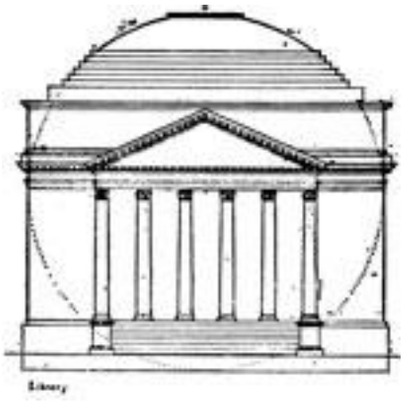

VIRGINIA LAW REVIEW

VOLUME 87 MARCH 2001 NUMBER 1

ARTICLE

STARE DECISIS AND DEMONSTRABLY ERRONEOUS PRECEDENTS

Caleb Nelson[*]

AMERICAN courts of last resort recognize a rebuttable presumption against overruling their own past decisions. In earlier eras, people often suggested that this presumption did not apply if the past decision, in the view of the court's current members, was demonstrably erroneous.[1] But when the Supreme Court

[*] Associate Professor, University of Virginia School of Law. For helpful comments at various stages of this project, I thank Lillian R. BeVier, Vincent Blasi, Curtis Bradley, Barry Cushman, John C. Harrison, John C. Jeffries, Jr., Michael J. Klarman, Daryl Levinson, George A. Rutherglen, James Ryan, John Setear, Kate Stith, William J. Stuntz, G. Edward White, participants in a conference on comparative constitutional law organized by A.E. Dick Howard, and participants in a Legal Studies Workshop at the University of Virginia. I remain solely responsible for all errors (demonstrable or otherwise). The views expressed in this Article are mine alone and should not be attributed to any of my employers, past or present.

[1] See Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent."); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 352–53 (1936) (Brandeis, J., concurring) ("This Court, while recognizing the soundness of the rule of *stare decisis* where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous."); Benjamin N. Cardozo, The Nature of the Judicial Process 158 (1921) ("The United States Supreme Court and the highest courts of the several states overrule their own prior decisions when manifestly erroneous."); see also, e.g., United States v. Nice, 241 U.S. 591, 601 (1916) (overruling a prior case's interpretation of a statute because "we are constrained to hold that the decision in that case is not well grounded"); Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 652–53 (1873) (overruling two prior decisions because they were not "founded on a correct view of the law"); Trebilcock v. Wilson, 79 U.S. (12 Wall.) 687, 692 (1871) (rejecting a prior decision because it "appears to have overlooked the third clause" of the relevant statute); Mason v. Eldred, 73 U.S. (6 Wall.) 231, 237–38 (1867) (declining to rely on a prior decision

makes similar noises today,[2] it is roundly criticized.[3] At least within the academy, conventional wisdom now maintains that a purported demonstration of error is not enough to justify overruling a past decision.[4]

The Court itself frequently endorses this conventional wisdom. In the realm of statutory interpretation, the Court has said that it will adhere even to precedents that it considers incorrect unless they have proved "unworkable," have been left behind by "the growth of judicial doctrine or further action taken by Congress," pose "a direct obstacle to the realization of important objectives embodied in other laws," or are causing other problems.[5] Even in constitutional cases—which are thought to demand less respect for precedent[6]—the Court has said that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[7]

Indeed, people often assume that this requirement is an essential feature of *any* coherent doctrine of *stare decisis*. "To permit overruling where the overruling court finds only that the prior court's

---

because its reasoning was "not satisfactory"); see also infra Part II (discussing antebellum cases).

[2] See, e.g., Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citing *Smith*, 321 U.S. at 665, for the proposition that "when governing decisions . . . are badly reasoned, 'this Court has never felt constrained to follow precedent'").

[3] See, e.g., Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 112–13 (1991) (arguing that *Payne*'s criterion for overruling precedent "clearly would wreak havoc on the legal system").

[4] See, e.g., Charles Fried, Constitutional Doctrine, 107 Harv. L. Rev. 1140, 1142–43 (1994); Gerhardt, supra note 3, at 71; Deborah Hellman, The Importance of Appearing Principled, 37 Ariz. L. Rev. 1107, 1120 n.75 (1995); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 756–63 (1988).

