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Reconciling Originalism and Precedent

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RECONCILING ORIGINALISM AND PRECEDENT

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INTRODUCTION

Originalism is often thought, by both its advocates and its critics, to be inconsistent with precedent. But if originalism cannot employ precedent, it would appear to be a seriously defective theory because it would ignore precedent even when doing so has enormous costs.

This Article challenges this common view of originalism and argues that nothing in the Constitution forbids judges from following precedent. Rather, the Constitution allows for precedent in two ways. First, the Constitution as a matter of judicial power incorporates a minimal notion of precedent. While this minimal incorporation has important theoretical implications—because it indicates a "no precedent position" is unconstitutional—it is so minimal that it does not have significant practical consequences

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for current judicial disputes about precedent. Second, the Constitution treats precedent as a matter of federal common law that it is revisable by congressional statute. Thus, the courts in the first instance and Congress ultimately have significant discretion over what precedent rules should be adopted. The Constitution thereby allows either extremely weak or extremely strong precedent.

Although the argument that precedent violates the Constitution's original meaning has largely been based on the constitutional text, the view of precedent offered in this Article is consistent with the constitutional text. The key ground, however, for preferring the compatibility of originalism and precedent is historical. Precedent was an important part of Anglo-American law for centuries before the enactment of the Constitution, and the Founding generation expected precedent to apply to, and continue after, the Constitution. Therefore, there is a strong presumption against any constitutional interpretation that condemns precedent.

While historical arguments have previously been made to justify precedent, they have been used to prove a different point—to justify a relatively strong modern approach to precedent as deriving from the grant of judicial power. This is a hard argument to make. By contrast, this Article's argument is easier, since it is more closely tied to the historical practice regarding precedent. We show that judges consistently accepted at least a weak view of precedent from the time of Coke until after the ratification of the Constitution. This evidence strongly suggests that the Constitution does not reject precedent and that it authorizes precedent in the two ways we describe.

Having established that the original meaning of the Constitution does not forbid precedent, the next question is: what is the normatively best approach to precedent under originalism? Employing a consequentialist perspective, we argue that an intermediate approach to precedent is best. A precedent doctrine should consist of rules that require precedent to be followed when doing so would produce net benefits and that require original meaning to be applied instead of precedent in other cases.

In developing this consequentialist approach, we employ a normative theory of originalism that we have advanced in several other articles.[1] This supermajoritarian theory of originalism argues that the Constitution and its amendments are likely desirable because they were enacted in accordance with a supermajoritarian process that generally produces beneficial provi-

[1] *See* John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism*, 98 Geo. L.J. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109247; John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67 (2008) [hereinafter McGinnis & Rappaport, *The Condorcet Case*]; John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) [hereinafter McGinnis & Rappaport, *A Pragmatic Defense*]; John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007) [hereinafter McGinnis & Rappaport, *Three Views*].

sions. This theory suggests that following the Constitution's original meaning is desirable because it is only that meaning that passed through the beneficial supermajoritarian process.

We then balance these benefits of following the original meaning with the benefits of following precedent—in particular, predictability, judicial constraint, and protection of reliance interests. Examining these relative benefits, we begin the task of developing a doctrine of precedent. This Article, while not offering a full precedent doctrine, does recommend three specific precedent rules. First, precedent should be followed when it is necessary to avoid imposing enormous costs. For example, even if one believed that Social Security violated the original meaning of the Constitution, one should still follow the precedents holding it constitutional to avoid the enormous costs and disruption that invalidating that program would cause. Second, precedent should be followed when it is entrenched—when the precedent enjoys strong support that is comparable to that enjoyed by a constitutional amendment. Third, precedent should be followed when it corrects a supermajoritarian failure. Unfortunately, the original supermajoritarian process for enacting the Constitution had some serious defects, such as the exclusion of blacks and women. Where a precedent operates to correct the results of these defects, a strong argument exists for following it. In addition to proposing these three precedent rules, the Article discusses several factors that are relevant to determining when precedent would be desirable. These factors are helpful in designing additional precedent rules.

We thus hold a position on precedent intermediate between scholars like Michael Paulsen[2] and Gary Lawson[3] who believe that precedent is illegitimate and scholars like Thomas Merrill[4] and Henry Monaghan[5] who believe that precedent has a strong presumption in favor of being followed. Against the first group of scholars, we argue that it is constitutional to follow precedent and wise to do so under rules that attempt to capture the circumstances when abandoning a prior decision would more likely be costly than beneficial. Against the second group of scholars we observe that precedent is not as presumptively beneficial as the original meaning of the Constitution, because the judicial process is not as well suited to creating constitutional entrenchments as the supermajoritarian constitution-making process. It is therefore a mistake to generally privilege precedent over the original meaning and substitute a general presumption in its favor for the more carefully circumscribed precedent rules we recommend.

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[2] Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

[3] Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007) [hereinafter Lawson, *Mostly Unconstitutional*].

[4] Thomas Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005).

[5] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

Our intermediate position then would protect the precedents that are most likely to produce net benefits but would allow substantial leeway for the overruling of other precedents. It would insulate certain important precedents, like those permitting the federal government plenary power over economic affairs[6] as well as *Griswold*,[7] because these precedents, even if wrong, either represent a current consensus or would impose substantial costs if overturned. But our theory would also permit challenges to a wide of variety of precedents that might otherwise be regarded as settled. For instance, under our theory, the Supreme Court could appropriately discard a substantial portion of current constitutional criminal procedure, such as the exclusionary rule, and interstitial doctrines of the administrative state, such as Congress's authority to establish independent agencies (assuming that these do not comport with original meaning). These prior cases do not appear to be protected by any precedent rule that would produce net benefits.

This Article is divided into two parts. The first Part argues that the original meaning of the Constitution is compatible with precedent. We initially explore the history of precedent to show that history strongly suggests that the Constitution does not forbid the use of precedent. We then offer a constitutional interpretation that, consistent with history, authorizes precedent.

The second Part of this Article develops the normative argument in favor of an intermediate approach to precedent. Initially, we briefly describe the supermajoritarian theory of originalism. Part II then discusses the benefits of following the original meaning as well as the benefits of following precedent. Finally, this Part recommends the three precedent rules enumerated above and illustrates how these rules would apply to some important Supreme Court decisions involving precedent.

I. PRECEDENT, ORIGINALISM, AND THE CONSTITUTION

Precedent has often been thought to conflict with originalism. This Part challenges and rejects this claim, arguing that precedent is consistent with the Constitution's original meaning. The Constitution allows for precedent in two ways. First, there is a strong case for concluding that the Constitution incorporates a minimal degree of precedent within the judicial power. Second, the Constitution otherwise treats precedent law as a matter of federal common law (or general law) that is revisable by congressional statute. Consequently, the Constitution allows a great range of different precedent rules.

Part I.A examines Gary Lawson's widely discussed theory, which argues that following precedent is inconsistent with the original meaning of the Constitution, and shows that Lawson's argument largely depends on an

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[6] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

[7] Griswold v. Connecticut, 381 U.S. 479 (1965).

account of the history of precedent. Part I.B therefore turns to the history of precedent in England and America and shows that some form of precedent had been a consistent part of Anglo-American law from at least the time of Coke. This history strongly suggests that precedent is not unconstitutional. Part I.C concludes by offering an interpretation of the constitutional text that is supported by the historical account set out in Part I.B.

A. The Supposed Conflict Between Originalism and Precedent

While many scholars believe that originalism is inconsistent with precedent, Gary Lawson's argument was one of the first in the modern era to this effect, and it remains the most arresting, powerful, and persuasive. In two articles published over a fifteen-year period, Lawson eloquently argues that the original meaning of the Constitution prohibits precedent in constitutional cases.[8] Lawson's argument is both simple and elegant. He notes that the Supremacy Clause makes the Constitution, federal statutes, and federal treaties the supreme law of the land. It does not include prior judicial decisions. Thus, if a judge believes that a prior judicial opinion misconstrued the original meaning of the Constitution, the judge is obligated to follow the Constitution, not the precedent. The use of precedent is therefore unconstitutional in constitutional cases.[9]

The simplicity of this argument should not lead us to ignore its radical implications. First, this interpretation does not merely allow judges to disregard precedent; rather, it actually *forbids* them from following precedent.[10] Thus, following mistaken precedent is unconstitutional, irrespective of the consequences.[11] Second, this interpretation would also appear

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[8] *See* Lawson, *Mostly Unconstitutional*, *supra* note 3, at 1; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) [hereinafter Lawson, *Constitutional Case*].

[9] *See* Lawson, *Mostly Unconstitutional*, *supra* note 3, at 6; Lawson, *Constitutional Case*, *supra* note 8, at 32.

[10] It might be thought that this argument would forbid not only horizontal but vertical precedent. Lawson, however, argues that lower federal courts would still be obliged to follow Supreme Court precedent because they are "inferior" to the Supreme Court. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1994). While it raises fascinating questions, we leave aside the question whether, and if so, to what extent, this conclusion is compatible with Lawson's overall approach.

[11] This interpretation would also have implications outside of the Judiciary. Presumably, the Executive would be forbidden from following judicial precedents under this view. While Lawson argues that the Executive would be required to follow judicial judgments on the ground that the term "judicial *power*" implies binding decisions, the Executive would be forbidden from following judicial precedents that it believes are mistaken. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1290–92 (1996). While Paulsen also appears to argue that Presidents are required to not follow judicial precedents (and even judgments), he nonetheless takes much of it back, arguing that three principles require the President to moderate his decisions. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 332 (1994); *see also* Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 WM. & MARY BILL RTS. J. 113, 118 n.18 (2007) (raising questions about the constitutionality and legitimacy of Paulsen's principle of accomodation).

to prohibit following precedent in statutory cases. If federal statutes are the supreme law of the land, then they should be applied rather than a mistaken precedent.[12]

Although Lawson's interpretation strongly conflicts with modern practices, that does not mean it also conflicts with the original meaning. Much more important is that his interpretation conflicts with traditional Anglo-American practices. In particular, our historical review indicates that precedent was a consistent and valued part of Anglo-American law at least for nearly two centuries before the Constitution. The review also provides evidence that the Founders' generation expected precedent to apply to the Constitution. Given this history, a strong presumption exists against any constitutional interpretation that would prohibit following such a valued and consistently employed practice. Before finding a prohibition on such a practice, one would ideally want an express provision doing so, or, at least, the absence of any plausible reading of the text that would allow the practice. As shown below, neither of these conditions holds.

Lawson is aware, as he puts it, that "the doctrine of precedent was certainly familiar in the Founding era," but he does not believe this fact has significant force.[13] This is in part due to Lawson's belief in the strength of his textual argument, but it is also due to the weakness of the claim that he seems to mistakenly believe is the sole alternative to his interpretation—that the judicial power establishes "a general obligation to prefer judicial decisions to the Constitution in at least some cases."[14] To support such a claim, one would have to find evidence for a relatively strong view of precedent under the judicial power. This claim would thus require both evidence of a relatively strong kind of precedent and evidence that that view was so consistently adhered to that it became bound up with the concept of judicial power itself. Our historical review does not reveal evidence for this claim. Thus, it is no surprise that Lawson concluded that precedent at the time of the Founding was "not so well established and developed to be a part of the 'judicial Power' in the super-strong sense that would be necessary to give judicial decisions preference over the Constitution."[15]

But the view that the judicial power incorporates a relatively strong notion of precedent is not the sole alternative to Lawson's no-precedent interpretation. We argue that the Constitution treats precedent rules as a matter of common law that is revisable by congressional statute. We also argue that the Constitution incorporates a very weak notion of precedent as judi-

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[12] While it would be unconstitutional for courts to follow precedent in statutory cases under ordinary circumstances, it is possible that Congress could pass a law allowing for Supreme Court precedent in statutory cases. Congress might enact a statute providing that a Supreme Court statutory interpretation decision should be understood as having the effect of amending the statute. It is by no means clear that such a statute would conform to the original meaning of the Constitution.

[13] Lawson, *Mostly Unconstitutional*, *supra* note 3, at 12–13.

[14] *Id.* at 12.

[15] *Id.* at 13.

cial power. As we show below, precedent rules had been employed since at least the time of Coke. While the rules for precedent varied at different times and in different courts, judges at the very least consistently applied and valued a weak version of precedent during this period. This history cuts against Lawson's view that the Constitution does not permit precedent, and supports our interpretation of the Constitution.[16]

B. A Short History of Precedent

Our historical discussion begins with a focus on the English legal system. We then turn to the American experience, first in the colonies, then in the independent states and during the ratification debates, and finally in the Supreme Court under the new Constitution. In all of these periods, we find evidence for three general claims. First, precedent existed in all of these periods.[17] Although precedent was generally weaker than in modern times, the precedent rules varied over time and in different courts. In some courts, significant weight was conferred on an individual decision, whereas other courts placed significant weight only on a series of decisions. Second, precedent rules conferred greater weight on a series of decisions than on a single decision. Third, precedent rules placed more weight on decisions involving property rights because they involved greater reliance interests.

1. Precedent in England.—In England, support for precedent goes back many centuries, with one prominent statement by Bracton endorsing precedent in the thirteenth century.[18] For present purposes, it is necessary to go back only to the time of Coke, when there were many statements supporting precedent.[19] Coke himself wrote that "our book-cases are the best

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[16] In contrast to Lawson's textual arguments against precedent, other originalists rely on conceptual or normative arguments. For example, Randy Barnett argues that originalism is logically inconsistent with precedent because "[o]riginalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed," and only a constitutional amendment is capable of changing its meaning. *See* Randy Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59 (2005). Whatever the merits of Barnett's normative argument, we believe that it is missing a key ingredient, namely, it does not purport to show that the Constitution itself precludes precedent. If the Constitution expressly told judges to follow precedent in certain circumstances, an originalist would not argue that judges should decline to follow the constitutional text because originalism precludes it. Instead, he would concede that the original meaning requires the following of precedent. Our argument is of the same form, since we believe the Constitution implicitly allows for precedent.

[17] For a view of the history of precedent that is similar in many respects with ours, see Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1085–1101 (2003).

[18] *See* HENRICI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 9 (Sir Travers Twiss ed., 1990) ("If, however, any new and unaccustomed cases shall emerge, and such as have not been usual in the realm, if, indeed any like cases should have occurred, let them be judged after a similar case, for it is a good occasion to proceed from like to like.").

[19] *See* SIR CARLETON KEMP ALLEN, LAW IN THE MAKING 205–07 (7th ed. 1964) (discussing sixteenth- and seventeenth-century emphasis on precedents in both procedural and substantive matters).

proofs what the law is."[20] Coke's support for precedent is no surprise because the artificial reason of judges, which Coke emphasized, consisted largely of knowledge of precedent.[21] Coke's emphasis on precedent as an essential ingredient of the common law[22] was continued by the next English legal giant, Mathew Hale, who in 1713 announced:

> The Decisions of Courts of Justice, tho' by Vertue of the Law . . . do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times . . . .[23]

Hale's view was then developed further by William Blackstone in the 1760s. Blackstone, who was the most widely read English legal commentator in America at the time of the Constitution, wrote:

> [I]t is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the law; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined . . . . The doctrine of the law then is this: *that precedents and rules must be followed, unless flatly absurd or unjust*: for though there reason be not obvious at first view, yet we owe

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

[21] *See* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 64 (2001).

