on stare decisis to protect the institution of racial segregation. He argued that a whole social order rested on this institution.²¹⁰ But other overriding considerations eviscerated the strength of this claim: judged by developing national standards (strongly held, at least among elite groups), segregation was perceived to be the gravest of moral wrongs, a national tragedy of the first order.²¹¹ Moreover, it seems doubtful that stare decisis is ever properly invoked to bar the claims of any group prevented from constructing the political and social rules of which they complain.²¹²

My central problem here is this: I do not believe that a "substantially harmful" criterion can be fairly reduced to simply the majority's personal views of the desirability *vel non* of a given practice. Furthermore, the judgments called for by the criterion need not be unprincipled. But it may not be possible to go further and formulate relatively determinate implementing criteria, however general, that would guide, if not constrain, judgment. The circumstances seem simply too varied and fact-dependent to make feasible helpful criteria as to what appropriately counts as a sufficiently "substantial" harmful effect justifying overruling.²¹³ For example, beyond simply inventorying differences, how does one differentiate between *Lochner* and *Brown* (assuming both

209. At least this is so if the decisions do not represent an unbroken line of authority over a long period of time. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), in fact rested upon the choice of one conflicting line of authority over another. See Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 647 (1946) ("[T]here was ample authority in the Supreme Court opinions looking both ways.").

210. Brief for Appellees on Reargument at 59-60, *Briggs v. Elliott*, 347 U.S. 483 (1954).

211. It can be argued that the government should never be able to rely on stare decisis to protect its reliance interest; such a principle may have disposed of the stare decisis claim. But this limitation on stare decisis should not often prove important in constitutional adjudication, see *supra* text accompanying note 145, at least so long as the precedent affected private persons.

212. See J. Ely, *supra* note 153, at 136-81.

213. See Jones, *supra* note 191, at 591-93; Pound, *supra* note 167, at 6. Of course,

are inconsistent with the original understanding)? And what of other, less significant precedents? Many decisions fall into the category of nonfoundational matters, such as a governor's duty to honor a fugitive extradition warrant,²¹⁴ or the validity of a tax on interstate commerce.²¹⁵ How does one add specificity to the general justifications for overruling the controlling precedents in these cases?

3. *Clearly Wrong*. — It is sometimes said that a factor to be taken into account is whether the precedent is clearly wrong. For example, Judge Wallace presents this factor as an additional limitation on overruling a precedent: "a justice should consider overturning a prior decision only when the decision is clearly wrong, has significant effects, and would otherwise be difficult to remedy."²¹⁶ I do not believe that this factor should receive much independent weight. Whether a precedent is seen as *clearly* wrong is often a function of the judge's self-confidence more than of any objective fact. More importantly, my arguments above²¹⁷ are tantamount to advocating a general presumption against overruling wrongly decided precedents. That is, clear departure from the original understanding is not alone enough to merit overruling a precedent. For example, the "ordered liberty" standard of *Palko v. Connecticut*²¹⁸ and the "evolving standards of decency" standard of *Trop v. Dulles*²¹⁹ seem clearly wrong as a matter of original understanding. But both have been repeatedly accepted by the Court and are now deeply ingrained in our constitutional jurisprudence. It should take a great deal more than a judgment of clear error to overthrow them.

4. *Judicial Self-Protection*. — One additional important question is whether judicial self-protection is a legitimate criterion that should be taken into account in deciding whether to adhere to a challenged precedent. Consider, for example, the Reagan administration's well-publicized assault on *Miranda*.²²⁰ How should the Court evaluate the

this formulation is prone to the danger of vacuousness: precedents should be followed unless they shouldn't be. See R. Wasserstrom, *supra* note 144, at 39-55.

214. See *Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861)).

215. *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987) (overruling *General Motors Corp. v. Washington*, 377 U.S. 436 (1964)).

216. Wallace, *Whose Constitution?*, in *Still the Law of the Land?* 10 (C. Roche ed. 1987). See Frickey, *supra* note 115, at 342 (factors that the Court properly relied on in overruling *National League of Cities* include the fact that the case was wrongly decided, that its precedential value was weak because of an uncertain fifth vote, and that it was unworkable in practice). Chief Justice Rehnquist's readiness to overrule precedent suggests an even less deferential attitude towards *stare decisis*.