[5] Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989); see also, e.g., id. at 171–73 (noting that "[s]ome Members of this Court believe that *Runyon* [*v. McCrary*, 427 U.S. 160 (1976),] was decided incorrectly," but are nonetheless adhering to it because a decision to overrule would require some "special justification" above and beyond the mere demonstration of error); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283–84 (1995) (O'Connor, J., concurring) (reiterating her view that the majority had been wrong in a past case from which she dissented, but following that case "because there is no 'special justification' to overrule [it]") (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

[6] See, e.g., Neal v. United States, 516 U.S. 284, 295–96 (1996); Hubbard v. United States, 514 U.S. 695, 711–12 & n.11 (1995) (plurality opinion of Stevens, J.); *Patterson*, 491 U.S. at 172–73; Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).

[7] Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 864 (1992).

decision is wrong," writes Deborah Hellman, "is to accord the prior decision only persuasive force . . . without according it any weight *as precedent*."[8] Even Justice Scalia—who seems less wedded to precedent than some of his colleagues[9]—has said that "the doctrine [of *stare decisis*] would be no doctrine at all" if it did not require overruling judges to "give reasons . . . that go beyond mere demonstration that the overruled opinion was wrong."[10]

Other Justices associate this requirement with "the very concept of the rule of law underlying our . . . Constitution."[11] Professor Michael Gerhardt explains that if the applicable rules of precedent permitted the Court to overrule past decisions "based solely on disagreement with the underlying reasoning of those precedents," future Courts would in turn be free to reject the reasoning of the overruling decisions.[12] According to supporters of the conventional academic wisdom, changes in judicial personnel could thus generate an endless series of reversals, and the "inevitable consequence" would be "chaos."[13]

This logic, however, is too facile. If one accepts Justice Scalia's premise that judges can sometimes give a "demonstration" that a prior opinion "was wrong"—that is, if one believes that there can be such a thing as a demonstrably erroneous precedent—then one might well reject the presumption against overruling such precedents. This Article suggests that one can readily develop a coherent doctrine of *stare decisis* that does not include such a presumption. If certain assumptions hold true, moreover, the elimination of this presumption would not unduly threaten the rule of law.

---

[8] Hellman, supra note 4, at 1120 n.75; accord, e.g., Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 59 (1989) ("[I]f incorrectness were a sufficient condition for overruling, there would be no precedential constraint in statutory and constitutional cases."); Amy L. Padden, Note, Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After *Payne v. Tennessee*, 82 Geo. L.J. 1689, 1706 (1994) ("If 'wrongness' were a sufficient basis for overruling precedent, each Justice could decide each case as if it were one of first impression and entirely disregard any precedent.").

[9] See infra notes 192–93 and accompanying text.

[10] *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring in part and concurring in the judgment).

[11] *Casey*, 505 U.S. at 854.

[12] Gerhardt, supra note 3, at 71.

[13] Id. at 71, 145.

The theory is grounded in a simple point: Even in cases of first impression, judges do not purport to have unconstrained discretion to enforce whatever rules they please. Many of their arguments appeal instead to external sources of law, like statutes or established customs. These external sources of law will often be indeterminate and incomplete; they will leave considerable room for judicial discretion. But unless they are *wholly* indeterminate, they will still tend to produce some degree of consistency in judicial decisions. If (as some commentators suggest) the primary purpose of *stare decisis* is to protect the rule of law by avoiding an endless series of changes in judicial decisions,[14] we may be able to achieve this purpose without applying a *general* presumption against overruling past decisions. We may, in short, be able to refine the doctrine of *stare decisis* to take advantage of the consistency that would tend to exist even in its absence.

Part I of this Article draws on the familiar framework of *Chevron U.S.A. v. Natural Resources Defense Council*[15] to suggest such a refinement. As we shall see, the theory sketched out in Part I suggests a possible link between one's perceptions of legal indeterminacy and one's views about *stare decisis*. In particular, the more determinate one considers the external sources of the law that judicial decisions seek to apply, the less frequently one might deem precedents binding.

Part II seeks to establish the *descriptive* power of the theory sketched out in Part I. Focusing on the period between the Founding and the Civil War (which tracks what Frederick Kempin has called the "critical years" for the doctrine of *stare decisis* in America[16]), I argue that the theory explains why—and to what extent—American courts and commentators embraced *stare decisis*. In both the written law (discussed in Section II.A) and the unwritten law

---

[14] See, e.g., Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 Cal. L. Rev. 1309, 1357 (1995) (arguing that "stare decisis . . . can best be understood . . . as a cycle-prevention vehicle").