[22] Judge Michael McConnell highlights Coke's reliance on custom and precedent. McConnell writes that even in cases of first impression, Coke would not fill the gap with abstract reason, but instead would "cast the net of his antiquarian research farther afield," and in the famous *Calvin's Case*, came "up with a 200-year-old precedent." See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 179–80.

[23] SIR MATHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 68 (Legal Classics Library 1987) (1713).

> such a deference to former times as not to suppose they acted wholly without consideration.[24]

Several aspects of Blackstone's discussion deserve emphasis. First, Blackstone's discussion provides further evidence that precedent had an important role to play in the English legal system. Second, his discussion reveals that there were various reasons for following precedent, including that it promoted judicial consistency and constraint as well as clear and predictable law. Third, while Blackstone makes clear that precedent is important, he also indicates that it is not an absolute rule, as there is an exception for decisions that are "flatly absurd or unjust," or, as Blackstone alternatively puts it, "most evidently contrary to reason" or divine law.

This exception, however, is not one that can swallow the precedent rule by allowing judges to ignore precedents by finding them unreasonable. Many precedents will not implicate matters of reason. For example, there may be several ways to resolve a matter within the limits of reason. While the resolution selected by a prior decision may not be the next judge's preferred method, it still may not fairly be characterized as contrary to reason.[25] Moreover, even if the resolution does seem to be unreasonable, Blackstone states that it must be "flatly absurd or unjust" or "most evidently contrary to reason." Thus, earlier decisions are seen as being presumptively correct as a matter of reason, "because we owe . . . a deference to former times as not to suppose they acted wholly without consideration."[26]

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[24] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69–70 (Univ. of Chicago Press 1979) (1765) (last emphasis added).

[25] *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 32 (2001).

[26] *See* 1 BLACKSTONE, *supra* note 24, at 70. In the passage quoted *supra* on page 8, Blackstone adopted a declaratory view of law, writing that when a decision is overruled or not followed, "the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." *Id.* Some commentators have viewed Blackstone's view as being largely inconsistent with the notion of precedent because it adopts the declaratory view of the law. For example, Thomas Lee argues that the declaratory theory "presupposes a relatively weak (if not nonexistent) doctrine of stare decisis." Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999). According to Lee, "the classic declaratory theory left ample room for departing from precedent under the fiction that prior decisions were not law in and of themselves but were merely evidence of it." *Id.*

While it is possible that most practitioners of the declaratory theory held a "relatively weak" view of precedent, Lee's argument that there is a strong connection between the declaratory theory and weak precedent does not necessarily hold. There is a basic distinction between the effect of a mistaken decision and the discretion of a court to refuse to follow earlier decisions. While the declaratory theory holds that the effect of a mistaken decision is that it is treated as if it was never the law, this does not mean that it also has a weak standard for recognizing that a precedent was mistaken. As Blackstone's own position seems to suggest, one could believe that prior judicial decisions should usually be followed while also believing that that when an old decision is not followed, it had never been law and the new decision applies retroactively. In fact, some contemporary judges, such as Justice Scalia, argue for ap-

While Blackstone, following Coke and Hale, obviously had an influential view, that does not mean that every judge followed precedent to the same degree. While some judges emphasized precedent less (or more), no evidence exists that judges rejected precedent entirely. Blackstone's contemporary, Lord Mansfield, is sometimes characterized as eschewing precedent, but that is not correct. While Mansfield may have placed less value on precedent, he still recognized its force.[27] As noted legal historian C. K. Allen wrote: "Many dicta might be quoted to illustrate Mansfield's insistence, even against some of his own contemporaries, on the necessity of adhering to settled principles, provided that they were established by clear evidence . . . in the form of reliable precedents or well-known practice."[28]

Although the precedential approach applied by English judges may seem relatively weak, English judges applied precedent more strongly in two situations. First, English judges gave much greater weight to a series of decisions than to a single decision.[29] Second, English law also placed greater weight on decisions involving property rights. In these cases, reliance interests were deemed to be especially important and therefore the courts placed even greater value on precedent.[30] Thus, while precedent existed in all areas to some extent, it was stronger in certain circumstances.[31]

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plying judicial decisions retroactively precisely because it will discourage judges from overruling precedents. *See* James Beam Distilling Co. v. Ga., 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

[27] Mansfield certainly was aggressive in overturning various decisions, but he "never entirely ignored precedents." Healy, *supra* note 21, at 71 (quoting DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 126 (1989)). In the same vein, he sometimes followed rules he did not agree with because "the authorities are too strong" or "the cases cannot be got over." ALLEN, *supra* note 19, at 212.

[28] ALLEN, *supra* note 19, at 211–12 (emphasis omitted).

[29] Theodore Plucknett writes that during the Year Book period of the Middle Ages, a single case would have only limited authority, but a series of cases was "a well established custom" and was entitled to significant weight. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 347 (5th ed. 1956). The authority of a series of decisions continued to be recognized as the strength of precedent grew over time. Still, Plucknett writes, "under a developed system of precedents one case is as good as a dozen if it clearly covers the point, and at the present day citations are consequently few and to the point. The eighteenth century, however, still seems tempted to find safety in numbers, and to regard the function of citations to be merely that of proving a settled policy or practice." *Id.* at 349; *see also* Healy, *supra* note 21, at 68 (greater weight given to a series of decisions).

In 1612, John Davies wrote in his *Irish Reports* that "a custom doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience." J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 32 (1990) (quoting John Davies). Coke also noted that "wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of light and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto . . . . [N]o man ought to take it on himself to be wiser than the laws." *Id.* at 35 (quoting Sir Edward Coke in *Calvin's Case*).

[30] *See, e.g.*, Morecock v. Dickins, (1768) 27 Eng. Rep. 440, 441 (Ch.); *see also* Healy, *supra* note 21, at 69 ("[M]ost judges agreed [in 1760] that precedent should be followed in cases involving property

Although this brief review of English law indicates that judges gave precedential weight to decisions from at least the time of Coke, it is sometimes said that historians cannot agree on when precedent became established in England, with some dating it to the nineteenth century and others to an earlier period.[32] If that were true, one might then argue that precedent was not a clearly established part of English law when the Constitution was written at the end of the eighteenth century. This argument has been made by numerous opponents of precedent.[33]

But this argument rests on a confusion. While historians do differ about when precedent emerged, their disagreement relates to the question of the emergence of the *modern* English view of precedent, under which a single judicial decision established an absolute (or at least very strong) obligation for future courts to follow.[34] But our question is not whether a single judicial decision had absolute or significant weight, but whether prior judicial decisions could lead judges to decide cases differently than they otherwise would have. If a series of prior judicial decisions had significant precedential weight, then such cases would influence judicial decisions, even though the modern theory of precedent had not been adopted. While it may be unclear when the modern view of precedent emerged, it *is* clear that a significant precedent practice existed since at least the early seventeenth century, and probably for centuries before that.

2. Precedent in Colonial America.—The English approach to precedent was transplanted to America when the English established colonies there. Of course, the Anglo-American approach changed over time as the Americans developed from colonies to a confederation of republican states and finally to a nation under the Constitution. But within the American legal system, precedent continued throughout this period, exhibiting significant similarities to its English counterpart.

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or contracts, where certainty was essential."); Lee, *supra* note 26, at 688 (noting that, by the time the *Morecock* decision was handed down, a "distinction had already taken hold in the English courts" between "commercial cases and other decisions"); Lee J. Strang, *An Originalist Theory of Precedent, Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 451–52 (2006) ("Stare decisis was applied more vigorously in cases involving property or contract.").

[31] For a similar view of the use of precedent in England, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 228–29 (2008).

[32] *See* ALLEN, *supra* note 19, at 219 n.1 (arguing that the modern theory developed in the nineteenth century); PLUCKNETT, *supra* note 29, at 349–50 (same); William Holdsworth, *Case Law*, 50 L. Q. REV. 180, 180 (1934) (arguing that the modern theory "was reached substantially by the end of the eighteenth century").

[33] *See* Healy, *supra* note 21, at 55–56, 66–73; Lawson, *Mostly Unconstitutional*, *supra* note 3, at 12–13; Lee, *supra* note 26, at 659–62; Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1576–77 (2000) (endorsing Lee's argument).

[34] *See* sources cited *supra* note 32.

During the colonial period, the American colonies developed from informal outposts to the political communities that would successfully rebel against the English. As English subjects, the colonists were largely governed by the English system of law.[35] Their judiciaries were filled with persons selected by the English governors and their councils, with the governor himself serving in the Judiciary.[36] Colonial judicial decisions were sometimes subject to judicial review in England.[37] Thus, it is no surprise that English rules of precedent were applied in American courts.

As the colonies developed into mature political communities, they increasingly employed the English common law.[38] By the eighteenth century, commentators suggest that a practice of giving respect to precedent was generally followed in America.[39] Legal historian Morton Horwitz believes that the colonists held a strong view of precedent: "[T]he overwhelming fact about American law through most of the eighteenth century is the extent to which lawyers believed that English authority settled virtually all questions for which there was no legislative rule."[40] Consequently, there was "a strict conception of precedent."[41] Legal historian William Nelson has a similar view.[42] Even if one disagrees with these historians and believes that a weaker view of precedent prevailed in the colonies, that would still allow a significant role for precedent, similar to that in England at the time.

Statements supporting precedent came from the bar as well as the courts. John Adams wrote during the colonial period that "every possible

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[35] LEONARD LABAREE, ROYAL GOVERNMENT IN AMERICA 4–5 (1930).

[36] EVARTS GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 113, 140–44 (1898).

[37] LABAREE, *supra* note 35, at 5.

[38] Healy states that during the seventeenth century, the colonists were "struggling to survive on a strange continent," and therefore employed a legal system that relied on adaptability rather than restraint. Healy, *supra* note 21, at 73–74. He suggests—without actually asserting—that precedent was not followed. *Id. But cf.* Strang, *supra* note 30, at 457 ("During the seventeenth century such a doctrine was weak, but in the eighteenth century, as the colonial legal system became increasingly complex, the doctrine of precedent came to resemble its English counterpart."). But even if precedents were not followed at this early date, this fact would have little relevance for the meaning of the Constitution. In the undeveloped colonies of the seventeenth century, the colonists displayed a "strong dislike of lawyers," and therefore may not have followed accepted legal forms such as precedent. Healy, *supra* note 21, at 74. But as time progressed, the colonies developed and came to embrace the Anglo-American legal system. *See* Healy, *supra* note 21, at 74–75; Strang, *supra* note 30, at 456. The Americans, who were writing the Constitution in developed political communities, would no doubt have relied on the ordinary legal forms that had developed in England and in the colonies for the last several generations. They would not have assumed that the forms employed by new undeveloped colonial outposts would govern or be relevant.

[39] *See, e.g.*, Strang, *supra* note 30, at 457.

[40] MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 8 (1977).

[41] *Id.*

[42] *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 18–20 (1975).

Case [should be] settled in a Precedent, leav[ing] nothing to the arbitrary Will or uniformed Reason of Prince or Judge."[43] Similarly, judges emphasized that the courts were not free to depart from "the known rules of the common law."[44] In the Maryland case of *Somerville v. Johnson*, for example, the court followed precedent, stating that it otherwise would have reached the opposite result.[45]

There is also evidence that colonial courts followed the two additional aspects of the English precedent doctrine.[46] First, the courts recognized that a series of decisions was entitled to greater weight than a single decision. The Massachusetts Supreme Court stated that when a "Usage had been uninterrupted . . . the Construction of the Law [is] thereby established" and the court "therefore would make no Innovation."[47] Second, the courts acknowledged that precedents were entitled to greater weight in cases involving property, because of the reliance interests involved.[48]

3. Precedent in the Independent States.—After independence, the colonies became states. While they were no longer formally subject to the English legal system, the American states in the period before the Constitution and in the early years afterward largely continued to employ the Anglo-American legal system, including the precedent rules. First, the courts used precedent, with some courts applying stronger precedent rules and other courts applying weaker ones. The courts also followed the two additional

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[43] 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 167 (L.H. Butterfield ed., 1961). As Chief Justice of the Massachusetts Supreme Court, Thomas Hutchinson had expressed similar views, emphasizing the need for known and certain law and arguing that the common law provided the rule of decision and prevented judicial legislation. HORWITZ, *supra* note 40, at 5.

[44] *See* HORWITZ, *supra* note 40, at 8.

[45] Somerville v. Johnson, 1 H. & McH. 348, 353–54 (Md. 1770), *cited in* Strang, *supra* note 30, at 457.

[46] Healy questions the claim that colonial courts generally followed the English precedent doctrine. Healy, *supra* note 21, at 75–76. But Healy's arguments focus on the modern notion of strong precedent. Thus, many examples he proposes, while inconsistent with strong precedent, are entirely consistent with the weaker view of precedent. For example, Healy cites as evidence against precedent that James Otis had "argued in a 1761 case that it is '[b]etter to observe the known Principles of Law than any one Precedent.'" Healy, *supra* note 21, at 76. This statement, however, is not inconsistent with the English conception of precedent that conferred limited weight to single decisions. Where a single case is inconsistent with known principles of law, which were derived from previous cases, courts would often not follow the single decision. But that did not imply that precedent was not given weight and that a series of decisions was not given significant weight. A similar analysis applies to Healy's discussion of *Belt v. Belt*, a Maryland decision from 1771, in which the Court "disregarded the decision in a previous case and instead followed the teachings of Mansfield." Healy, *supra* note 21, at 76 (discussing Belt v. Belt, 1 H. & McH. 409, 418 (Md. 1771), 1771 WL 13, at *6). But, again, it was entirely consistent with the accepted system for the court to not follow a single decision that was inconsistent with "the authorities in the books" that had been derived from other cases. *See Belt*, 1 H. & McH. At 418, 1771 WL 13, at *6.

[47] HORWITZ, *supra* note 40, at 8 (quoting Watts v. Hasey, Quincy's Mass. Rep. 194 (1765)).

[48] *See Somerville*, 1 H. & McH. at 353–54, *quoted in* Strang, *supra* note 30, at 457.

precedent rules: they gave greater weight both to a series of decisions than to a single precedent and to decisions concerning property.[49]

Statements from important judges and commentators from this period illustrate the use of precedent. James Wilson, a leading participant at the Constitutional Convention and in the ratification debate, as well as a Supreme Court Justice and author of a legal treatise, wrote:

> Judicial decisions are the principal and most authentick evidence, which can be given, of the existence of such a custom as is entitled to form a part of the common law. Those who gave such decisions, were selected for that employment, on account of their learning and experience in the common law. As to the parties, and those who represent the parties to them, their judgments continue themselves to be effective laws, while they are unreversed. They should, in the cases of others, be considered as strong evidence of the law. As such, every prudent and cautious judge will appreciate them. He remember, that his duty and his business is, not to make the law, but to interpret and apply it."[50]

Wilson, here, seems to follow the Blackstonian approach, which treats precedent as entitled to strong, but not absolute, weight.

Thomas Jefferson also appears to have expected and approved of the use of precedent. In 1776, the Virginia legislature set up a committee, chaired by Jefferson, to codify the laws. Jefferson, supported by a committee majority, tried not to change the language of certain "ancient statutes" in part because "the meaning of every word [had been] so well settled by decisions."[51] Moreover, Jefferson and the majority did not try to reduce the entire common law to statutes because "every word and phrase in [the new statutes] would become a new subject of criticism and litigation, until its sense should have been settled by numerous decisions."[52] Clearly, then, Jefferson and the committee majority expected precedent to apply to statutory interpretation, and they appeared to believe it had desirable qualities in terms of clarity and predictability.