217. See the discussion of the justifications for according *stare decisis* a role in constitutional adjudication, *supra* notes 144-74 and accompanying text, especially the discussion of maintaining the legitimacy of judicial review, *supra* notes 166-74 and accompanying text, which is applicable to all cases; see also the adoption of Dean Pound's formulation of *stare decisis*, *supra* note 193 and accompanying text.

218. 302 U.S. 319, 325 (1937).

219. 356 U.S. 86, 101 (1958).

220. See, e.g., Shennon, *supra* note 134, at A1, col. 2.

following argument? "*Miranda* was wrongly decided. But the Supreme Court should adhere to the decision because it is not clear that it works real harm in the interrogation context (it is not substantially harmful). More importantly, *Miranda*'s repudiation would make the Court look like a tool of the incumbent administration and thus weaken the Court's position in the American constitutional order." I suspect that these latter "political" considerations would enter into the Court's judgment, and I am reluctant to develop any theory that excludes what must be. Besides, it is not clear where the line is drawn between institutional self-protection and striving to maintain the legitimacy of judicial review, and the latter interest plays an important role in justifying stare decisis. But if institutional self-protection is to play some significant role in legitimation theory, difficult issues must be confronted. Despite arguable examples to the contrary, the general belief has been that decisions on the merits are not to be avoided simply because in the long run the Court would be better off if it could wash its hands of the controversy.²²¹

B. *Precedent*

The meaning of precedent—the definitional problem—assumed obvious importance in English law given the long refusal of the House of Lords to overrule its precedents.²²² And not surprisingly, in the common-law context widely divergent concepts have been advanced. The precedent has been viewed as limited to the "decision" on the "material facts" as seen by the precedent court,²²³ or the same as seen by the nonprecedent court;²²⁴ for others, the term means the "rules" formulated by the precedent court;²²⁵ for still others, the term includes the reasons given for the rules formulated.²²⁶

There is, of course, no necessary right answer here, and English common-law discussions cannot automatically be transplanted to American constitutional law. Still, for us some answers seem better

221. See Hart & Wechsler, *supra* note 179, at 660–62.

222. See generally C. Allen, *Law in the Making* 183–258 (6th ed. 1958) (precedent in the English system). We are concerned with "precedent" as it appears to the Supreme Court, not to lower courts. In the latter respect, it may look quite different. Schauer, *Book Review*, 53 *U. Chi. L. Rev.* 682, 682–84 (1986).

223. See Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *Yale L.J.* 161, 169, 182 (1930).

224. See E. Levi, *An Introduction to Legal Reasoning* 2 (1949).

225. See Simpson, *The Ratio Decidendi of a Case*, 21 *Mod. L. Rev.* 155 (1958); cf. Montrose, *Ratio Decidendi and the House of Lords*, 20 *Mod. L. Rev.* 124, 125 (1957) (difficulties of applying precedent when defined as articulated legal rules). But see Goodhart, *The Ratio Decidendi of a Case*, 22 *Mod. L. Rev.* 117, 121 (1959) (criticizing the "classical" theory that the binding precedent is the rule invoked).

226. See Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 *Cornell L. Rev.* 707, 730–32 (1978) (The precedent consists of "nothing less than facts, issues, ruling, and substantive reasons for those rulings.").

than others. Little is appealing in the Legal Realist claim²²⁷ that *stare decisis* is concerned only with what the Court *decided* on the material facts, not with what it *said*. The relevant facts do not identify and classify themselves; criteria are needed to determine what the legally relevant facts are and at what level of generality they are to be specified.²²⁸ More importantly, *stare decisis* is invoked to justify subsequent decisions. Necessarily, what the Supreme Court *said* assumes paramount importance.

What the Court said must include the Court's rule or standard.²²⁹ This constitutes the "enactment force of precedent,"²³⁰ in Dworkin's phrase, or the "precept," in Pound's.²³¹ This is the core of the precedent. The compelling state interest test in cases involving racial discrimination, or the obscenity criteria in first amendment case law, are examples.