[15] 467 U.S. 837 (1984). Under *Chevron*, when an administrative agency has adopted a "permissible" interpretation of the statute that it administers, courts are generally supposed to accept that interpretation even if they would have construed the statute differently as an original matter. Courts, however, are not similarly bound by agency interpretations that they deem "impermissible." Id. at 842–45.

[16] Frederick G. Kempin, Jr., Precedent and Stare Decisis: The Critical Years, 1800 to 1850, 3 Am. J. Legal Hist. 28 (1959).

(discussed in Section II.B), Americans viewed *stare decisis* as a way to restrain the "arbitrary discretion" of courts.[17] But this sort of discretion was thought to exist only within a certain space, created by the indeterminacy of the external sources of law that courts were supposed to apply. Outside of that space, presumptions against overruling precedents were not considered necessary; the external sources of law would themselves avoid an arbitrary discretion by providing determinate answers to the questions that courts confronted. People did not expect courts presumptively to adhere to past decisions that got those answers wrong. To the contrary, once courts and commentators were convinced that a precedent was erroneous (as measured against the determinate external rules of decision), they thought that the decision should be overruled unless there was some special reason to adhere to it.

Part III explores the *normative* issues raised by this approach. It discusses the obvious risk that courts will find "demonstrable error" where none exists, and it also examines whether the approach will produce any offsetting benefits. In the end, I conclude that the conventional academic wisdom is unproven: Depending on one's assumptions about how legal communication works, one might well expect the theory laid out in Part I to yield better results than a general presumption against overruling past decisions.

I. USING *CHEVRON* TO REFINE THE DOCTRINE OF *STARE DECISIS*

Imagine, for a moment, that our legal system was based entirely on statutory codes, and that the codes were perfectly clear about their application to every conceivable case. This system is beyond the capacity of human beings to produce; even civil-law countries do not enjoy such a completely determinate set of statutes. But if we found ourselves in such a world, we might see no reason for *any* presumption against overruling precedents. Because the codes yield a single determinate answer to all conceivable legal questions, we might well expect judges applying the codes to reach the same results even if not bound by each other's conclusions. Even without help from *stare decisis*, then, the underlying rules of decision set out in the governing statutes would themselves generate fairly con-

[17] See The Federalist No. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

sistent results. And while individual judges might sometimes make mistakes, letting future judges overrule those mistakes would not necessarily risk an endless series of reversals; we might expect the overruling judges to be able to give a reasoned explanation of their position, and we might expect this explanation to be capable of *persuading* future judges even though it did not *bind* them.

Now relax our assumptions to make them more realistic. In deference to modern skepticism about whether we can meaningfully speak of the common law apart from judicial precedents, let us continue to focus on written laws. In particular, let us imagine that a case turns on the proper interpretation of a statute or a constitutional provision. But let us acknowledge that the relevant provision may well be ambiguous: Although it is not completely indeterminate (in the sense that interpreters could read it to establish any rules they pleased),[18] it lends itself to a number of different constructions.

In the realm of administrative law, the *Chevron* doctrine tells us that a statute of this sort gives the implementing agency authority to pick one of the "permissible" constructions.[19] When no administrative interpretation is in the picture, we would read the statute to give similar discretion to the courts.[20] Whether the interpreter is an administrative agency or a court, however, the interpreter's discretion is limited. If the statute may be construed to establish Rule *A*, Rule *B*, or Rule *C*, the statute gives the interpreter some discretion over which of these three rules to pick, but the interpreter is not free to read the statute to establish Rule *D* instead.

Despite the familiarity of this framework, neither courts nor commentators have fully appreciated how it bears on common understandings of *stare decisis*. When we think about *stare decisis*, we are used to asking whether courts should follow a past decision even though they would have reached a different conclusion as an original matter. But *Chevron* teaches us that this formulation is

[18] If we thought that a federal statute was completely indeterminate in this sense, we would say either that it violated the nondelegation doctrine or that it was void for vagueness. See, e.g., Touby v. United States, 500 U.S. 160, 165 (1991) (discussing the nondelegation doctrine); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497–99 (1982) (discussing vagueness doctrine).