Chancellor Kent also approved of precedent. In his widely regarded treatise, Kent wrote:

> A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and their con-

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[49] *See* NELSON, *supra* note 42, at 18 n.62.

[50] 2 THE WORKS OF JAMES WILSON 160–61 (James DeWitt Andrews ed., 1896).

[51] Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), *in* 12 THE WRITINGS OF THOMAS JEFFERSON 297, 299 (Albert Ellery Bergh ed., 1907).

[52] *Id.*

> tracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and pretty implicitly followed . . . . If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. . . . [W]hen a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law.[53]

Chancellor Kent also seemed to follow the Blackstonian approach[54] of treating precedent as strong evidence of the law.[55]

The evidence from this period is also important because it reveals that the dominant approach to precedent was not limited to the common law but was also applied to decisions construing written laws. Many decisions invoked what were regarded as the ordinary rules of precedent when construing written laws.[56] Moreover, judicial opinions did not state that

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[53] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 442–43 (1826).

[54] Because Kent's treatise was written in 1826—nearly forty years after the Framing—its ability to shed light on the Constitution's original meaning is limited. Nonetheless, the treatise's adoption of the Blackstonian-Wilsonian approach suggests the continuity of that view.

[55] While Kent did not have a strong or modern conception of precedent, he certainly believed that precedent can change the results that judges would otherwise reach. Kent's writings certainly recognize that precedents can be overruled:

> But I wish not to be understood to press too strongly the doctrine of *stare decisis*. . . . It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance. . . . Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it.

KENT, *supra* note 53, at 444. But as the quotation in the text makes clear, Kent also strongly affirmed precedent. Clearly, Kent had a nuanced view that noted that overrulings are a matter of tradeoffs—in particular, tradeoffs between reliance and accuracy. Kent also recognized that a series of decisions is of greater weight than a single decision, and while not impregnable, are entitled to substantial weight.

[56] *See, e.g.*, Goodell v. Jackson, 20 Johns. 693, 720 (N.Y. 1823) (Kent, C.); Packard v. Richardson, 17 Mass. (17 Tyng) 122, 143 (1821); Kerlin's Lessee v. Bull, 1 Dall. 175, 178 (Pa. 1786); Bush v. Bradley, 4 Day 298, 309–10 (Conn. 1810) (opinion of Smith, J.); Minnis v. Echols, 12 Va. (2 Hen. & M.) 31 (Va. 1808) (opinion of Roane, J.); Respublica v. Roberts, 1 Yeates 6, 7 (Pa. 1791). For an extended discussion of several of these cases, see Nelson, *supra* note 25, at 14–17 and accompanying footnotes. *See also* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 391 (Marvin Meyers ed., rev. ed. 1981) ("Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decision of his predecessors, should vary the rule of law according to his individual interpretation of it."). *But see* Commonwealth v. Posey, 8 Va. (4 Call) 109, 116 (1787) (opinion of Tazewall, J.) (writing that "the uniformity of decisions" about the correct interpretation of a statute "does not weigh much with me," because "although I venerate precedents, I venerate the written law more").

Thomas Jefferson and the Virginia committee on law revision also expected precedent to apply to written laws. *See* Letter from Thomas Jefferson, *supra* note 51, at 299. Zephaniah Swift expected the same. *See* ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 46 (John

different precedent rules should apply to written laws. This is important because it might otherwise be thought that the precedent rules were special to the common law. Under that view, judicial decisions might be thought to be entitled to weight, not because that is how judicial decisionmaking operates, but because the common law consists of precedents or judicial custom. That precedent was applied to written law strongly indicates that this latter view of precedent as part of the common law was not the full understanding of precedent. Even if precedent first originated on the understanding that judicial custom was part of the law, the precedent practice became so deeply entrenched that it came to be understood as an aspect of judicial decisionmaking that also applied to written laws.

One factor that complicates the experience within American states after the revolution is that of English precedents. While the Americans were operating within an English common law framework that was often deemed to exceed national boundaries, they had declared independence and therefore were no longer subject to English law. Consequently, some of the states adopted a two-level approach to precedent, giving English precedents less weight than American state precedents. Because the states treated American precedents with greater respect, the treatment of English precedents does not indicate a change in precedent rules generally, but only a reduced authority for English law in an independent nation.[57]

Byrne, Windham, Conn.) ("[The Connecticut courts] have by a series of decisions ascertained the construction of the statutes, by which many very important points, and principles have been settled.").

[57] Some of the judges during this period followed what appeared to be a weak (but nonetheless genuine) view of precedent. For example, in a treatise written in 1795, Connecticut lawyer and later Chief Justice Zephaniah Swift discussed the role of English and Connecticut precedents under Connecticut law. Swift both seemed to endorse precedent (precedent "is founded in the highest wisdom, and produces the best effects") and to dismiss or limit it ("the institution [of precedent], is a principle established which corrects all errors and rectifies all mistakes"). *See* SWIFT, *supra* note 56, at 40, 41. One way to reconcile Swift's apparently conflicting views is to interpret him as following Blackstone's notion that only clear errors can be reversed and that precedent should otherwise be followed.

However one interprets Swift's meaning, it seems clear that he believed that Connecticut decisions were entitled to at least a moderate amount of precedential weight, because Swift drew a distinction between English and Connecticut decisions. Swift wrote "[t]hat part of the English common law, *which has been thus approved by the [Connecticut] courts*, may be considered as our common law by adoption." *Id.* at 44 (emphasis added). By contrast, "that part which has not been thus adopted, may . . . be considered obligatory, so far as it is consistent with reason, adapted to our local circumstances, and conformable to the policy of our jurisprudence." *Id.* Because Connecticut decisions are entitled to greater precedential weight than English decisions, Swift views Connecticut decisions as having real, significant precedential weight.

A similar view is expressed by Vermont Chief Justice Nathaniel Chipman. Chipman wrote that "[i]f no reason can be assigned, in support of [English] rules or precedents, not already adopted in practice [in Vermont]," then they should not be adopted. NATHANIEL CHIPMAN, REPORTS AND DISSERTATIONS IN TWO PARTS 65 (Anthony Haswell, Rutland, Vt. 1871). Clearly, when Vermont courts had actually adopted such English rules, which might be relied on, even precedents that seemed unreasonable might have been followed. Similar views of relatively weak precedent were held by other judges. *See* Nelson, *supra* note 25, at 31 (discussing Jacob Radcliff of the Supreme Court of New York, who agreed that "common law decisions could be erroneous" and should not be followed unless overruling them would

4. Precedent During the Ratification Debates.—This Anglo-American tradition of precedent was also recognized during the constitutional ratification debate. The question of precedent arose in several different criticisms of the proposed Constitution by Anti-Federalists. Yet defenders of the Constitution did not deny that precedent would be employed. As we show in this section, the comments about precedent and the Constitution suggest that commentators believed that the Constitution did not prohibit precedent.

The Federal Farmer, an Anti-Federalist critic of the Constitution, both expected and approved of the development of precedent. The Federal Farmer was concerned about the lack of precedents to guide the federal courts concerning equity: "[W]e have no precedents in this country, *as yet*, to regulate the divisons in equity as in Great Britain; equity, therefore, in the supreme court *for many years* will be mere discretion."[58] While the Federal Farmer was thus critical of the absence of precedent, he clearly believed that precedent would emerge over time.

Another Anti-Federalist critic of the Constitution who expected precedent to be employed was Brutus. Brutus wrote that the federal Judiciary

> will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them.[59]

This analysis shows that while he was displeased about how it would operate, Brutus believed that precedent would be applied to constitutional adjudications.

In *The Federalist No. 78*, Alexander Hamilton responded in part to Brutus's criticisms of the judicial power under the proposed Constitution. Hamilton defended the Judiciary, not by denying that precedent would apply, but by asserting it:

> It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which

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have retrospective influence or affect preexisting rights); *see also id.* (discussing the similar view of Edmund Pendleton).

[58] *Letters from The Federal Farmer No. 3* (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (Herbert J. Storing ed., 1981) (emphasis added).

[59] *Essays of Brutus No. 15* (Mar. 20, 1788), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 441.

> serve to define and point out their duty in every particular case that comes before them.[60]

Thus, Hamilton defended precedent, and the context suggests that such precedent would apply as to written laws.

James Madison also expected and approved of precedent. Madison wrote in *The Federalist No. 37* that "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications."[61] During the ratification period, Madison wrote in a letter, "[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[62] This evidence demonstrates that Madison believed precedent would apply to constitutional decisions. Moreover, Madison adopted the traditional view that a series of decisions was entitled to greater weight than a single decision.[63]

5. Precedent in the Supreme Court.—The early Supreme Court also followed precedent.[64] While it is less clear whether it followed a weak or strong form of precedent, our major interest is not in establishing the kind of precedent it followed, but that its actions suggest that following precedent is legitimate. To that end, we first present evidence that it followed a relatively strong form of precedent, then evidence that it followed a weaker form, and finally reject suggestions that the early Court opposed the use of precedent.

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[60] THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[61] THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003).

[62] Letter from James Madison to Samuel Johnston (June 21, 1789), *in* 12 STATE RECORDS OF NORTH CAROLINA 634 (Walter Clark ed., 1907).

[63] Madison adhered to this idea throughout his life. Later examples involve his decision to sign the bill reauthorizing the bank of the United States because precedent supported its constitutionality, although he had a contrary view. *See* Ira Lupu, *Time, the Supreme Court, and* The Federalist, 66 GEO. WASH. L. REV. 1324, 1334 (1998). Many years later, Madison returned to this subject, articulating a view that was consistent with his earlier ideas but more elaborate. He wrote:

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

Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 392 (Marvin Meyers ed., rev. ed. 1981).

[64] We are indebted for the cases we discuss here to Lee, *supra* note 26, and Strang, *supra* note 30, who have provided very useful pictures of precedent in the Marshall Court.

On the one hand, the early Court took many actions consistent with a strong adherence to precedent.[65] First, the Marshall Court overruled almost no decisions, and its few overrulings had special justification.[66] Second, the Justices sometimes made clear they felt confined by precedent: in *Ex Parte Bollman*, Chief Justice Marshall relied on two prior decisions to conclude that an issue was no longer open, even though the issue had not been raised by counsel or addressed by the Court in those two decisions.[67] Third, the Justices sometimes announced they were following a precedent, even though they disagreed with it.[68]

On the other hand, in *Ex Parte Bollman*,[69] Justice Johnson contested Marshall's reliance on prior cases, taking a weaker view of precedent. While Johnson rejected a strong view of precedent,[70] he adopted a weaker view. Johnson wrote that

> this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of ad-

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[65] In addition to the Supreme Court, the lower federal courts also appear to have followed precedent. *See* Strang, *supra* note 30, at 468. ("There are countless similar examples showing that stare decisis was a ubiquitous feature of early federal court legal practice as employed by litigants, the courts, and even the reporters."). A notable example involves Judge Chase's decision for the federal Circuit Court concerning the constitutional definition of treason, where the judge relied on two previously federal court interpretations. According to Chase, "[t]hese decisions, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, though not altogether obligatory, ought to be viewed with great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness." Case of Fries, 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5127) (discussed in Strang, *supra* note 24, at 470). Chase also "considered the law as settled by those decisions." *Id.* at 936.

[66] The two decisions where the Court actually overruled prior cases involved situations in which a contrary practice had evolved after the overruled decision, *see* Gordon v. Ogden, 28 U.S. 33, 34 (1830) (overruling Wilson v. Daniel, 3 U.S. 401 (1798), on the basis of the fact that "a contrary practice" to the decision had "since prevailed"), and where the full record had not been before the Court in the previous decision. *See* United States v. Percheman, 32 U.S. 51, 88–89 (1833) (overruling Foster v. Neilson, 27 U.S. 253 (1829)). Thus, there were special circumstances that justified these overrulings. *See also* Lee, *supra* note 26, at 679–81.

Two decisions are normally mentioned as overrulings, but they were not true overrulings. In Hudson v. Guestier, 10 U.S. 281 (1810), Marshall himself recognized that he had counted votes incorrectly in the previous case of *Rose v. Himely*, 8 U.S. 241 (1808). 10 U.S. at 285 (Marshall, J., dissenting). The majority thus did not overrule *Rose* on the issue before it. *See* Lee, *supra* note 26, at 677–78. *Green v. Neal's Lessee*, 31 U.S. 291 (1832), also does not provide an example of overruling precedent that had any claim to binding effect, despite its failure to follow the previous cases of *Patton's Lessee v. Easton*, 14 U.S. 476 (1816), and *Powell's Lessee v. Harman*, 27 U.S. 241 (1829). *Neal's Lessee* merely held that when Tennessee law had changed on the decisive question at issue, the new Tennessee law should have been followed. 31 U.S. at 295, 299–301; *see also* Lee, *supra* note 26, at 678.

[67] 8 U.S. 75, 100–01 (1807).

[68] In *Ogden v. Saunders*, 25 U.S. 213, 266 (1827), Bushrod Washington notably said that he would follow the conclusion of *Sturges v. Crowninshield*, 17 U.S. 122 (1819), that permitted states to pass bankruptcy laws to discharge debts, despite his continued disagreement with its holding.

[69] 8 U.S. 75, 101 (Johnson, J., dissenting).

[70] *See* Lee, *supra* note 26, at 669.

> judications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own decisions, or those of any other tribunal. . . . Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error.[71]

Johnson is here merely denying that two individual cases that did not even address an issue constitute precedent sufficiently powerful to resolve the matter. He is thus not rejecting the concept of precedent generally, but arguing for circumscribing its principal force to a series of decisions.[72]

We also disagree that Marshall's failure on occasion to cite a prior case suggests that precedent had no place in his jurisprudence. Indeed, it seems that Marshall sometimes neglected precedent because of the poor digest system available to the court. In *McCulloch v. Maryland*,[73] for example, Marshall did not cite to *United States v. Fisher*,[74] which had also construed the Necessary and Proper Clause fourteen years previously.[75] But none of the attorneys in the case mentioned it either, suggesting that the precedent was simply overlooked.[76] Moreover, in *McCulloch*, Marshall himself suggested that legal precedent and practice from the all three branches—legislative, executive, and judicial—were important determinants of his decision.[77] Thus, Marshall's occasional neglect of precedent should not be understood as a rejection of that concept.[78]

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[71] *Bollman*, 8 U.S. at 103–04.

[72] In another part of the opinion, Justice Johnson indicated that it is only a single decision that must be addressed, since the second decision merely cited the first. *Id.* at 104.

[73] 17 U.S. 316 (1819).

[74] 6 U.S. 358, 396 (1805).

[75] We also do not believe Marshall's occasional decision not to prominently cite a precedent in an opinion reflected his rejection of precedent. In *Cohens v. Virginia*, 19 U.S. 264, 290-310 (1821), Marshall engaged in a lengthy analytical discussion to conclude that the Supreme Court had appellate authority to review state court judgments. Only after justifying the conclusion did Marshall cite *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), which had decided the question previously. *See Cohens*, 19 U.S. at 310. While this practice seems inconsistent with modern practice, it is not necessarily inconsistent with the weaker theory of precedent. By answering the question again with a slightly different theory and without significantly relying on the previous decision, the Court lent independent authority to its conclusion regarding one of the most significant issues in constitutional law at the time. Under the weaker version of precedent, a single decision may not be entitled to great weight, but a series of decisions was entitled to more weight, and therefore the manner in which *Cohens* was decided helped to solidify the law in this area.