The real issue is whether more should be included, specifically whether the precedent should also include the grounds for the decision—that is, the reasoning or principles behind the rule or standard. The general view in this country has been to deny this. The Legal Realists were emphatic on this score, of course.²³² But even Dean Pound wrote that "[i]t cannot be insisted upon too often that our common-law technique does not make the language authoritative, much less binding authority. It is the result that passes into the law."²³³ I disagree, and my disagreement follows from a conception of the judicial opinion as a reasoned elaboration of principle.²³⁴ By the time they get to the Supreme Court, few, if any, cases are exactly alike. The Court necessarily will be required to consult the reasoning elaborated in the prior decision, once any seemingly plausible limitation on extension of the precedent is proffered.²³⁵ In effect, the Court is asked to

227. See J. Frank, *Courts on Trial* 262–89 (1949); Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 159 (1928). For a modern statement of this view, see Jones, *supra* note 191, at 22 ("It is the court's *decision* that is the precedent, not what the court says in the judicial *opinion* justifying that decision.").

228. See, e.g., N. McCormick, *Legal Reasoning* 117–19 (1978); J. Stone, *The Province and Function of Law* 187–88 (1950).

229. What the Court "said" may be ascertained by implication in some cases. What the Court "said" in a given summary affirmance, for example, may be incontestable even though entirely inferential.

230. R. Dworkin, *Taking Rights Seriously* 111 (1978).

231. Pound, *supra* note 167, at 9–10.

232. See *infra* note 246.

233. Pound, *supra* note 167, at 8.

234. See Monaghan, *supra* note 113, at 16–25. If the Court was simply to announce one summary disposition after another, one would be required to rethink precedent. See Perry, *supra* note 196, at 235 (jurisprudential analysis of *stare decisis* which, *inter alia*, insists that judicial reasoning is part of the precedent).

235. Statements such as those asserting that the prior decision "is not strictly controlling, in the sense that no holding can be broader than the facts before the court," *United States v. Stanley*, 107 S. Ct. 3054, 3062 (1987), are unpersuasive.

measure the scope of the rule or standard by the reasoning behind it. Of course, the reasoning must be set in the context of the facts, and some notion of obiter dicta is necessary.²³⁶ Nonetheless, there seems to me no reason to exclude the underlying reasoning from the concept of the precedent. The compulsion behind any precedent is not an inexorable or uniform one,²³⁷ and the compulsion behind judicial reasoning may be taken to be less than the compulsion behind the rule or standard announced.²³⁸ Moreover, fair leeway must be accorded for reexamination of the prior reasoning.²³⁹ But, having recognized all that, there seems to be no advantage in absolutely divorcing the precedent-setting Court's reason for deciding from the precedent it has sought to establish, particularly when the reasoning necessarily helps frame the scope of the rule or standard. In his well-known work, Professor Cross defines the *ratio decidendi* in a way that is generally satisfactory: "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."²⁴⁰

Of course, there will be argument about what constitutes the precedent, particularly in the case of a single decision.²⁴¹ As Justice Brandeis put it, "[t]he process of inclusion and exclusion, so often

236. I do not think we can—or should—dispense with some distinction between holding and dicta. E.g., *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494, 2498 (1987). Some distinction along this line seems to be particularly necessary with respect to often sprawling, undisciplined, heavily footnoted opinions issued by the Supreme Court. Closely analogous is recognition that important holdings are not made in passing in footnotes. E.g., *Perry v. Thomas*, 107 S. Ct. 2520, 2526 (1987) (oblique reference in footnote to *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973), cannot fairly be read as a binding holding).

237. See, e.g., R. Dworkin, *supra* note 3, at 240–50 (suggesting variety of principles that can be drawn from a line of precedents).

238. See Pound, *supra* note 167:

Then, too, we must distinguish subsequent judicial rejection of the reasoning by which the result was reached in a prior case and substitution of different reasoning leading to the same result, from a changed course of decision requiring a different result. It ought not to be necessary to say this. But one encounters constantly statements that a line of prior decisions has been overruled and a new line of decisions has been inaugurated, when all that has been done is to announce a better or more all embracing line of reasoning which will sustain the old decisions and lead to better results in new ones which have come up for the first time.

Id. at 7.

239. As Karl Llewellyn noted, a distinction exists between "the *ratio decidendi*, the court's own version of the rule of the case, and the *true* rule of the case, to wit, what *it will be made to stand for by another court*." K. Llewellyn, *The Bramble Bush* 52 (1960).