[19] See *Chevron*, 467 U.S. at 843–44 & n.11.

[20] See, e.g., John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 701 (1997).

imprecise: It obscures a distinction that may well be important. When judges say that they would have reached a different conclusion as an original matter, they may be saying either of two things. Perhaps they are saying that the prior court simply made a different discretionary choice than they would have made; the prior court used its discretion to pick Rule *A* when the current judges would have picked Rule *B*. Or perhaps the current judges are saying that the prior court went *beyond* its discretionary authority; the relevant provision could permissibly be construed to establish Rule *A*, *B*, or *C*, but the prior court read it to establish Rule *D*.

These are quite different possibilities, and respect for the rule of law does not necessarily require *stare decisis* to have the same effect in both situations. In the first situation, a presumption against overruling the precedent makes perfect sense: Before we let current judges substitute their discretionary choices for the discretionary choices made by their predecessors, we may well want to require a "special justification" (such as the proven unworkability of the prior judges' chosen rules). Letting judges overrule past decisions of this type simply because they would have made a different discretionary choice might indeed generate an endless series of reversals.

In the second situation, however, this fear is less acute. If the prior court went outside the range of indeterminacy, it did not simply exercise its discretion; it made a demonstrably erroneous decision. Letting future courts overrule such decisions does not necessarily open the floodgates to an endless series of reversals. As long as the overruling court adopts a rule within the range of indeterminacy, we might expect that rule to be stable.

In the second situation, indeed, one could have a coherent doctrine of *stare decisis* that flips the conventional presumption against overruling precedents. Instead of requiring a "special justification" for overruling the prior decision (such as its practical unworkability), one who considered the prior decision demonstrably erroneous might require a special justification for *adhering* to it (such as the need to protect reliance interests).[21]

[21] Cf. Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 26–27 (1994) (invoking Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1807), and arguing that just as courts should not close their eyes on the Constitution and see only a statute, so too courts should not close their eyes on the Constitution

Thus, the conventional wisdom is wrong to suggest that any coherent doctrine of *stare decisis* must include a presumption against overruling precedents that the current court deems demonstrably erroneous. The doctrine of *stare decisis* would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter. But when a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law. These are two different statements, and the doctrine of *stare decisis* could take account of this difference: One could recognize a rebuttable presumption *against* overruling decisions that are *not* demonstrably erroneous while simultaneously recognizing a rebuttable presumption *in favor of* overruling decisions that *are* demonstrably erroneous. If one truly believes in the concept of "demonstrable error," moreover, one might see no threat to the rule of law in such a doctrine.

II. The Historical Link Between Perceptions of Indeterminacy and *Stare Decisis*

Any proposal to adopt the theory described in Part I, and self-consciously to link *stare decisis* with current judges' perceptions of "demonstrable error," obviously invites a variety of objections. But let us defer those objections until Part III. Whatever one thinks of the normative desirability of the theory described in Part I, the theory has considerable descriptive power. In fact, this Part argues that the theory accounts for the growth of *stare decisis* in American law: Antebellum Americans embraced *stare decisis* to restrain the discretion that legal indeterminacy would otherwise give judges, and they did not extend *stare decisis* farther than this purpose seemed to demand. In particular, when convinced of a precedent's error, most courts and commentators did not indulge a presumption against overruling it.

---

and see only an erroneous precedent); Commonwealth v. Posey, 8 Va. (4 Call) 109, 116 (1787) (opinion of Tazewell, J.) (asserting that "the uniformity of decisions" about the proper interpretation of a statute "does not weigh much with me," because "although I venerate precedents, I venerate the written law more").

Careful modern scholars have concluded that the antebellum conception of *stare decisis* stood "in an uneasy state of internal conflict."[22] But the theory set forth in Part I helps us dissolve the alleged tension in antebellum thought. Equipped with this theory, we can fully explain why the same jurists who spoke of a duty to correct past errors also spoke of an obligation to follow certain precedents that they would have decided differently as an original matter.

A. Antebellum Conceptions of Stare Decisis *in the Written Law*

"To avoid an arbitrary discretion in the courts," Alexander Hamilton declared in *Federalist 78*, "it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ."[23] As we shall see, concern about such discretion was a common theme throughout the antebellum period; in one form or another, it shaped most antebellum explanations of the need for *stare decisis*.[24] But the "arbitrary discretion" that wor-

---

[22] Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 666 (1999).