[76] *See* Lee, *supra* note 26, at 668.

[77] *McCulloch*, 17 U.S. at 401 Similarly, in *Stuart v. Laird*, 5 U.S. 299 (1803), Justice Patterson upheld circuit riding in large part because the practice had been used in case after case. *Id.* at 309 ("[T]he practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.").

[78] One possible objection to our reliance on the history of precedent is that it is consistent with what Lawson describes as the epistemological case for precedent. *See* Lawson, *Mostly Unconstitutional*, *supra* note 8, at 18–22. Under the epistemological view of precedent, one can rely on precedent if it is the

6. Conclusion.—Precedent was supported by the leading founders of the country, including James Madison, Alexander Hamilton, Thomas Jefferson, James Wilson, and John Adams, as well as by leading legal giants, including Coke, Hale, Blackstone, and Kent. This is a veritable who's who of Founders and legal giants. Perhaps equally powerful is the absence of writers who explicitly or even implicitly rejected the use of precedent. Therefore, we can conclude that precedent was a longstanding, important, and valued part of Anglo-American law. It is thus extremely unlikely that the enactors would have prohibited precedent in the Constitution,[79] and one should not conclude that they did absent either an explicit provision saying so or no alternative way to read the text. Fortunately, there are two ways to find precedent recognized under the Constitution.

C. The Consistency of Originalism and Precedent

The powerful history of the use of precedent raises the question of whether the constitutional text can accommodate it. This section argues that the Constitution allows for precedent in two distinct ways. First, the Constitution incorporates a minimal degree of precedent under the judicial power. Second, apart from this minimal degree of precedent, the Constitution treats precedent as a matter of common law that is revisable by congressional statute.

1. Judicial Power as a Basis for Precedent.—Article III vests the judicial power of the United States in the federal courts.[80] The judicial power can be understood as requiring judges to deploy a minimal concept of precedent—a concept of precedent that was followed widely and consistently from at least the time of Coke until the Constitution. This minimal

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"best evidence of the right answer." *Id.* at 19. Thus, one might argue that the weak version of precedent we discuss might be justified on epistemological grounds because prior decisions could be evidence of the correctness of these decisions, and a series of decisions would be strong evidence of their correctness. In this way, one might attempt to make Lawson's view consistent with at least some of the history.

This argument, however, will not work. Lawson argues that the circumstances in which an epistemological version of precedent should hold sway are very narrow indeed and are much narrower than the tradition of precedent we discuss. First, these precedent rules regularly held that precedents about property rights were entitled to greater weight because the reliance interest was larger. Since it is reliance, not accuracy, that is the main value, it is clear that epistemology cannot account for this rule. Second, even if one puts to the side the property-right precedent rule, the leading authorities on precedent, such as Blackstone and Kent, argued that precedent was also based on values other than accuracy, like predictability and judicial constraint. The weak precedent rules are hard to understand as simply being about accuracy. Finally, it should not be surprising that there is some connection between precedent and accuracy. Desirable precedent rules promote a variety of benefits, including accuracy. Real world precedent rules—both today and historically—cannot be understood as being solely about accuracy, as Lawson himself recognizes. *Id.* at 21.

[79] *See* Murphy, *supra* note 17, at 1084 ("[I]t seems quite clear that the Framers expected the new federal courts to treat their past decisions as evidence of law and to adhere to them absent a strong justification to the contrary.").

[80] U. S. CONST. art. III, § 1.

concept of precedent requires that judges give some weight to a string of judicial decisions on an issue over a substantial period. Under this view, the Constitution allows the common law or Congress to establish stronger precedent rules, but establishes a floor below which precedent cannot be eliminated.

The term "judicial power" in Article III is, at least on its face, ambiguous. It might be understood narrowly to mean the power to say what the law is in a judicial proceeding. But it might also be understood more broadly to include certain traditional aspects of the judicial office that were widely and consistently exercised. Such core aspects of an office often come to be identified with the power that the officer exercises. One prominent example is the view of many originalists that executive power is not simply the narrow power to execute the law but also includes many of the traditional powers of executives, such as the foreign affairs power.[81]

There are strong reasons for concluding that the Framers' generation would have understood the judicial power to include the minimal concept of precedent, which requires that some weight be given to a series of decisions. The concept of precedent that we would attribute to "judicial power" is, to be sure, a very narrow one. Indeed, this concept is actually slightly weaker than the weakest one that was followed historically. While we have found evidence of judges placing *substantial* weight on a series of decisions, the minimal precedent concept requires only that *some* weight be given. The narrowness of this definition makes it more likely that the concept was universal and would be regarded as part of the core of judicial power. Consequently, it is likely that when the Constitution was enacted, a judge refusing to give any weight to a series of cases all decided in the same way would have been deemed not merely to have been mistaken, *but to have improperly exercised judicial authority*.

This incorporation of minimal precedent under the judicial power would also have promoted the important values associated with precedent, such as predictability and judicial constraint. Even more significantly, the incorporation of minimal precedent helps assure the beneficence of Congress's power to establish precedent rules. Congress's power is potentially sweeping, but the minimal degree of precedent contained in the Constitution restrains Congress by preventing it from eliminating precedent.

It is, of course, true that the fact that judges deployed a legal concept at the time of the Framing does not necessarily make it a requisite element of

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[81] *See* Saikrishna Prakash & Michael D. Ramsey, *The Executive Power of Foreign Affairs*, 111 YALE L.J. 231, 252 (2001). For another example, see our argument that the members of Congress possess as constitutional powers some of the authority traditionally enjoyed by members of Parliament. *See* John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 332–36 (1997).

Article III's judicial power.[82] Judges employed many legal rules, but the federal courts are not required to deploy them now to properly exercise judicial power.[83] Widely followed precedent rules differed from particular common law rules, however, in that they were more centrally connected with judicial decisionmaking. The minimal concept of precedent was followed not just in one area of the law, but in all of them, and it involved the method of judicial decisionmaking rather than simply the application of certain legal rules.[84] Thus, giving weight to a series of precedents would have been seen to be an aspect of judging, not simply one of a multitude of rules judges happened to apply.[85]

The constitutionally required precedent rule just outlined is so narrow in scope, however, that it is unlikely to have any practical import in a world where precedent is accepted as a value. Rather, its most important contribution is theoretical: the rule indicates that the original meaning of the Constitution embraces at least some precedent. This rule shows that the no precedent position is unconstitutional. The bulk of precedent rules, however, derive from another source: these rules are a matter of common law that is revisable by congressional statute.

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[82] *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 524 (2000).

[83] *Id.*

[84] John Harrison views precedent rules as evidentiary rules about the nature of the law. He then argues that just as evidentiary rules for facts that were regularly applied, such as the hearsay rule, were not incorporated into the judicial power, precedent rules were also not so incorporated. *See* Harrison, *supra* note 82, at 524. We agree that the hearsay rule was not made part of the judicial power, but disagree that this implies that no aspects of precedent are part of the judicial power. Precedent rules were applied by more judges and to a more distinctively judicial task than hearsay rules. Precedent rules were applied by all judges as compared to hearsay rules which were mainly applied by trial judges. Moreover, precedent rules involve judicial decisions by judges on the law rather than decisions made largely in aid of jury decisionmaking. In addition, at the time of the Framing, the hearsay rule was a relatively recent development. *See* 5 JOHN H. WIGMORE, EVIDENCE § 1364, at 18 (John H. Chadbourn ed., rev. ed. 1974) (dating origin of hearsay rule to between 1675 and 1690). By contrast, while we have shown that some form of precedent was followed consistently from at least the time of Coke, precedent was thought to be a part of the English legal system from the earliest periods, *see* JAMES KENT, COMMENTARIES ON AMERICAN LAW 473-78 (12th ed. 1873), or even to predate it, *see* 1 WORKS OF JAMES WILSON 342 (1967) (suggesting that the doctrine of precedent was brought to England by the Romans). Thus, while the hearsay rule was certainly one of the broader common law rules, it did not have the generality, history, and connection with judicial decisionmaking that precedent had.

[85] John Harrison argues against incorporating precedent into the judicial power on the ground that the constitutional enactors would have viewed civil law judges, who did not formally follow precedent, as exercising the judicial power. *See* Harrison, *supra* note 82, at 522 n.61. This argument, however, fails to recognize that the term "judicial power" would have had different meanings depending on the context. Since the enactors were enacting a legal document within the Anglo-American legal system, they would be presumed to have in mind the judges of that legal system, who employed precedent. For the same reason, terms within the Constitution are often given their common law meaning rather than looking to their meaning under the civil law. It is, no doubt, true that the enactors would have deemed civil law judges as exercising judicial power in some sense of the term, but that does not mean that they used that foreign or secondary sense of the term in the Constitution.

2. Common Law as a Basis for Precedent.—There are two basic arguments for treating precedent as a matter of common law. First, it is difficult to view precedent rules as other types of law, including constitutional law, statutory law, or state law. Second, precedent has the characteristics of common or general law. But before making these arguments, it is useful to briefly discuss the concept of federal common law, or more accurately, the general law. In recent years, scholarship has begun to recover the idea of general law that existed in the early years of the republic.[86] This general law was unwritten and not the product of a single sovereign, but instead originated in both private and judicial custom. Yet, where applicable, this law was deemed authoritative and courts were therefore bound to apply it. Examples of general law include admiralty law, interstate law, and the law applied when the Supreme Court exercises original jurisdiction.[87]

Typically, general law would apply when it was not displaced by some superior law issued by the federal or state governments.[88] The general law would then bind the courts. An important feature of the general law is that it is not, as the federal common law is conceived today, supreme law of the land under the Supremacy Clause.[89] Two important implications follow from the general law not being the supreme law of the land: the general law is inferior to written federal law, and the general law cannot, on its own force, displace state law.[90]

Having clarified the nature of general law, we can now return to the two arguments for understanding precedent as part of the general law. Here we follow the pathbreaking work of John Harrison, who first articulated this

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[86] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

[87] *See* Harrison, *supra* note 82, at 525–26. It seems clear that the Constitution was written with an understanding that general law would apply. Constitutional provisions make much more sense if we assume that the enactors expected the general law to apply. For example, consider cases involving interstate border disputes, which are within the original jurisdiction of the Supreme Court. The law governing such disputes needs to include some common law as it cannot be entirely federal statutory law—because Congress has no enumerated power to legislate on border disputes—or state law, because one state cannot have authority to resolve a border dispute with another. Given the text and overall structure of the Constitution, it seems that the constitutional enactors expected the Supreme Court to resolve such disputes in accordance with the general law.

[88] Thus, in our view, except for the minimal concept of precedent commanded by the "judicial power," the Court's precedent rules are similar to default rules that the people acting through their representatives can vary.

[89] The Supremacy Clause provides that "this Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, § 1, cl. 2.

[90] Since it is not the supreme law of the land, the general law would not be binding on state courts when these courts construe federal law. This Article does not address how precedent would operate in state courts.

understanding of precedent.[91] The first argument for viewing precedent as general law is through a process of elimination. The alternative ways for viewing precedent are not sustainable.[92] The main alternative source of precedent rules—the Constitution—cannot establish any more than a minimal portion of those rules. While the judicial power can be fairly read to require a minimal precedent rule that was widely and consistently followed and was connected to judicial decisionmaking, other precedent rules do not satisfy these criteria. Rather, there has been a diversity of precedent rules, both horizontal and vertical, that has governed judicial decisions both before and after the Constitution was enacted.[93] It is hard to see how one could derive a single precedent approach from this diversity. One would have to select a particular precedent rule and then show how it was incorporated into the term "judicial power," despite the existence of diverse precedent approaches. One would also have to explain why the Constitution's enactors would have sought a single precedent approach that did not change even as circumstances did. Nor can precedent be viewed as federal statutory law or state law. Congress has not passed any statutes that directly address precedent, especially at the Supreme Court level.[94] Moreover, state laws cannot be viewed as the appropriate source of precedent for the federal courts throughout the nation.[95]

The second argument for treating precedent as general law is that precedent has the characteristics of general law.[96] As our historical review has shown, precedent norms existed across different jurisdictions in the Anglo-American legal world. Thus, there was a general law to apply. Moreover, that law was unwritten, originated in judicial custom, and was deemed authoritative. Finally, while commentators are not as explicit about the nature of precedent as one might like, they did indicate that precedent was a common law doctrine.[97]

Furthermore, the history recounted above perfectly fits the view that precedent is a matter of common law. While this history strongly suggests that the Constitution does not prohibit precedent, the historical variability of

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[91] *See* Harrison, *supra* note 82, at 525–29. While we follow Harrison's view of precedent as a matter of general law, we do disagree with his view that the Constitution does not incorporate any notion of precedent under the judicial power. *See id.* at 518–21.

[92] *Id.* at 525.

[93] *See* Harrison, *supra* note 82, at 521–23; *supra* Part I.B.

[94] Harrison, however, does argue persuasively that precedent in federal courts is at best understood as reflecting a mixture of statutory structure and general law. *See* Harrison, *supra* note 82, at 525–31.

[95] We leave aside the question of whether the application of such state laws to federal courts would be unconstitutional, as Harrison believes, *see id.* at 525 (citing *McCulloch*), or whether they would simply be preempted under the statutes establishing federal courts.

[96] *Id.* at 529.

[97] *See* ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 9 (1822) ("Stare decisis is a fundamental maxim of the common law."); *see also* Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 286 (1850) (Curtis, J.) (referring to "the maxim of the common law, *stare decisis*").

precedent rules also indicates that the Constitution does not enact most of the precedent rules. Treating precedent as a matter of common law allows for precedent to operate under the Constitution without requiring identification of a single unchanging precedent approach. Thus, given the absence of an alternative source of law and its conformity with the history, the argument for treating precedent as a matter of common law is compelling.

Although precedent rules have been treated as a matter of common law, a strong argument exists that Congress can revise these rules. Congressional power to establish or revise precedent rules for constitutional cases in federal courts is found in Congress's authority to pass laws that are necessary and proper for carrying into execution the judicial power. This power permits Congress to pass laws that will permit the Judiciary to perform its job more effectively. If a law can be viewed as enabling the Judiciary to perform more effectively, then the Constitution gives to Congress the discretion to decide whether to pass it.[98] Precedent rules involve questions such as how judges would best balance conflicting values of the judicial enterprise, like accuracy and predictability. Precedent rules are therefore easily classified as helping the courts perform their function more successfully. Thus, Congress is given the authority to decide which precedent rules courts should follow. Just as Congress can use this power to legislate rules of procedure for the federal courts, so too can it use this power to enact rules of precedent.[99]

One might object that permitting judges and legislatures to shape precedent rules delegates too much power to ordinary officials to change the Constitution, thus exacerbating agency costs in a manner the constitutional enactors would have avoided. But precedent does not allow subsequent actors to change the meaning of the Constitution.[100] Rather, it governs the internal operations of the Judiciary by telling judges how to balance values such as accuracy and predictability when deciding whether to follow potentially erroneous decisions. Moreover, the Necessary and Proper Clause permits Congress to frame only genuine precedent rules, not subterfuges for reaching particular results—that is, to exercise legislative,

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[98] *See* Harrison, *supra* note 82, at 532–34; William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 793–94 (1975).