240. This statement is said to be a "tolerably accurate" description of the English understanding. R. Cross, *Precedent in English Law* 76 (3d ed. 1977); cf. N. McCormick, *supra* note 228, at 86, 215 (propositions of law included in the holding).

241. "Courts do not accord to their predecessors an unlimited power of laying down wide rules." G. Williams, *Learning the Law* 75 (11th ed. 1982).

applied in developing a rule, cannot end with its first enunciation."²⁴² Definition of a precedent will often take time. Moreover, a reading of any precedent will often be value infused.²⁴³ Even more importantly, as Neil MacCormick correctly emphasizes, a precedent may be open enough so that it is fairly read to possess more than one *ratio decidendi*.²⁴⁴

But no theory of precedent assumes *ex ante* that all precedents are clear.²⁴⁵ Accordingly, the difficulties described, and they are real ones, seem simply to point to the limits of written communication. However, they do not establish that the entire concept of precedent is without content. They do not establish that the doctrine is incoherent, excessively indeterminate, unprincipled, or infinitely manipulable.²⁴⁶ Every

242. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting). Max Radin long ago showed this in the common law context. See Radin, *supra* note 183, at 209; see also E. Levi, *supra* note 224, at 3 (rules evolve by focusing on important similarities and differences among cases over time).

243. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1204-09 (1987).

244. N. MacCormick, *supra* note 228, at 83-84, 215. This point seems nicely illustrated by the various opinions in *United States v. Stanley*, 107 S. Ct. 3054 (1987) (construing *Chappell v. Wallace*, 462 U.S. 296 (1983)) (suits by servicemen for service connected injuries).

245. Professor Schauer gives careful treatment to the difficulties of formulating categories of relevance without succumbing to the belief that "all characterizations of a past event are always up for grabs." Schauer, *supra* note 105, at 587; see also N. MacCormick, *supra* note 228, at 219-28 (pointing to similarities between interpretation of statutes and precedents).

246. One of Max Radin's most important criticisms was that the concept of precedent suffers, if not from incoherence, from indeterminacy. Radin, *supra* note 183, at 206-09. Other Legal Realists carried this criticism much further. Karl Llewellyn insisted that there are two concepts of precedent, one for those decisions that the court favors, another for those it doesn't. K. Llewellyn, *supra* note 239, at 67-69. See Llewellyn's iconoclastic list of 64 different ways to handle precedent, K. Llewellyn, *The Common Law Tradition* 77-91 (1960). Llewellyn's list has been summarized as comprising "eight ways to follow but constrict a precedent, eight to stand by it, thirty-two to expand it, twelve ways to avoid it and four to kill it." Wise, *The Doctrine of Stare Decisis*, 21 Wayne L. Rev. 1043, 1051 (1975). No doubt this brand of Realism captures much of the contemporary reality. But in principle this conception seems unacceptable, unless one is willing to reduce adjudication to rhetoric or to the function of simply masking the exercise of political power. Professor Shapiro, in Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731, 734 (1987), seems to me to have overlooked this point when he accepted Llewellyn's model of precedents.

While Edward Levi never embraced this cynicism, his own views are open to the same criticism. Levi insisted that the American doctrine permits courts unrestrained authority to realign prior cases in terms of the material facts as it sees them: the precedent-setting court's own view of the material facts, the controlling rules and the operative theories are not part of the precedent. E. Levi, *supra* note 224, at 1-4. No doubt one can assign some type of interpretive leverage to the court called upon to apply the precedent. But Levi's view of the second court's function has a dangerous tendency to empty the concept of precedent of any meaning. *Stare decisis* becomes simply a matter of an expository style or technique, one that impels a second court, so far as practicable, to "place the situation they are judging within the generalized class of some existing

court and every lawyer knows that there are precedents that simply cannot be distinguished; they must be either followed or overturned. As Professor Schauer observes, "precedent rests on similarity, and some determinations of similarity are incontestable within particular cultures or subcultures."²⁴⁷ Every term of court bears witness to the fact.