[23] The Federalist No. 78, supra note 17, at 439.

[24] See, e.g., 1 Diary and Autobiography of John Adams 167 (L.H. Butterfield ed., Athenum 1964) (draft of November 5, 1760) ("[E]very possible Case being thus preserved in Writing, and settled in a Precedent, leaves nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge."); Alexander Addison, The Constitution and Principles of Our Government a Security of Liberty (1796), *in* Charges to Grand Juries of the Counties of the Fifth Circuit in the State of Pennsylvania 188, 197 (Phil., T. & J.W. Johnson & Co. 1883) (indicating that *stare decisis* keeps law from depending on "the variable and occasional feelings and sentiments of a court"); William Cranch, Preface, *in* 5 U.S. (1 Cranch) iii, iii (1804) (arguing that "the least possible range ought to be left for the discretion of the judge," and that the publication of case reports "tends to limit that discretion"); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 87 (1807) (argument of counsel) (praising *stare decisis* as a way to restrain "the ever varying opinions and passions of men" and to keep each judge from "set[ting] up his own notions, his prejudices, or his caprice"); Church v. Leavenworth, 4 Day 274, 280 (Conn. 1810) (portraying *stare decisis* as a way to avoid giving effect to "the discretion of the judge"); Daniel Chipman, Preface, *in* 1 D. Chip. 9, 30–31 (Vt. 1824) (noting how reports of past decisions limit "the discretion of the Judge"); Joseph Story, Law, Legislation, and Codes, *in* 7 Encyclopedia Americana app. at 576–92 (Francis Lieber ed., 1831), *reprinted in* James McClellan, Joseph Story and the American Constitution app. III at 359 (1971) (noting that *stare decisis* "controls the arbitrary discretion of judges, and puts the case beyond the reach of temporary feelings and prejudices, as well as beyond the peculiar opinions and complexional

ried Hamilton should be contrasted with what Chief Justice John Marshall called "a mere legal discretion," exercised by judges in "discerning the course prescribed by law."[25] This "legal discretion" connoted skilled judgment, not freewheeling choice.[26] In the context of statutory interpretation, for instance, it meant that judges would draw upon known principles of interpretation to figure out "the sound construction of the act," and hence their "duty."[27]

The contrast between "arbitrary discretion" and "duty" (as identified by "mere legal discretion") informed antebellum conceptions of *stare decisis*. In this Section, I focus on conceptions of *stare decisis* as applied to questions of written law. I argue that for much of our nation's history, the dominant view of *stare decisis* was both remarkably consistent and remarkably similar to the theory described in Part I.

1. James Madison's Discussion of "Liquidation"

When describing the courts' "duty" in matters of statutory interpretation, antebellum lawyers frequently spoke as if courts exercised no will of their own. Whether one is reading *Federalist 78*

---

reasoning of a particular judge"); Intelligence and Miscellany, 7 Am. Jurist & L. Mag. 448, 449 (1832) (reprinting speaker's comment that *stare decisis* "limits [the judges'] discretion" and avoids "arbitrary power"); Gulian C. Verplanck, Speech When in Committee of the Whole, in the Senate of New-York, on the Several Bills and Resolutions for the Amendment of the Law and the Reform of the Judiciary System 27–28 (Albany, Hoffman & White 1839) (praising "[t]he authority of decided cases" as "the best safeguard against the arbitrary or capricious discretion of Judges"); McDowell v. Oyer, 21 Pa. 417, 423 (1853) (emphasizing that *stare decisis* keeps law from depending on "the caprice of those who may happen to administer it"); see also William E. Nelson, Americanization of the Common Law 18–19 (1975) (noting that in colonial Massachusetts, "[m]en as politically antagonistic as Thomas Hutchinson and John Adams viewed the doctrine of precedent . . . as a means of limiting judicial discretion").

[25] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

[26] See G. Edward White, The Marshall Court and Cultural Change, 1815–1835, at 198 (1988); see also, e.g., Brown v. Van Braam, 3 U.S. (3 Dall.) 344, 350 (1797) (argument of counsel) (contrasting "a sound legal discretion" with "mere will, whim and caprice"); Rex v. Wilkes, 98 Eng. Rep. 327, 334 (K.B. 1770) (Mansfield, L.J.) ("[D]iscretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular.").