[99] *See* Harrison, *supra* note 82, at 532–34.

[100] Thus, the distinction between rules that constitute the original meaning of the Constitution and precedent rules that govern the internal operation of the Court is crucial to the argument here. Congress lacks the power to change the meaning of the Constitution. For instance, it could not enact interpretive rules that would tell the Court to look for modern meanings rather than original meanings or to emphasize text more than intent. As we discuss elsewhere, the interpretive methods deemed applicable to the Constitution at the time of its enactment provide the rules for constituting the Constitution's meaning, and Congress cannot change these rules any more than it can change the words of the Constitution. While Congress's authority to pass genuine precedent rules is a significant power, the power to enact interpretive rules that would change the meaning of the Constitution would be awesome and would be inconsistent with the constraint that is an essential aspect of a constitution.

not judicial, power. Consequently, these precedent rules must be relatively general in scope and application. Judges and legislatures cannot pick and choose certain rules to protect the authoritative value of cases they like, while applying different rules to overturn the cases of which they disapprove. Instead, they are permitted to make general decisions, such as to what extent society should value the benefits of original meaning as compared to predictability and constraint. Furthermore, because judicial power incorporates a minimal concept of precedent, there are additional limits on Congress's power to use its authority to legislate precedent rules to decide particular cases.

Of course, we do not understand precedent ever to replace the original meaning of the Constitution. Originalism remains the sole route to establishing its meaning. But precedent is authorized by the original meaning of the Constitution. Indeed, there is nothing strange about the Constitution authorizing decisions that depart from its original meaning. For example, the Constitution clearly requires the executive to enforce court judgments in specific cases, even if it believes these judgments have misconstrued the Constitution. The Constitution establishes this rule presumably because it sometimes regards other values as taking priority over following the original meaning. Similarly, the Constitution should be understood as authorizing that precedent be followed rather than the original meaning, because it sometimes confers greater weight on other values, such as predictability, clarity, and stability.

An ideal theory of precedent would balance these values against the benefits from preserving the Constitution's original meaning. Of course, this ideal theory need not be the one courts previously struck, either today or historically. We have used traditional precedent practice to show that precedent was an essential part of the law at the Framing, not to argue that the balance it struck was necessarily optimal. It is to the optimal balance that we now turn.

II. THE NORMATIVE THEORY OF PRECEDENT

Because precedent is not significantly constrained by the Constitution but instead is a matter of common law and statute, it is useful to consider the optimal approach to precedent in constitutional cases. Ultimately, this optimal approach should be applied to constitutional cases through common law and federal statute.

We begin by briefly presenting the normative arguments for the supermajoritarian theory of originalism. The next several sections then start distilling desirable precedent rules. First, we examine the relative benefits of following the original meaning and of following precedent. We then identify three specific rules for when precedent should be followed: when following precedent is necessary to avoid enormous costs, when precedent has been entrenched, and when precedents correct defects of the supermajo-

ritarian process for enacting constitutional provisions. We next identify several factors or circumstances when precedent would be relatively more or less beneficial—factors from which additional precedent rules could be constructed. After contrasting our approach to precedent with that of other scholars and the Supreme Court's approach in *Planned Parenthood v. Casey*, we conclude by applying the three proposed precedent rules to some important Supreme Court cases.

A. The Supermajoritarian Theory of Constitutional Originalism

In previous articles, we have argued that originalism is the best interpretive method for the United States Constitution because it is more likely to produce desirable results than other interpretive approaches.[101] Our argument consists of four steps. First, entrenched constitutional provisions that are desirable should take priority over ordinary legislation, because such entrenchments operate to establish a beneficial framework for governance, including representative institutions, checks and balances, and the protection of individual rights. Second, the use of strict supermajority rules to enact and amend constitutional provisions generally produces desirable entrenchments. Strict supermajority rules help to assure that constitutional provisions are supported by a consensus. They also impede the passage of partisan measures because support from both parties is needed for enactment. Further, supermajority rules produce desirable constitutional provisions because they place the constitutional enactors behind a limited veil of ignorance that leads them to focus more on the public interest than on narrow interests.[102]

Third, with one important exception—the exclusion of African Americans and women from the constitutional enactment process—appropriate supermajority rules have generally governed the passage of the Constitution and its amendments.[103] While this exclusion once had enormous ill effects, allowing slavery of blacks and disenfranchisement of both blacks and women, the constitutional consequences of these exclusions have largely been corrected and the costs of further judicial correction are higher than the benefits.[104] Finally, because it was the original meaning that the drafters, ratifiers, and public used to decide whether to adopt the Constitution

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[101] We have discussed this theory at length previously. *See* McGinnis & Rappaport, *Three Views*, *supra* note 1; McGinnis & Rappaport, *A Pragmatic Defense*, *supra* note 1; McGinnis & Rappaport, *The Condorcet Case*, *supra* note 1.

[102] These are just a few of the arguments. For fuller treatment, see McGinnis & Rappaport, *Three Views*, *supra* note 1, at 1172–81; McGinnis & Rappaport, *The Condorcet Case*, *supra* note 1, at 109–15.

[103] McGinnis & Rappaport, *The Desirable Constitution and the Case for Originalism*, *supra* note 1.

[104] We have developed a theory of supermajoritarian failure that addresses what should be done about departures from appropriate supermajority rules. In cases where the departures have been either fully or largely corrected, as with the exclusion of blacks and women, we contend that the Constitution should be enforced as if it had been originally enacted in accord with appropriate supermajority rules. *See id.* at 34–37.

by supermajority,[105] the desirability of the Constitution requires that judges interpret the document based on its original meaning.

Thus, originalism is necessary to preserve the benefits of a desirable Constitution enacted under supermajority rules. This justification suggests that the focus of originalism should be on how a reasonable person at the time would have understood its meaning. To answer that question, one must look to the commonly accepted meanings of the words and the interpretive rules that were deemed applicable to the Constitution. One would not look to the interpretive rules that modern scholars believe best state the original meaning of a provision, but instead to those rules and methods that people at the time would have employed. We call this interpretive approach "original methods originalism."

B. The Relative Benefits of Original Meaning and Precedent

We now turn to the question of how to fit precedent into our normative theory of originalism. When precedent departs from the original meaning of the Constitution, Supreme Court Justices must decide whether to follow the precedent or the original meaning of the relevant constitutional provision. Because the supermajoritarian theory of the Constitution and originalism is a consequentialist theory, we answer this question by comparing the benefits of following originalism with those of following precedent. One advantage of our consequentialist theory in this area is that it treats both originalism and precedent as having commensurable effects that can be compared.

1. The Benefits of Following Original Meaning.—The benefits of original meaning are threefold. First, as discussed above, our supermajoritarian theory shows that the original meaning of the Constitution is likely to be desirable because it was enacted through a strict supermajoritarian process. Thus, enforcing the original meaning of this desirable Constitution is likely to be beneficial.

A second benefit of originalism derives from the clarity, predictability, and judicial constraint that it is likely to produce. Justice Antonin Scalia, among others, has emphasized this benefit.[106] While the original meaning of the text does not always yield clear rules, it usually yields clearer guidance than an approach that allows a majority of judges to interpret provisions based on their policy views. While this benefit may be insufficient to justify originalism on its own, it is nonetheless significant and adds considerable force to the argument based on the likely desirability of a Constitution produced by supermajority rules.

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[105] *Id.* at 17–18.

[106] ANTONIN SCALIA, A MATTER OF INTERPRETATION 45–46 (Amy Guttman ed., 1997); Antonin Scalia, *The Rule of Laws as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79, 1184–85 (1989).

A third benefit of originalism is rarely recognized and therefore deserves a more extended discussion. Originalism preserves the important role of the constitutional amendment process. An effective supermajoritarian amendment process is necessary to update the Constitution while also preserving the benefits produced by supermajoritarian enactment of constitutional provisions. However, nonoriginalism, especially when it attempts to update the Constitution, prevents that amendment process from operating effectively.

The strict supermajoritarian process for constitutional amendments requires that there be a strong consensus in favor of a specific constitutional change. Establishing such a consensus, however, will often involve an extended period before the requisite number of people are convinced that the constitutional change is needed. During this period, there will generally be a political movement in which people can promote the change in a variety of ways. Examples include enacting the change at the state level and demonstrating the benefits of the change through its statewide effects, passing the change in the form of a federal statute, or simply keeping the issue on the political agenda. Eventually, successful movements gain enough support to pass the change as a constitutional amendment.

Judicial updating of the Constitution short circuits this process. A court that believes it is empowered to update the Constitution is quite likely to do so during this period when many people, perhaps a significant majority, favor constitutional change but do not have the requisite support for an amendment. Once the Supreme Court takes action, the opportunity to amend the Constitution will likely cease. Even if the amendment process would have reached a different result than the Court did, an amendment will not be able to secure the necessary support unless the Supreme Court's decision is very far from what the country would have enacted.

For example, during the 1970s, a movement grew to pass an equal rights amendment protecting women against government discrimination, because women had not been found protected under the Fourteenth Amendment. The movement stalled, however, in part because the Supreme Court updated the Constitution by starting to protect women under the Equal Protection Clause.[107] Once women were protected, there was less reason to enact the Equal Rights Amendment, especially given the other concerns the Amendment raised.[108]

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[107] We do not mean to suggest that the particular Equal Rights Amendment (ERA) that passed Congress and was sent to the states would necessarily have been enacted had the Supreme Court remained inactive. As we suggest, that Amendment raised other concerns that might have led to its failure, including, most importantly, that it employed general language in a world where courts were regularly engaged in the practice of creative judicial interpretation. *See infra* note 196 and accompanying text. If, however, the Supreme Court had refused to act, it seems likely that an amendment with more specific language that addressed broader concerns, such as women in combat, might have been enacted.

[108] We have previously suggested that Court decisions helped preclude the possibility of an Equal Rights Amendment for women. *See* McGinnis & Rappaport, *A Pragmatic Defense*, *supra* note 1, at

The fact that the Supreme Court updates the Constitution rather than the constitutional amendment process imposes significant harm. The Supreme Court's decision may differ from the constitutional amendment that would have passed in several different ways. First, the constitutional amendment would have reflected a consensus of the nation. By contrast, the Supreme Court decision would merely reflect the views of a majority of the Court, who will tend to follow their own political preferences rather than the consensus of the nation.[109] Second, because the constitutional amendment cannot easily be changed and therefore will be applied in future circumstances that cannot be anticipated, it is enacted behind a limited veil of ignorance. By contrast, because the Justices know that they can distinguish, ignore, or overturn precedents, they are not adopting their decisions behind such a veil of ignorance. Third, even if the Court's decision might have led to the same result as the amendment process would have, the nation would not know this. Therefore, the Judiciary's decision would be less accepted—and more subject to revision and resistance—than if it had been enacted as a constitutional amendment.

Thus, originalism has substantial benefits—it enforces desirable constitutional provisions; it promotes clarity, predictability, and constrained

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393. Jack Balkin has disputed this contention. He observes that a substantial number of states had already rejected the ERA before a plurality of the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), applied strict scrutiny to legislation that discriminated by sex. *See* Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 472 n.119 (2007).

We disagree with Balkin and also believe that he may misunderstand our argument. We acknowledge that there were other causes for the failure of the ERA that passed Congress to be ratified. In particular, the general judicial activism of the Warren and Burger Courts preceding any states' rejection of the ERA was an important cause of the failure of that amendment. Given the background of the judicial activism, citizens could not be confident that the Court would have interpreted the ERA, especially with its general language, according to the meaning its enactors claimed to attach to it. To be concrete, citizens at the time had reason to fear that the Court would use the amendment to impose a more radical vision of sexual equality than was widely shared by the enactors. By not enforcing the Constitution according to its understood terms, the Court reduces the effectiveness of constitutional amendment process generally.

Still, had the Court not acted to protect women under the Fourteenth Amendment, an equal rights amendment might have been ratified—either the one with general language passed by Congress or one with more specific limitations that might have been subsequently enacted. In 1971, before the ERA was even passed by Congress, the Supreme Court decided *Reed v. Reed*, 404 U.S. 71 (1971), in which it invalidated an Idaho law that gave preference to male over female administrators for estates. While that case did not expressly endorse heighted scrutiny, it effectively provided more substantial scrutiny for sex discrimination than for ordinary economic legislation. Indeed, the subsequent plurality in *Frontiero* stated that there was already implicit support for "heightened judicial scrutiny" of sex discrimination in *Reed*. 411 U.S. at 682. Thus, even at the time states rejected the ERA and before the decision in *Frontiero*, legislators could have rationally believed that sex discrimination was already subject to heightened judicial scrutiny.

[109] We recognize that the Supreme Court does not have unlimited power to choose any norms it wants because it faces overruling by amendment and political backlash if it goes too far. Nevertheless, the Court has substantial leeway in choosing norms that lack supermajoritarian or even majority support, so long as they have sufficient support to prevent a constitutional amendment or substantial and effective political response. *See* McGinnis & Rappaport, *supra* note 103, at 22.

judges; and it protects the constitutional amendment process. These benefits suggest that originalism should be followed in cases of first impression, and all the more so in cases when there is a precedent that accords with original meaning. But when there is a precedent that conflicts with the original meaning, the benefits of departing from that meaning and following the precedent must also be considered.[110]

2. The Benefits of Following Precedent.—There are several benefits from following precedent. We only briefly summarize them here because, unlike the virtues of originalism from a consequentialist perspective, these benefits are well known. The first two of these benefits overlap with some of the benefits of originalism. First, precedent can often make the law more predictable. If a constitutional provision is ambiguous or vague, a judicial decision can resolve the uncertainty. Second, by clarifying ambiguous or vague provisions, precedent can also serve to constrain judges in the future.[111] An important aspect of this constraint advances a core value of the rule of law—helping to assure that like cases are decided alike.[112] Finally, precedents often create important reliance interests.[113] When precedents are overturned, people who took actions in reliance on them may incur significant costs. Following precedents in these circumstances will not only avoid such costs, but it will also reduce uncertainty in the law.[114]

3. The Tradeoff.—Having briefly discussed the main benefits of originalism and precedent, we are now in a position to compare those competing benefits and to explore the tradeoff between them. Under our consequentialist approach, the goal is to use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true. Because rules have significant advantages in terms of judicial manageability, economy, predictability, and constraint, it is not desirable to have judges decide whether original meaning or precedent produces greater benefits on a case-by-case basis. Instead, judges should apply

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[110] Our discussion of entrenched precedent below describes circumstances in which the benefits outweigh the costs of overruling such precedent. *See infra* Part II.C.2.

[111] *See* Merrill, *supra* note 4, at 278 (2005) (precedent provides a thicker body of norms to constrain judges).

[112] *See id.* at 276–77.

[113] *See* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1185–86 (1999).

[114] Some commentators have argued strong precedent rules are justified because they protect the institutional legitimacy of the Court. *See, e.g.*, Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v Louisiana, 57 U. CHI. L. REV. 1260, 1262–63 (1990). This argument is troubling because it suggests that hiding and perpetuating errors is superior to acknowledging and correcting them. Such an argument would never be applied to other parts of the government. If the President violated the Constitution, few commentators would suggest the appropriate response is to cover up the violation, rather than criticize it, because to do so would "undermine the President's legitimacy." We believe the same analysis applies to the Court, and wonder what else could justify this difference in treatment.

a comprehensive doctrine with rules that identify when either originalism or precedent produces greater net benefits.