V. THE WRITTEN CONSTITUTION OF 1789

At first glance it appears that a viable theory of stare decisis could preserve a significant role for originalism. While much of the past would be taken as beyond recall, future decisions would be governed by original understanding, at least in those areas not dominated by precedent. But before accepting such a role for precedent in constitutional adjudication, it is necessary to reexamine the relationship between the written text and judicial precedents. After all, if a significant part of the current constitutional order cannot be squared with any acceptable conception of the original understanding of the written Constitution, the normative force of any further appeal to originalism is not obvious. Put differently, the central problem for originalism is whether the cost of embracing stare decisis is too high—whether, in the end, the embrace destroys originalism's bedrock assumption that, until formally amended, the Constitution establishes a permanent ordering binding on all organs of the government, including the courts.

A. Text Over Case Law

From the beginning of our political and legal tradition, we have differentiated between text and its interpretation. The implicit premise has been to privilege the text over its interpreted gloss.²⁴⁸ This general

decision." Radin, *supra* note 183, at 212. Moreover, recognition of unconstrained reralization readily induces cynicism. The Supreme Court's well-known effort in *Paul v. Davis*, 424 U.S. 693, 701-10 (1976), to distinguish the apparently decisive holding in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), on the issue of whether reputation was part of the "liberty" protected by the due process clause seems to meet Levi's specifications. It also drew widespread condemnation as bordering on cynicism.

247. Schauer, *supra* note 105, at 587. Alas! Even this statement is not without exceptions. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1240-50 (1987) ("distinguishing" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)); see also Oliphant, *supra* note 227, at 73 (Each case and each precedent "rests at the center of a vast and empty stadium. The angle and distance from which that case is to be viewed involves the choice of a seat.").

248. The very idea of a text is itself not straightforward; it is visible only through an interpretive lens. Accordingly, any concept of a constitutional text must subsume ideas about a constitutional language and grammar, which govern how the text is to be interpreted. And it is now commonplace that language is not a neutral mirror of reality, but is constitutive in character. Language helps shape, structure and define reality. E.g., B. Whorf, *Language, Thought and Reality* 246-56 (1956); Joseph & Walker, *A Theory of Constitutional Change*, 7 *Oxford J. Legal Stud.* 155, 175-78 (1987).

For recent explorations of the contention that the Framers had such a grammar in the then existing common-law rules for interpreting documents, compare C. Wolfe, *The*

phenomenon is no doubt of interest to literary critics, but in the legal tradition this step has been taken in order to permit us to understand and express important elements of our legal order. For example, in constitutional adjudication, this distinction was used to express the once dominant view that a court passed on constitutional issues only as a necessary incident to deciding the concrete rights of actual litigants. Accordingly, the Court did "not pass a statute calling for obedience by all within the purview of the rule that is declared."²⁴⁹ *Cooper v. Aaron's*²⁵⁰ well-known identification of judicial interpretations of the fourteenth amendment with "the supreme Law of the Land" was widely perceived as an attack on this established tradition,²⁵¹ an attack that, *inter alia*, threatened to collapse any distinction between text and interpretation.²⁵²

Cooper v. Aaron notwithstanding, the distinction between text and interpretation has been an important part of our constitutional tradition. Charles Warren long ago wrote that "[h]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."²⁵³ Professor Charles Black echoes a similar claim: "[t]his text, however widely it may be departed from in fact, always stays there."²⁵⁴ Statements of this nature could readily take the form of a claim that judicial interpretations should have no stare decisis effect whatever; that their status is only evidence of what the text means, with their capacity to persuade entirely a function of the "force of the[ir] reasoning."²⁵⁵ For many,

Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 17-38 (1986) (widespread acceptance among the Framers of certain rules for interpreting laws and legal documents, all designed to ascertain the will of the legislator) with Powell, Book Review, 65 Tex. L. Rev. 859, 872 (1987) (Framers may not have shared a common understanding of constitutional interpretation); see also Jacobsohn, *supra* note 26, at 50-52.

249. Wechsler, *supra* note 181, at 1008.

250. 358 U.S. 1, 18 (1958).

251. See Hart & Wechsler, *supra* note 179, at 83-85. See generally Meese, The Law of the Constitution, 61 Tul. L. Rev. 979, 986-87 (1987) (Court's dictum in *Cooper* conflicts with the basic principles of democratic government and the very meaning of the rule of law); Perspectives on the Authoritativeness of Supreme Court Decisions, 61 Tul. L. Rev. 977, 991-1095 (1987) (symposium).