In this Article, we do not propose a comprehensive doctrine of precedent. Our work is more preliminary than that. Instead, we take two steps towards such a doctrine. First, we recommend that judges should follow precedent in three specific situations: when following precedent would avoid enormous costs, when a precedent is entrenched, and when following precedent would correct failures in the supermajoritarian enactment process. While these three rules are only a part of a comprehensive doctrine of precedent, they do represent an important step in the development of that doctrine. Second, we identify several factors that make it more or less likely that precedent will be beneficial. These factors do not constitute rules that we recommend judges apply, but instead will prove useful in generating additional precedent rules.

Ultimately, precedent doctrine should allow significant room for both original meaning and precedent. Of course, when an issue is one of first impression or has been previously decided in accord with the original meaning, there is no reason not to follow the original meaning. But when an existing precedent conflicts with the original meaning, an intermediate approach that sometimes follows original meaning and sometimes follows precedent is best. For example, as we note below, our intermediate approach recommends that the Supreme Court follow *Griswold v. Connecticut*[115] as an entrenched precedent, but it does not protect *Roe v. Wade*[116] from being overturned.

Our consequentialist approach to originalism and precedent has been criticized by Jack Balkin.[117] Balkin argues that our approach faces a dilemma. On the one hand, if we provide limited protection to precedent, that would require wholesale overruling of a vast swatch of cases, rendering our theory both impractical and radically inconsistent with Supreme Court practice.[118] On the other hand, if we broadly protect precedent, that would undermine our supermajoritarian justification for the desirability of the Constitution because much of the Constitution's meaning would be supplied by a majority of Justices rather than a strict supermajority of the nation.[119]

Balkin's criticism, however, is misplaced. First, Balkin appears to commit the fallacy of the excluded middle, because he ignores the possibility of pursuing the intermediate approach that we endorse. This intermediate approach neither requires wholesale overruling nor ignoring the original

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[115] 381 U.S. 479 (1965).

[116] 410 U.S. 113 (1973).

[117] *See* Balkin, *supra* note 108, at 471–81.

[118] *Id.* at 475.

[119] *Id.*

meaning. Rather, it pursues a middle path that attempts to gain the greatest benefits from both original meaning and precedent.

There is, moreover, no incongruity between our embracing both originalism and substantial precedent. We are consequentialists and therefore must consider the interrelation of different and sometimes conflicting objectives of a complex and mature legal system. One objective of this system is to obtain the best possible rules, operating on a clean slate. Originalism furthers this goal. Another objective is promoting predictability, reliance, and stability. Precedent furthers this goal. These different objectives may conflict, and we must make the best tradeoff possible to promote desirable consequences.

It would be wonderful if constitutional decision-makers never made any mistakes. But in the real world, where such mistakes are not infrequent, one must consider how to respond to them. It is undesirable to correct all mistakes because the costs are simply too large. But while some nonoriginalist precedents must thus be accepted, we still can correct those errors that are not too costly to rectify.

C. Precedent Rules

Having examined the benefits and costs of following originalism and of following precedent, the next three sections recommend three specific precedent rules. These rules come in determinate enough form so that they can be applied by judges. While we believe that a comprehensive precedent doctrine would include additional rules, here we recommend only these three.

1. Precedent, Which, if Overruled, Would Result in Enormous Costs.—Precedent should be respected when overruling it would result in enormous costs. Extremely important institutions are sometimes based on judicial interpretations of the Constitution. Two obvious examples are Social Security and paper money. While some originalists believe that the Supreme Court decisions interpreting the Constitution to allow Social Security[120] and legal tender laws for paper money[121] were wrongly decided, overruling those cases would result in enormous costs. The fear, uncertainty, and chaos that overruling these decisions would cause to the nation's public pensions and monetary system are so tremendous that they would far exceed any benefits from returning to the original meaning.

But this category of enormous costs is broader than simply these two extreme cases. Where a decision would require a large number of programs to be struck down, a strong case exists for concluding that the costs are

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[120] Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[121] Juilliard v. Greenman, 110 U.S. 421 (1884); Knox v. Lee, 79 U.S. 457 (1870); Hepburn v. Griswold, 75 U.S. 603 (1869).

simply too large to allow it to be overruled. For example, while there is a strong case for concluding that the original meaning of the Commerce Clause was much narrower than the New Deal interpretations,[122] returning to that original meaning would require the immediate elimination of a vast number of government programs from securities regulation to environmental protection. The benefits of returning to the original meaning now do not compare with these costs.

By contrast, many important precedents do not rise to this level. Even if overruling a decision would cause a large number of statutory provisions to become unconstitutional, that would not necessarily mean it would fall into this category. As an example, consider *INS v. Chadha*,[123] which in effect held more than 300 legislative veto provisions in 200 statutes to be unconstitutional. Assume, contrary to the actual case, that *Chadha* overruled a Supreme Court precedent that had upheld the legislative veto. Such an overruling would not have created significant disruption because the invalidated statutory provisions could in the main continue to operate and in other cases were relatively easy to correct.[124]

2. Entrenched Precedent.—The second precedent rule involves entrenched precedent. First, we describe why the Court should confer great weight on entrenched precedents. Second, we consider how to assess whether a precedent is entrenched. Finally, we discuss similar theories of precedent for which entrenched precedent supplies a more precise justification.

Entrenched precedents are decisions that are so strongly supported that they would be enacted by constitutional amendment if they were overturned by the courts. For instance, if the Supreme Court were to hold that sex discrimination was not significantly restricted by the Equal Protection Clause, then it is quite likely that the nation would quickly act to place this protection back into the Constitution. A similar point applies if the Supreme Court were to reverse *Brown v. Board of Education*[125] based on the mistaken view that separate but equal stated the original meaning of the Fourteenth Amendment.

Under our approach, it is straightforward that entrenched precedent should take priority over the original meaning. For entrenched precedents,

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[122] *See, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987)

[123] INS v. Chadha, 462 U.S. 919, 967 (1983) (Powell, J., concurring in the judgment). For a partial list of the affected statutes, see *id.* at 1003–13.

[124] While the enormous costs of the cases in this category of precedent seem to justify keeping them irrespective of the factors that might argue for the return to original meaning, one can identify precedents, the overturning of which would impose lesser costs. These costs should be deemed one factor in the analysis of determining whether a precedent should be followed or overturned. Certainly, *Chadha* would fall into this category, as would a large number of other cases.

[125] 347 U.S. 483 (1954).

the benefits of following originalism are small and the benefits of following precedent are large. The benefits of following the original meaning are small because there is strong support for the new constitutional rule announced in the precedent. It is the precedent rather than the original meaning that currently has consensus support and thus a presumption of beneficence. The benefits of following the precedent are large, not only because of its presumed desirability, but also because it does not involve a change in the law.

Now, it might be argued that the consensus represented by the entrenched precedent is in important ways inferior to that forged by a constitutional amendment. The advantage of the amendment process is that it creates not only a consensus but also one visible to the polity, thus muting disagreement. Moreover, it may be difficult for Justices to determine what decisions would have attained the requisite consensus and to identify the actual underlying principles of those decisions. Consequently, one might argue that the Judiciary should be required to overrule the precedent in favor of the original meaning to ensure that the consensus exists, which would be proved by a subsequent amendment.

Such a requirement, however, would have great costs. First, because this approach would require the overruling of all precedents that conflict with original meaning, including those that are genuinely entrenched, it would cause great harm to the nation's attachment to widely accepted opinions. These opinions have now come to be valued; overruling them would harm people's attachment to their understanding of the Constitution—an attachment which helps unify the nation.[126] Second, a practical and rationally ignorant public is unlikely to understand or sympathize with such overrulings.[127] They might regard it as extremely burdensome to have to pass a constitutional amendment merely to confirm what they believe everyone already knows—that the Constitution authorizes the precedent and a consensus supports that precedent. Moreover, the public might be suspicious of such overrulings, believing that the Justices did not actually support the entrenched decision. This public opposition might also make it more difficult for the Justices to reach originalist decisions on other difficult issues because the public would be more likely to doubt the Court's legitimacy. Finally, fearing the reactions of the public, the Justices might be reluctant to overrule the decision and be led to engage in dishonest evasions, thus undermining the goal of making the law clear and accessible.

Consequently, it is less costly for the Justices to follow genuinely entrenched precedents. While the Justices may make mistakes in determining when such a consensus exists, there are factors that can discipline their in-

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[126] For instance, the sex discrimination cases of the 1970s, discussed *supra* note 108, represent such consensus even if they do not reflect an accurate understanding of the Fourteenth Amendment.

[127] On rational ignorance, see ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 20 (1998).

quiry. Most importantly, the search for consensus is factual, not ideological. Justices are to assess whether the principle in the proffered precedent would now secure the consensus requisite to a constitutional amendment, not whether the principle is sound. Thus, as with originalist inquiries themselves, Justices are directed away from their own commitments and passions to purposes not their own. This focus is a source of discipline.[128]

The proper way to test whether the requisite consensus exists is to ask whether there is any significant opposition to the substance of the constitutional principle embedded in the precedent. By focusing on substance, we mean to exclude opposition that rests on disagreement with the means by which the principle was created—by judicial lawmaking rather than constitutional amendment. For the reasons discussed above, it is counterproductive to force Justices to overrule a precedent simply to assure that the constitutional principle is enacted by the legitimate constitution-making process.

Furthermore, the Justices should not attempt to predict whether the amendment would be passed by taking into account matters that are unrelated to the public's support for the principle. For example, one might believe that the public would be unmotivated to enact constitutional amendments to reenact *Griswold v. Connecticut*[129] or even mid-level scrutiny for discriminations based on sex, on the ground that existing state and federal law does not infringe on these rights. But whether or not people would be motivated to *act* on principles and symbols is difficult to predict. It is much easier to determine whether there appears to be support for a principle.[130]

In framing this precedent rule we also have to determine what degree of likelihood should be demanded for the passage of a constitutional amendment that would enact the precedent. Our view is that Justices should be persuaded that the amendment is more likely than not to have passed. Requiring a lesser probability would permit the displacement of an original constitutional provision that would still likely be controlling and therefore still likely beneficial. Requiring a greater probability would pre-

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[128] Moreover, the Justices here are constrained by having to find a precedent whose principle is to be tested for consensus. They are not simply to ask whether consensus exists for any principle they choose, but must instead point to a principle embedded in a previous decision. This limitation substantially narrows the field of possible principles to follow, providing another disciplinary framework.

[129] 381 U.S. 479 (1965).

[130] For the same reasons, the Justices should not attempt to predict whether political conflicts—partisan or otherwise—would interfere with the constitutional amendment. For example, it might be thought that liberals and conservatives could not agree on the proper way to define intermediate scrutiny because they might attempt to grandstand in order to promote other positions, such as their differing views on abortion. But these problems should be ignored, because they are difficult to predict, may change over time, and do not really go to the basic point of whether there is support for the underlying principle.

serve a constitutional provision that would more likely than not be displaced by a constitutional amendment, absent judicial intervention.[131]

Finally, it is important to correctly describe the scope of the entrenched precedent. Entrenched precedent extends only to the principle that enjoys the consensus of a constitutional amendment. Thus, entrenched precedent may well not include the dicta of a precedent or even a broad reading of its holding. For instance, it may well be that in 1994 a requisite consensus supported a reading of the New Deal cases that endorsed plenary federal control over economic matters. But no consensus existed to endorse federal power over noneconomic matters, like carrying guns around a school. The *Lopez* Court was therefore correct not to have considered itself foreclosed by precedent in reaching its result.[132]

Similarly, Justices should choose a less sweeping view of what the 1970s sex equality cases mean when evaluating them as precedent. There seems to be a consensus that government should not discriminate on the basis of sex without a substantial reason. But as shown by the opposition to unisex bathrooms or women's participation in combat—opposition that emerged during the debates over the Equal Rights Amendment—the principle is narrower than the principle against racial discrimination. Under the consensus view, the law can recognize that society regards men and women as different in ways that the races are not. The law can therefore follow widely shared norms favoring separation of the sexes to protect bathroom privacy and to shield women from the threats of violent combat.

In contrast, our theory of entrenched precedent would not encompass what has become recently known as a "superprecedent"—a precedent that the Court has itself reaffirmed and therefore is thought by some to be entitled to dispositive weight.[133] For instance, at the time of the confirmation

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[131] Another question involves the time at which a precedent must have consensus support. One view would be that the precedent should have consensus support at the time when it is to be applied. Another view would be that the precedent could satisfy the consensus requirement at any time after it was decided, even if it no longer had consensus support at the time it was to be applied. We believe the first rule is superior for four reasons.

First, if the precedent does not command a consensus at the time the Justices are to apply it, the original rule it displaces still has a claim to presumptive beneficence. Thus, the argument for precedent displacing originalism is much weaker. Second, in those circumstances, a decision by Justices to discard a precedent in favor of the original meaning is not so costly in terms of public reputation because there is no current consensus. Third, it is much more difficult for the Justices to determine whether there ever existed the requisite consensus than to assess whether the requisite consensus exists currently. Therefore, the disciplinary framework for such decisionmaking would be less reticulated and the error costs accordingly higher. Finally, requiring consensus at the time the Justices are to apply the precedent differentiates a precedent from a constitutional amendment that remains binding even if the consensus in its favor dissipates. Such a differentiation helps preserve incentives to make constitutional changes through amendment rather than through judicial decision.

[132] *See* United States v. Lopez, 514 U.S. 549, 554–61 (1995).

[133] *See* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1204, 1216 (2005) (discussing Chief Justice Roberts's and Justice Alito's testimony at the Senate Committee on the Judiciary hearings in which superprecedents were mentioned).

hearings of Chief Justice John Roberts and Justice Samuel Alito, many Senators and commentators argued that the reaffirmation of some aspects of *Roe v. Wade*[134] by *Planned Parenthood of Southeastern Pennsylvania v. Casey*[135] made *Roe* a superprecedent that could not be overruled.[136] But there is no necessary or even strong relation between a judicial reaffirmation and the consensus requisite for a constitutional amendment. The Judiciary cannot create popular consensus by its own fiat, even by repeating itself.

3. Corrective Precedent.—Another rule for following precedent that grows out of our supermajoritarian theory of originalism involves what we call corrective precedent—precedent that operates to correct imperfections in the supermajoritarian process for enacting and amending the Constitution. There is a strong case for following such corrective precedents.

Our supermajoritarian theory of originalism is premised on the view that constitutional provisions enacted pursuant to appropriate supermajority rules will generally be desirable.[137] But the original supermajority rules for enactment and amendment, while quite appropriate in their overall structure and strictness, nonetheless were grossly defective in excluding blacks and women. Supermajority rules are designed to ensure the Constitution reflects a consensus and the rules cannot adequately fulfill this purpose if they exclude a portion of the population. While those defects had enormous consequences originally, their consequences have now largely been corrected through subsequent constitutional amendments and judicial decisions.[138]

When there is a defect in the supermajority rule for enacting and amending the Constitution, the Justices face a difficult question. Should they attempt to correct any remaining defects that are the result of the exclusion by interpreting the Constitution so that it has the content that appropriate supermajority rules would have produced? Or should they simply enforce the imperfect Constitution as written, on the ground that doing so is nonetheless better than attempting to judicially revise it?

In our prior work, we argued that judicial correction of these supermajoritarian failures is generally disfavored but can be justified when the failures are substantial.[139] On the one hand, the benefits of these corrections

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[134] 410 U.S. 113 (1973).

[135] 505 U.S. 833 (1992).

[136] *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 321 (2006) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144–45 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

[137] See *supra* Part II.A.

[138] McGinnis & Rappaport, *supra* note 103, at 37–43.

[139] *See id.* at 37–39.

can be significant because provisions that are likely to have been different under appropriate supermajority rules do not have a presumption of desirability. On the other hand, the costs of corrections can be very large if Justices disagree over what provisions would have been different under appropriate supermajority rules and over how to effect those changes. Justices with different ideological viewpoints would seek to correct the document in ways that reflect their own ideologies. These disagreements would be hard to resolve because they depend on historical counterfactuals analyzing what would have occurred had excluded groups been included.

But once a court has corrected the Constitution—even if the correction was unjustified—there is a strong argument for treating its decision as a binding precedent. Once a decision has been made, the relative benefits and costs shift towards following a precedent. First, when there is an existing precedent that corrects a supermajoritarian failure, the Court's decision to follow that precedent avoids the possibility of a spiral of disagreements associated with the initial decision to correct the failure. Second, following the corrective precedent also produces a variety of benefits that precedent generally serves, such as reliance, predictability, judicial constraint, and judicial economy.

For example, assume again that *Brown v. Board of Education*[140] was—contrary to our view—wrongly decided as a matter of original meaning. Even in this case, the Court would be justified in following it under our doctrine of corrective precedent. Had African Americans been fully included in the constitution-making process in 1868 (or even 1789), it is likely that they would have placed a high priority on obtaining a general prohibition on racial discrimination as to important government benefits, such as public schooling.

Moreover, it is likely that at least in 1866 they could have made that priority a part of the Fourteenth Amendment. Michael McConnell has shown that there was substantial support for desegregating the public schools in the aftermath of the Fourteenth Amendment, even though African Americans were not fully enfranchised.[141] Thus, with the full participation of African Americans in the Fourteenth Amendment drafting and ratification process, it is quite likely that a stronger nondiscrimination provision encompassing public education would have been adopted. Thus, even if *Brown* was wrong as an original matter, it is now a justified correction of a supermajoritarian failure.[142]

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[140] 347 U.S. 483 (1954).

[141] *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 962–71 (1995); *see also* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 U. TEX. L. REV. 7 (2008) (noting that thirty-six out of thirty-seven state constitutions established a state duty to provide a public school education).

[142] Assuming that *Brown* was wrong as an original matter, whether the decision is justified as a matter of corrective precedent is a harder question. The answer turns on a host of considerations, including

It is interesting to note that, even if (contrary to our own view) *Brown* was wrongly decided as an original matter, it would be protected under both the corrective and entrenched precedent rules. This helps explain why *Brown* is a bedrock of constitutional jurisprudence under an originalist regime, whatever one's view of its correctness as an original matter.

Of course, it not enough for a precedent to be claimed as corrective for it to be treated as binding. To be followed, a corrective precedent must have a reasonable likelihood of actually being corrective. For instance, while it is likely that African Americans could have secured a prohibition on racial discrimination in public schooling, it is implausible to believe that they could have secured a requirement of forced busing in the interest of diversity or some other social goal. The political philosophy of that time was more hostile to interference with personal liberties to achieve social goals.[143]

D. Factors Relevant to Beneficial Precedent Rules

Here we explore various factors that indicate when it makes more or less sense to follow precedent. These factors are not intended as precedent rules to be applied by judges. Rather, they provide information about the desirability of precedent in different circumstances and are useful as a means of developing precedent rules.

1. Uncertainty in the Constitution's Original Meaning.—One key factor in determining whether to follow a precedent is the clarity of the original meaning of the Constitution. When the original meaning is uncertain, there is a far stronger argument for following precedent—provided that it is within the range of uncertainty regarding the original meaning—than there is if the precedent clearly conflicts with the original meaning. In a superb article, Caleb Nelson argues that courts in the early years of the Republic generally used an approach under which they would follow precedent if it reasonably resolved an ambiguity, but not if it was demonstrably erroneous.[144]

This factor follows from our tradeoff between originalism and precedent. When the Constitution is itself unclear, the virtues of following the original meaning are not as strong. One justification for originalism is that it promotes clarity in the law. But if the original meaning is unclear, then there is less reason to follow it. Instead, a precedent that reasonably

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the extent to which the Court could have decided other issues, based on the original meaning, which would have reduced the need for *Brown*. For example, if the Court could have enforced the voting rights provisions of the Fourteenth and Fifteenth Amendments effectively, this would have reduced the need for *Brown*.

[143] *Cf*. Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 458 (2001) (mentioning the Whig and free-soil origins of the Fourteenth Amendment).

[144] Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13 (2001).

resolves the uncertainty will better promote clarity, even though later a judge may believe it resolved the matter incorrectly.[145] A second justification for originalism—the one we emphasize most—is that it enforces provisions with desirable consequences. But here, as well, constitutional ambiguity militates against originalism because we cannot be sure of what the original meaning is. Thus, there is a diminished value in following the original meaning.[146]

2. Reliance Costs.—Another important factor in determining whether to follow a precedent is the degree of reliance on that precedent. Reliance occurs when someone takes an action he would not otherwise have taken based on the assumption that a precedent will be followed. The degree of reliance on precedents varies with the number of people who have relied on it and with the costs that they would incur if the precedent was overturned. Traditionally, precedent rules were significantly influenced by reliance interests. In particular, stronger precedent rules were applied to property—and, sometimes, commercial interests—based on the view that reliance in this area was greater. One way to think of the reliance factor is that it is a variation on the huge costs rule discussed earlier.[147] The costs of overruling a precedent on which there has been substantial reliance are higher than the costs of overruling a precedent on which there has been no reliance. Not only does overturning a precedent that has been relied upon upset expectations and impose costs, it also weakens people's willingness to rely on future precedent and thus to plan for the future.

The greater the reliance costs, the stronger the argument for not overturning a precedent. Reliance costs can be especially significant in at least two situations. First, they will be great when the government establishes a program that people significantly rely upon, such as Social Security. Second, these reliance costs can be great when people make significant private investments based on assumptions about the law.

3. Precedent Established in Violation of the Precedent Rules.—Our consequentialist approach would also suggest that precedent should be fol-

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[145] One of the virtues of clarity is that it helps treat similarly situated litigants equally and such equal treatment is thus a virtue that rides on clarity. Originalism, of course, has the same virtue when original meaning is clear, and thus the benefits of equal treatment do not always favor precedent over originalism.

[146] The limitation here that the precedent be within the range of uncertainty of the original meaning is essential. If a court were to interpret an uncertain provision in a clearly mistaken way, then the costs of following the precedent would be much greater because it would be clearly departing from the original meaning.

Our discussion here of uncertainty in the original Constitution overlaps with the common claim that precedent should be followed if it represents a plausible construction of the original meaning. If one interprets a plausible construction as one that is within the range of uncertainty of the original meaning, then the two factors are identical.

[147] *See supra* Part II.C.

lowed less, other things being equal, if the precedent was not decided according to the proper rules of precedent. The important benefit from such a rule is that it creates a disciplining effect. If judges know that decisions that violate precedent rules will not be treated as authoritative precedent, they will have better incentives to comply with the rules of precedent. Such incentives are most beneficial if the precedent rules themselves reflect the optimal tradeoffs that we are outlining here.

4. Epistemic Value of Precedent.—Precedent may also have an important epistemic value. Justices, like other humans, must recognize that they are not infallible. That a majority of Justices previously interpreted the original meaning of the Constitution in one way provides evidence for that interpretation. Precedent thus appropriately changes a Justice's prior beliefs about the correct interpretation,[148] just as an opinion of an expert appropriately changes the prior beliefs of decisionmakers about the conclusion to which the expert testifies. When a precedent raises the probability that its interpretation of the Constitution conforms to the original meaning, a Justice should give the precedent weight in his or her assessment.

The nature of epistemic precedent in an originalist world is limited in two important respects. First, only cases that make a good faith effort to discover the original meaning deserve epistemic weight.[149] Many cases—from *Lochner v. New York*[150] to *Roe v. Wade*[151]—have deserved no weight on epistemic grounds because they have not attempted to derive their results from the Constitution's original meaning. Second, current Justices also have a particular reason to discount the epistemic value of past precedent if they discover new evidence relevant to the original meaning that the previous decision did not consider. In contrast, one might believe that early Supreme Court cases that attempted good faith discovery of the original meaning deserve additional weight on epistemic grounds, because the Justices' temporal proximity to the Constitution makes them more likely to get the right answer.

5. Other Possible Precedent Rules.—Our discussion of factors is intended to clarify the benefits and costs of precedent and ultimately to help generation of additional precedent rules. While this Article only endorses

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[148] For a discussion of how judges' prior beliefs or "priors" can be changed, see RICHARD POSNER, HOW JUDGES THINK 68 (2008).

[149] *See* Barnett, *supra* note 16, at 267.

[150] 198 U.S. 45 (1905). While we are critical here of *Lochner* for not attempting an originalist justification for its decision, we do not necessarily mean to criticize the result in *Lochner*. That may or may not be justified on originalist grounds, depending on how one reads the Privileges or Immunities Clause of the Fourteenth Amendment. For defenses of the Clause that read it as justifying the result in *Lochner*, see RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2003); Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunites of United States Citizens: A Modest Tribute to Professor Seigan*, 45 SAN DIEGO L. REV. 777 (2008).

[151] 410 U.S. 113 (1973).

three precedent rules, we believe that others may be justified. In an effort to illustrate the type of rules that might be justified, we here suggest one possible rule. Although we do not recommend it here, we think it might turn out, upon further analysis, to be sound.

According to this rule, a precedent should be followed when the original meaning of a provision is unclear, the precedent followed a reasonable interpretation of the provision, that interpretation established a clear rule, and the precedent has been relied upon significantly. Such reliance could be shown either through significant private activities taken in reliance of the decision or a large number of statutory programs that must be changed. Such a precedent rule would generate a clear constitutional meaning and protect reliance interests, but not endorse an interpretation that was clearly inconsistent with the meaning employed by the constitutional enactment process.

E. The Contrast with Other Approaches to Precedent

In this section, we contrast our precedent approach first with the Supreme Court's most famous and extended recent discussion of precedent and then with that of other scholars.

1. The Contrast with the Supreme Court's Approach in Casey.—The Supreme Court's most recent extended discussion of precedent is in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[152] In that case, the Court's plurality listed several factors that bear on its willingness to decline to follow precedent. Here, we critique the Court's approach, both to show its weakness from a consequentialist perspective and to highlight the differences with our own approach.[153]

To begin with, our approach contrasts with the *Casey* approach in two general ways. First, in *Casey*, the plurality appears to adopt a presumption in favor of following precedent. We reject this presumption. We believe that there is a strong reason for following the original meaning generally and therefore a presumption in favor of precedent is unjustified. Second, the *Casey* opinion does not articulate specific rules, but mentions factors that appear to make it more or less likely that precedent should apply. By contrast, we believe that questions of precedent should be settled by rules, not by factors, because of the advantages in terms of predictability and constraint that rules confer.

Even assuming that factors are an acceptable way to frame a precedent doctrine, we disagree with how the plurality employs the factors in *Casey*. First, the *Casey* plurality suggests that it is less likely to follow a precedent

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[152] 505 U.S. 833, 854–69 (1992) (plurality opinion).

[153] The precedent analysis of *Casey* has been relied upon subsequently by the Court. *See* S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 166 (1999); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 233 (1995).

that is not practically workable or, in another formulation is in some sense "unworkable."[154] It is obvious that a precedent that is unworkable either because the rule it furnishes is unclear or leads to inconsistent results is a precedent without significant value. Far from offering good consequences that may counterbalance the bad consequences of following a rule that is presumptively inferior to the original meaning, precedent that is unworkable itself wreaks a kind of legal havoc.

Our analysis, however, does not embrace the converse proposition that a precedent should be retained because it is workable. Many legal rules may be workable but unsound. The advantage of following the original meaning is that it is likely not only to be workable but also to be better than other rules. Thus, unworkability undermines the force of precedent while workability does little to generate that force.

We have a similar skepticism about another *Casey* factor: "[W]hether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[155] If a precedent is a "remnant" and inconsistent with other rules around it, the precedent is likely contributing to legal incoherence.[156] Legal incoherence in jurisprudence has negative consequences because individuals have more trouble complying with a set of rules that are incoherent and hard to understand. Such incoherence provides a factor militating against retaining precedent.

But the coherence of a precedent with the rest of law is, by itself, not a reason for retaining a precedent. First, that a precedent coheres with the rest of the law does not mean that a case overruling it may not also be coherent. Many different plausible rationales can serve to make a set of cases coherent just as many plausible shapes can connect a set of dots. Second, coherence with other precedents counts as a reason for preserving the precedent at issue only if those precedents should themselves be preserved. Thus, any analysis would require an assessment of whether these other precedents are themselves protected by the appropriate rules of precedent, such as whether overruling them would create enormous costs.

Another factor discussed by the *Casey* plurality is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[157] Once again it is relatively clear how changed facts can undermine a precedent if they rob it of "legal significance." If a precedent depends on a set of facts that no longer holds, it is manifestly subject to revision. But merely because the facts underlying a precedent have not changed is not a reason to retain that precedent. The

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[154] *Casey*, 505 U.S. at 855 ("Although *Roe* has engendered opposition, it has in no sense proven 'unworkable' . . . .").

[155] *Id.*

[156] We are not suggesting that originalists would often confront such a situation. To be a remnant the nonoriginalist precedent must be inconsistent not with simply one other precedent but with several.

[157] *Id.* at 855.

original meaning of the Constitution should lead to a better result even if the facts do not change from the time the precedent was decided. A precedent should be followed rather than the original meaning only if the precedent fits within a rule of precedent that encapsulates important beneficial consequences.

In short, the *Casey* plurality tried to establish a presumption in favor of following precedent. The plurality suggests that precedent should be followed unless there are particular factors that undermine its utility. Our analysis of the tradeoff of precedent versus originalism does not support such a presumption. Instead, the original meaning should be followed unless a justified precedent rule indicates otherwise. Moreover, the rule-oriented analysis we have advocated provides a more disciplined framework than *Casey*'s multiple factor analysis.

2. The Contrast with Other Scholars.—This section compares our precedent theory with that of other scholars. We show that our normative approach to precedent is distinctive and intermediate between scholars who see no role for precedent and scholars who think that precedent should routinely be followed.

We previously expressed our disagreement with scholars who argue that precedent should have no role in constitutional adjudication because it is unconstitutional.[158] In contrast, we suggested that precedent should be followed in cases where following a precedent rule will have better consequences than adhering to original meaning. Depriving constitutional law of all reliance on precedent would create substantial political instability as it would require the Court to overrule cases for which the polity has a consensus or which would cause enormous costs. Examples of these cases include those that give Congress plenary power over economic affairs under the Commerce Clause[159] as well as widely accepted results such as *Griswold v. Connecticut*.[160] We cannot help but note that opposition to all precedent is also tactically hopeless: no Supreme Court now or in the foreseeable future is going to reconsider decisions that would have enormous costs or that are widely accepted. As a result, a no-precedent position is not likely to be followed.