252. Meese, *supra* note 251, at 987.

253. 3 C. Warren, The Supreme Court in United States History 470-71 (1922). For modern statements, see, e.g., S. Barber, On What the Constitution Means 5-6 (1984); Meese, *supra* note 251, at 985.

254. B. Eckhardt & C. Black, The Tides of Power 6 (1976). The same assumption inheres in such statements as "The paradigm of constitutional adjudication . . . is clearly distinguishable from traditional common law adjudication. In common law adjudication a new rule *does* replace an old one; the new rule's legitimacy is not dependent on its predecessor, or on any other collateral source of law." Note, *supra* note 120, at 368.

255. The Passenger Cases, 48 U.S. (7 How.) 282, 470 (1849) (Taney, C.J., dissenting).

this position is self-evident.²⁵⁶

The obvious breadth of such a position assumes an even more persuasive character when understood in light of the idea of a "written constitution."²⁵⁷ One can acknowledge not only that the idea of a written constitution is unclear (case-law rules are also written), but also that in theory it would seem to be a meaningless circumstance.²⁵⁸ Nonetheless, history asserts a powerful claim here, and in that light the written quality of the Constitution counted a great deal. The American Constitution was a watershed in the evolution of thinking about the meaning of a constitution: it culminated a shift from viewing a constitution as simply a description of the fundamental political arrangements of the society to a conception that the constitution stood behind, or grounded and legitimated, those arrangements—and of course constrained them.²⁵⁹ In this development, the "writtenness" of the American Constitution was crucial.²⁶⁰ For example, in a 1793 opinion attacking the doctrine of legislative sovereignty, Judge Tucker wrote that the English judges "having no *written Constitution* to refer to, were obliged to *receive* whatever *exposition* of it the legislature might think proper to make."²⁶¹ But, he said, "with us, the Constitution is not an 'ideal thing, but a real existence: it can be produced in a visible form': its principles can be ascertained from the living letter, not from obscure reasoning or deductions only."²⁶² And of course *Marbury v. Madison* itself placed considerable emphasis upon the written nature of the Constitution, stating that the Constitution must be enforced by the courts, otherwise the result would "reduce to nothing what we have deemed the greatest improvement on political institutions—a written constitution."²⁶³

In the interpretation of this written Constitution, we may assume that the founding generation was much attached to the original,

256. See, e.g., Douglas, *supra* note 184, at 736 (the oath clause makes irrelevant the "gloss which [the judges'] predecessors may have put on it"); Note, *supra* note 120, at 365–366 (emphasizing the "writtenness" of the Constitution).

257. Grey, *The Constitution as Scripture*, 37 *Stan. L. Rev.* 1, 13–17 (1984) (emphasizing that the Constitution is written).

258. See C. Black, *supra* note 154, at 26.

259. E.g., *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795). This conception emerged in the debates over the nature of the imperial constitution. J. Greene, *supra* note 149, at 71–72.

260. See G. Wood, *supra* note 90, at 536–43; Powell, *supra* note 45, at 39–43, 45.

261. *Kemper v. Hawkins*, Virginia (1793), quoted in Jacobsohn, *supra* note 26, at 83–84.

262. *Kemper*, *supra* note 261, at 84.

263. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). Marshall added "in America . . . written constitutions have been viewed with so much reverence . . ." *Id.* at 178. In his posthumously published essays on the Constitution, Justice Miller wrote; "A constitution, in the American sense of the word, is a written instrument by which the fundamental powers of the government are established, limited, and defined . . ." S. Miller, *Lectures on the Constitution of the United States* 71 (1891).

publicly shared understanding of the document.²⁶⁴ Thus, one can make a good case that, as historically understood, the written Constitution was intended to trump not only statutes but case law. This argument is reinforced if one recalls that to the founding generation it was not clear that judicial opinions would need to play such a dominant role in establishing the meaning of the Constitution.²⁶⁵

B. *Case Law Over Text*

But in the end, the written Constitution argument cannot sustain the absolute primacy of text over gloss. First, a written text is not logically inconsistent with the idea of *stare decisis*.²⁶⁶ Second, in fact we cannot know the Framers' original understanding on the subject under discussion: deeply ingrained transformative change. The Framers simply did not comprehend our central factual premise. Moreover, to say that the founding generation expected that there was a metaprinciple always requiring a return to original understanding adds little to the general argument that the founding generation did not intend any departures from original understanding in the first place.²⁶⁷ The importance of original understanding to the Framers, and their desire that

264. E.g., R. Berger, *supra* note 3, at 3, 363-67 (collecting sources); C. Warren, *supra* note 10, at 793-801. It cannot be overemphasized that we are concerned with public understanding. See *supra* notes 7-14 and accompanying text.