We also disagree with Professor Randy Barnett's more nuanced rejection of precedent.[161] Like Lawson and Paulsen, Barnett argues that precedent should never insulate from reversal a decision that is contrary to the original meaning.[162] But he also argues that in many cases the Constitution is so ambiguous or vague that many different interpretations are com-

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158 *See supra* Part I.A.

159 *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

160 381 U.S. 479 (1965).

161 *See* Barnett, *supra* note 16.

162 *Id.* at 258–59.

patible with the original meaning.[163] Barnett thus argues in cases of what he calls constitutional "construction" that a precedent does have a claim to being respected even if other decisions might also have been consistent with the original meaning.[164] We disagree with his theory of constitutional construction.[165] But, in any event, construction does not save his precedent theory from having many of the same practical difficulties as those of Lawson and Paulsen. Some precedents are incompatible with the original meaning and yet reflect a current consensus or cannot be overturned without enormous social costs.[166] Our precedent theory addresses these difficulties, but Barnett's does not. As a result, his theory will have many of the same defects as the theories that deny any substantial weight to prior cases.

Finally, our intermediate position also differs from those who argue that precedent should be routinely and presumptively followed. A leading modern exponent of this view is Tom Merrill.[167] Like our approach, Merrill's normative theory is consequentialist. But unlike our approach, Merrill's article focuses only on advancing the objective of judicial restraint.[168] He thus leaves out a crucial comparison—whether adherence to original meaning or to precedent is more likely to generate good rules and preserve the amendment process.

Even the question of whether the original meaning or precedent better constrains judges seems to us far closer than Merrill allows. First, when the original meaning yields a clear rule, it may well be more constraining than precedent. Merrill appears to suggest that precedents create thicker norms and thereby inherently tend to be more constraining than the original meaning.[169] But given that precedents span many eras and emerge from conflicting majorities,[170] they may be less coherent and more subject to manipulation than the more uniform original design and thus less constraining than the original meaning. Moreover, stare decisis in the American system is not absolute, and the possibility that precedent can be overruled creates additional uncertainty not present in adherence to original meaning.

In addition, our version of originalism—original methods originalism—thickens originalism's norms, to use Merrill's term. The original me-

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[163] *Id.* at 263–66.

[164] *Id.*

[165] *See* McGinnis & Rappaport, *Original Methods Originalism*, 103 NW. U. L. REV. ___ (2009)..

[166] For discussion of such precedents, see *supra* Part II.C.2.

[167] *See* Merrill, *supra* note 4, at 272–73. Another important article which is more tentative, but points to much the same position, is Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 771–72 (1988) (suggesting that originalism plays an "increasingly subordinate [role]" compared to precedents in constitutional adjudication).

[168] Merrill, *supra* note 4, at 273. Part of his argument for the judicial restraint that adherence to precedent provides is that it helps treat similarly situated litigants alike. *Id.* at 276.

[169] *Id.* at 278.

[170] *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805–806 (1982).

thods approach directs interpreters to follow the enactors' interpretive rules.[171] It thus provides jurists with additional methods to resolve ambiguities and vagueness. Accordingly, it potentially offers more constraint than other originalist theories.

Thus, our approach to precedent canvasses the full range of relevant considerations for a consequentalist theory and appropriately confines precedent to circumstances in which it is likely to have better consequences than the original meaning. Such a framework preserves the beneficial original meaning through the ages better than does Merrill's. In particular, it leaves open to challenge precedents that the Court has reaffirmed but that are incompatible with original meaning and whose overruling would not offend the kind of consequentialist precedent rules that we have described. Examples of such precedent would include many of the Warren Court's criminal procedure decisions, like the exclusionary rule,[172] and important details of the administrative state, like decisions that circumscribe the President's power to fire subordinates.[173]

F. Applying the Approach to Previous Supreme Court Overruling Decisions

This section applies some of our theories by considering important Supreme Court decisions that overrule precedents from *Brown v. Board of Education* onwards. Our purpose here is illustrative only, and we are not attempting to provide a comprehensive picture of the Court's decisions whether to overrule precedent. To focus on the question whether the Court should overrule precedents to pursue the original meaning, we generally assume that the overrulings would move constitutional jurisprudence closer to the original meaning. In some of the cases, we believe that the Court acted correctly in deciding whether to overrule precedent, but in one important case—*Planned Parenthood v. Casey*—we think the Court's use of precedent to protect the constitutional right to abortion was misplaced.

In *Brown*, the Supreme Court did not follow *Plessy v. Ferguson*'s[174] holding that separate but equal accommodation of the races complied with

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[171] *See* McGinnis & Rappaport, *supra* note 165, at ___.

[172] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by an unconstitutional search and seizure is inadmissible in a criminal trial in a state court).

[173] *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (upholding congressional power to limit the Attorney General's ability to remove Congress's appointed independent counsel); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding the congressional power to limit the President's ability to dismiss Federal Trade Commissioners). While we believe that the appropriate precedent rules do not protect the decisions that allow the creation of independent agencies from being overruled (assuming as we believe that they conflict with the original meaning), one important exception may exist to this claim. We are inclined to believe that the independence of the Federal Reserve is now so well accepted that it should be regarded as an entrenched precedent.

[174] 163 U.S. 537, 537–38 (1896).

the Fourteenth Amendment.[175] *Plessy* was not a precedent that should have been retained. Its holding was not supported by a substantial consensus, did not correct a supermajoritarian failure, and its overruling did not create enormous costs. First, separate but equal did not command the kind of national consensus needed to reach a constitutional amendment in 1954. Second, it was not plausibly a correction of a supermajoritarian failure; in fact, it helped to subordinate a class—African Americans—who were inadequately represented in the constitution-making process.

The most superficially plausible argument in favor of retaining *Plessy* is that overturning it would lead to enormous costs in the form of social disruption. But this social disruption is very different from the kind that might stay the Court's hand in overruling the New Deal cases that authorized Congress to engage in economic regulation of manufacturing and labor. The disruption from overruling *Plessy* occurred because of the threat of violence from a number of people—particularly southern whites—who refused to peacefully comply with the decision. This kind of disruption is not one the Court should take into account as insulating precedent from reconsideration because it amounts to the legal equivalent of a heckler's veto. Declining to overrule a case simply from fear of opposition, even of a violent kind, would encourage others to threaten disruption should other decisions be overruled. Thus, this kind of defense of precedent could lead to most unfortunate consequences for social peace and thoughtful public deliberation about constitutional issues.

Moreover, in this particular case, another group—African Americans—would have been harmed and offended if the doctrine of separate but equal had been reaffirmed. And if, as we believe, the oppression that led to their distress was in direct contravention of the Constitution, it would seem especially problematic to allow the feelings of others to be a barrier to vindicating the rights whose denial led to their justified anger.

In *Gregg v. Georgia*,[176] the Supreme Court essentially overruled its previous decision in *Furman v. Georgia*[177] that the death penalty was unconstitutional. The Court was correct not to follow *Furman*. Once again,

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[175] The precedential effect of *Plessy* is limited to the question of the correctness of separate but equal, not the question of whether the Fourteenth Amendment covers public schools. Our view is that *Plessy* is plainly wrong on the question of separate but equal. In that case, African Americans and railroad companies were denied the opportunity to contract to sit in certain coaches (those restricted to whites) that they wished. *Id.* at 538–39. The fact that whites were also denied the right to contract to sit in other coaches (those restricted to African Americans) is irrelevant, because it was the equality in contracting for a particular set of coaches (those in which whites also sat) that was at issue. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE. L.J. 1385, 1459, 1462 (1992). The question of whether the equality guarantee of the Fourteenth Amendment applies to public schools is a harder one, but we are inclined to believe it does. *See* McConnell, *supra* note 141, at 1132–36; *see also* Harrison, *supra*, at 1462–63.

[176] 428 U.S. 153 (1976).

[177] 408 U.S. 238 (1972).

the precedent did not represent the consensus of the country, was not a correction of a supermajoritarian failure, and was not overruled at great cost. Far from being an entrenched precedent that elicited national consensus, *Furman* triggered an adverse public reaction and prompted states to reenact their death penalty statutes.[178] *Furman* was also not a corrective precedent: there seems never to have been near the consensus needed to constitutionally ban capital punishment. Thus, the inclusion of excluded groups would not have created such a consensus in the previous centuries. Permitting the states to impose the death penalty did not undermine specific forms of reliance or create social disruption.[179]

The Court's decision in *United States v. Lopez*[180] was also justified. While the Court did not explicitly say that it was overruling prior precedent, many commentators thought *Lopez* upended the common view that Congress had plenary regulatory power under the Commerce Clause.[181] In *Lopez*, the Court felt free to act inconsistently with the understanding that the New Deal cases gave the Congress plenary legislative power.[182]

Under our precedent approach the Court was correct in doing so. *Lopez* did not disturb the precedent that gave Congress plenary power over core economic matters, like regulation of manufacturing, labor, and production. Strong arguments have been made that overruling such congressional authority would lead to very substantial disruption.[183] Moreover, there seems to be a consensus that the federal government should have at least some powers over economic matters that an originalist reading of the Commerce Clause might well deny.

Instead, the Court merely denied Congress the authority to regulate matters that were not commercial. While there may be a consensus to give the federal government regulatory power over economic matters, there is no similar consensus to allow the federal government control over the noncommercial matters, such as those at issue in *Lopez*. Similarly, overruling the New Deal precedent over noncommercial matters is unlikely to cause substantial disruption. Congress has not substantially regulated noncommercial matters.

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[178] JOHN HART ELY, DEMOCRACY AND DISTRUST 65 (1980).

[179] One might also see the decision as justified because *Furman* itself did not follow the rules of precedent in striking down the death penalty.

[180] 514 U.S. 549 (1995).

[181] *See* Andrew Koppelman, *How "Decentralization" Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 20–21 (2003).

[182] *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1157 (2008) (discussing how *Lopez* invalidated a federal statute as beyond Congress's authority, but did not overrule any previous cases, including any New Deal decisions).

[183] Robert Bork, for instance, has stated to overrule that reading of the New Deal would "overturn much of modern government and plunge us into chaos." ROBERT BORK, THE TEMPTING OF AMERICA 158 (1991).

The Court was similarly correct to flout precedent in *National League of Cities v. Usery*,[184] where the Court overruled *Maryland v. Wirtz*,[185] and held that Congress lacked power to regulate state operations.[186] Overruling *Wirtz* did not cause substantial disruption. Moreover, the notion that the federal government could regulate the operations of states certainly did not command consensus support, nor can it be plausibly understood as a correction of supermajoritarian failure.

Finally, in our view, *Planned Parenthood v. Casey*,[187] was wrong to rely on the precedential effect of *Roe v. Wade*.[188] Here we contrast *Roe* with *Griswold v. Connecticut*.[189] Under our analysis, *Griswold* is an entrenched precedent that enjoys the kind of consensus support equivalent to a constitutional amendment.[190] In other words, while some constitutional commentators still argue that *Griswold* was wrong as an original matter,[191] almost no one argues that as a policy matter contraception should be illegal or even that it would be desirable for the states to retain the authority to prohibit contraception. In contrast, *Roe* is not an entrenched or corrective precedent and overruling it would not create enormous costs.

It is obvious that *Roe* does not command the kind of constitutional consensus that would be needed to pass a constitutional amendment.[192] Some have argued that *Roe* is rightly decided under the Equal Protection Clause because women did not vote on abortion statutes. One could try to translate this claim into a case of constitutional correction by suggesting that women lacked representation in the political process when the Fourteenth Amendment was adopted and that their presence would have led to

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[184] 426 U.S. 833 (1976).

[185] 392 U.S. 183 (1968).

[186] Unlike the other overrulings discussed in this section, we do not mean to suggest that *National League of Cities* captures the original meaning. But for an argument that it does based on the meaning of states and the their structural position in the Constitution, see Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 819–20 (1999).

[187] 505 U.S. 833 (1992).

[188] 410 U.S. 113 (1973).

[189] 381 U.S. 479 (1965).

[190] *See* Mark Tushnet, *Response: Liberal Political Theory and the Prerequisites of Liberal Law*, 11 YALE J.L. & HUMAN. 469, 473 n.13 (1998).

[191] *See, e,g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004). In that article, one of the authors of the current Article argued in favor of overruling *Griswold*. *Id.* at 1611-12. The concept of entrenched precedent offered here had not been developed at the time. He now believes that the entrenched precedent analysis should control and that *Griswold* should not be overruled.

[192] *See* Jonathan Klick, *Econometric Analyses of U.S. Abortion Policy: A Critical Review*, 31 FORDHAM URB. L.J. 751, 751 (2004) (discussing polls showing the nation divided relatively equally on abortion rights). The Senate has recently divided almost equally on *Roe v. Wade* with 52 Senators supporting *Roe* and 46 opposing it. *See* U.S. Senate: Legislation & Records, Roll Call Vote, 108th Congress, 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00048.

the protection of abortion rights.[193] But this contention is implausible. Even now women are not much more likely to support abortion rights than men.[194] In any event, it seems very unlikely that the Fourteenth Amendment would have been modified in a way that included abortion rights. At the time of the Fourteenth Amendment, abortion was widely prohibited and was not generally seen as a women's rights issue.[195] Moreover, even if women had put such items on the agenda, there is no indication that they could have commanded the requisite constitutional consensus.[196]

In addition, the costs of overruling *Roe* would not be enormous. To be clear, we are not addressing the costs of prohibiting all abortions.[197] We focus only on the costs of the transition to a regime in which it is legal for states to prohibit abortion. Overruling *Roe v. Wade* will not make abortion illegal, and most states will probably maintain relatively permissive abortion laws. Thus, the transition costs may be relatively small because the effective legal norms will not change significantly in most places.

CONCLUSION

Precedent is often seen as an embarrassment for originalists. In this Article, we have argued that precedent is a legitimate and coherent doctrine within our version of originalism. It is legitimate because the Constitution itself authorizes a common law of precedent that is revisable by statute. It is coherent because the values relevant to precedent, like stability and reliance, can be balanced against the values of originalism, such as the beneficence of rules from a desirable constitution-making process. This balancing can result in precedential doctrines that are workable and attractive.

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[193] *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1368 (1998) (suggesting that abortion statutes lack legitimacy if electorate that voted on them excluded women).

[194] *See* JOSEPH.W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 958 (2006). Dellapenna states: "Support for abortion breaks down more on class lines than on gender lines. Some studies found that women are slightly more supportive of abortion rights than men if one controls for such variables as level for education, affluence, career orientation, religious devotion, and so on." *Id.*

[195] *See* Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1290 n.205 (1975) (discussing prevalence of anti-abortion laws at time of the enactment of the Fourteenth Amendment).

[196] Indeed, even at the time of the Equal Rights Amendment, the argument that the ERA might conceivably become a basis for a constitutional right to abortion was used in efforts to kill it. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 422 (2007). And abortion was a problem for the Amendment *despite* relatively clear legislative history that it could not have passed the Senate without the votes of Senators who were opposed to abortion and understood the ERA not to encompass a right to abortion. *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1037–40 (1984).

[197] We are assuming here an originalist approach. For such an approach, such costs are not relevant.

We have also shown how our theory generates two new justifications for precedent—entrenched precedent and corrective precedent. Together these justifications provide a sound basis to follow cases like *Brown v. Board of Education* and *Frontiero v. Richardson*, even if one does not believe these cases were decided correctly as an original matter. Thus, our theory deprives originalism's opponents of their familiar complaint that to embrace originalism is to abandon cases that have become fundamental to our constitutional order.