265. Interestingly, as late as 1890 Justice Miller seemed surprised at the emergence of a significant body of case law and that the Court was only then "completing a construction of our Constitution." S. Miller, *supra* note 263, at 100.

266. Dean Levi long ago made this clear with respect to statutory interpretation. E. Levi, *supra* note 224, at 31-33. The historical underpinnings of the written constitution argument forecloses treating the Constitution simply as a superstatute. Indeed, Justice Stevens is willing to accord *stare decisis* weight to the uniform decisions of lower courts in construing federal statutes. See *McNally v. United States*, 107 S. Ct. 2875, 2890 (1987) (Stevens, J., dissenting). But the superstatute approach has the advantage of reminding us not to view the Constitution as a document produced by a philosophy seminar. See Monaghan, *supra* note 16, at 390.

267. The Framers were familiar with the idea of precedent. See *The Federalist* No. 78, at 529 (A. Hamilton) (J. Cooke ed. 1961). But there is no historical basis for asserting that they intended to accord a privileged position to precedent over text. The whole idea of just what precedent entailed was unclear. See Wise, *supra* note 246, at 1049 (because doctrine of *stare decisis* did not become firmly established in England until nineteenth century, colonial and early American courts had no such doctrine to incorporate); see also Kempin, *Precedent and Stare Decisis: The Critical Years, 1800-1850*, 3 *Am. J. Legal Hist.* 28, 33 (1959) (material from colonial period, although scanty, tends to suggest American courts had no firm doctrine of *stare decisis*); Powell, *supra* note 10, at 1536-37 (exploring the Framers' understanding of precedent in construing texts). The relative uncertainty over precedent in 1789 also reflects the fact that "many state courts were manned by laymen, and state law and procedure were frequently in unsettled condition. The colonial and state courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication." R. Jackson, *supra* note 162, at 33. Moreover, during this time juries asserted power to determine the law as well as the facts.

courts should adhere to it, may be conceded; our task is to make sense out of a nonoriginalist universe.

In such a universe, the relationship between text and judicial gloss cannot be taken as obvious—at least in the process of constitutional adjudication. Thus, when Attorney General Meese reminds us that “there is the necessary distinction between the Constitution and constitutional law. The two are not synonymous,”²⁶⁸ he fails to see that this very distinction can be employed to privilege not the text but the case law. The Supreme Court is concerned not with the Constitution, but with constitutional law, which consists largely (albeit not entirely) of case law. As John Chipman Gray insisted long ago, “in truth, all the [l]aw is judge-made law,” and accordingly, texts are not themselves law, but only sources of the law.²⁶⁹ This view of constitutional adjudication comports with reality. Judges and lawyers (and even law professors) are centrally concerned with judicial decisions, not with the text. After examining the Court’s work at the end of the 1981 Term, Professor Harry Jones wrote:

What methodological phenomena strike us, or should strike us, as we proceed in our reading from case to case?

What is certainly most striking, or would be if familiarity had not made us take it for granted, is that two-thirds or more of the discussion in the opinions is about past Supreme Court cases, that is, about what these past cases arguably “held” and what was said in the opinions of the Court justifying the results reached in them. . . .

. . . The constitutional text is down there somewhere under this massive overlay of case law development and refinement, but the usual contest between advocates in the Supreme Court, and more often than not between or among the Justices, is the kind of contest that has characterized the common law judicial process at least since the days of Sir Edward Coke, a battle over *cases* and what they should be taken to stand for.²⁷⁰

Recognition that in actual process of constitutional adjudication the constitutional text plays only a role, and an increasingly subordinate one at that, has important consequences for originalism. Originalism must confront a constitutional adjudicatory process in which, after two centuries, the original understanding of the text is sim-

268. Meese, *supra* note 251, at 981.

269. J. Gray, *The Nature and Sources of the Law* 125 (2d ed. 1963); see also *id.* at 283 (law is what the judges declare). Gray was referring to statutory texts, but the same argument may be made in regard to constitutional texts; cf. 1 W. Blackstone, *Commentaries* *71 (“[T]he decisions of courts of justice are the evidence of what is common law.”); see generally Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 *Yale L.J.* 1191, 1216–42 (1987) (exploring differences between decision-based and norm-based legal theories).

270. Jones, *supra* note 191, at 12–13.

ply a factor in the process of decisionmaking, a factor to be considered and balanced against other factors. Indeed, frequently the text operates as little more than a boundary marker restraining judicial law-making. In each instance, the case law overwhelms the text and historical understanding. The latter play no directive role in determining most issues. Thus, in the arena of constitutional adjudication it is quite possible to see the case law and not the text as of central importance. A recent opinion for the Court by Justice Stevens illustrates this point:

The State's argument is supported by the plain language of the [Compulsory Process] Clause . . . by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law, by some scholarly comment, and by a brief excerpt from the legislative history of the Clause. We have, however, consistently given the Clause the broader reading reflected in contemporaneous state constitutional provisions.²⁷¹

VI. CONCLUSION

The more that *stare decisis* is used to rationalize the existing order, the more problematic becomes originalism's insistence upon the crucial importance of the written Constitution, at least in the context of constitutional adjudication. The central problem is this: to accord status to *stare decisis* requires an acknowledgement that originalism plays a purely instrumental role by contributing to the establishment of legitimate government, which in turn promotes stability and continuity. Neither originalism nor the constitutional text has mystical qualities that compel a return to the fold in the face of transforming departures from the original understanding. At this point in our history, when adherence to *stare decisis* promotes the underlying values of stability and continuity better than does adherence to the original understanding, the latter cannot prevail.

But if the Court legitimately may prevent inquiry into original understanding in order to *maintain* transformative change, does this concession also license prospective disregard of original understanding when the Court is satisfied that change is necessary to maintain systemic equilibrium? Moreover, should the Court reject the precedent itself in favor of still further change when to do so will achieve the important values?

While I certainly have no theory with which to answer these questions, I must tentatively conclude that under some circumstances the answers must be in the affirmative. *Brown's* departure from the original understanding is not only defensible, but was probably the Supreme Court's only legitimate response to the nation's escalating moral and social turmoil. But does all this mean we should view the Constitution

271. *Taylor v. Illinois*, 108 S. Ct. 646, 651-52 (1988) (footnotes omitted).

in significant measure as simply a symbolic expression of national continuity and unity?²⁷² If so, is the political order the ground of the constitutional order rather than vice versa?²⁷³

But in the end any temptation to dismiss the Constitution of 1789 from our view seems to be a mistake. Paul Brest is surely right in stating that "the written Constitution lies at the core of the American 'civil religion.'"²⁷⁴ So too is Professor Kay in asserting that "[n]otwithstanding evidence that the document itself is often no more than a peripheral feature of judicial decisionmaking, a constitutional law or a constitutional scholarship without a Constitution will be unthinkable for a long time to come."²⁷⁵ One can say, however, that no incontrovertible showing can be made that the Court must always adhere to the original understanding of the constitutional text. But this concession leaves originalism with the even larger problem of giving precise content to a theory of constitutional adjudication that includes original understanding, precedent, political equilibrium, and the need for change.²⁷⁶ Fortunately, that is the topic of another essay, not this one.

272. See A. Bickel, *supra* note 158, at 31. At still another level, it might be asked whether in this view the judicial function is designed simply to create a false consciousness among members of the polity by closing off authoritative arguments about departure from principle. See M. Douglas, *How Organizations Think* 112 (1986) (a successful institution must control the memory and sense of reality of its members).

273. At least for the purposes of constitutional adjudication, have we in effect reformulated our notion of what a constitution is, returning to the pre-Revolutionary War idea that (symbolism aside) a constitution is essentially a description of the fundamental political arrangements?

274. Brest, *supra* note 7, at 234 (quoting Levinson, "The Constitution" in *American Civil Religion*, 1979 Sup. Ct. Rev. 123, 123).

275. Kay, *The Illegality of the Constitution*, 4 *Const. Commentary* 57, 57 (1987).

276. I owe strong insistence on these points to my colleagues at a faculty workshop, particularly Kent Greenawalt, Lou Henkin, and Jerry Lynch.