[27] *Osborn*, 22 U.S. (9 Wheat.) at 866; see also The Federalist No. 78, supra note 17, at 436 (calling the judiciary's duty to follow the Constitution rather than unconstitutional statutes an "exercise of judicial discretion in determining between two contradictory laws").

or Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*, the message is the same: "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[28]

This did not mean that antebellum lawyers thought that statutes would always be perfectly determinate, and would never leave any room for different interpretive choices. To the contrary, as James Madison noted in *Federalist 37*, written laws inevitably had "a certain degree of obscurity."[29] Some ambiguities could be traced to the human failings of the people who drafted the laws; they might have been careless in thinking about their project or in reducing their ideas to words, and they would certainly be unable to foresee all future developments that might raise questions about their meaning. Other obscurities would result simply from the imperfections of human language, which is not "so copious as to supply words and phrases for every complex idea."[30] Written laws, then, would have a range of indeterminacy.

Madison and his contemporaries believed that precedents would operate within this range. According to Madison, the certainty and predictability necessary for the good of society could not be attained if each judge always remained free to adopt his own "individual interpretation" of the inevitable ambiguities in written laws.[31] Throughout his public career, Madison therefore empha-

---

[28] *Osborn*, 22 U.S. (9 Wheat.) at 866; see also The Federalist No. 78, supra note 17, at 433 ("The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . . .").

[29] The Federalist No. 37, at 197 (James Madison) (Clinton Rossiter ed., 1999); cf. The Federalist No. 22, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (arguing that a single supreme court had to have final say over the construction of laws and treaties because "[t]here are endless diversities in the opinions of men" and there might otherwise "be as many different final determinations on the same point as there are courts").

[30] The Federalist No. 37, supra note 29, at 196–97. Madison emphasized that even perfect draftsmanship could not avoid this latter source of obscurity. See id. at 197 ("When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.").

[31] Letter from James Madison to Jared Ingersoll (June 25, 1831), *in* 4 Letters and Other Writings of James Madison 183, 184 (Phil., J.B. Lippincott & Co. 1865); accord, e.g., Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 3 Letters and Other Writings of James Madison, supra, at 642–43.

sized that "a regular course of practice" could "liquidate and settle the meaning" of disputed provisions in written laws, whether statutory or constitutional.[32] Once the meaning of an ambiguous provision had been "liquidate[d]" by a sufficiently deliberate course of legislative or judicial decisions, future actors were generally bound to accept the settled interpretation even if they would have chosen a different one as an original matter.[33]

---

[32] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 3 Letters and Other Writings of James Madison, supra note 31, at 145 ("It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter; . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them."); see also The Federalist No. 37, supra note 29, at 197 (noting that because of the inevitable ambiguities in written language, "[a]ll new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications").

[33] Madison repeatedly used this argument to explain his alleged flip-flop on the constitutionality of the Bank of the United States. Before President Washington signed the 1791 bill establishing the First Bank of the United States, Thomas Jefferson had argued that the Constitution did not give Congress the power to create a national bank, and had unsuccessfully tried to persuade Washington to veto the bill. At the time, Madison had agreed with Jefferson. In 1816, however, President Madison himself signed the bill chartering the Second Bank of the United States.

To explain why he did not veto this bill, Madison stressed that Congress and the Washington Administration had amply considered the constitutional question in 1791. For the next twenty years, moreover, Congress had recognized the Bank in annual appropriations laws. See Letter from James Madison to Jared Ingersoll, supra note 31, at 186. Throughout this period, the Bank "had been often a subject of solemn discussion in Congress, had long engaged the critical attention of the public, and had received reiterated and elaborate sanctions of *every* branch of the Government; to all which had been superadded many positive concurrences of the States, and implied ones by the people at large." Letter from James Madison to James Monroe (Dec. 27, 1817), *in* 3 Letters and Other Writings of James Madison, supra note 31, at 55–56. Although Madison retained his own "abstract opinion of the text of the Constitution," he believed that the deliberate course of practice adopting a contrary view of that text overrode his "individual opinions" and freed him to sign the 1816 Bank Bill. See Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *in* 4 Letters and Other Writings of James Madison, supra note 31, at 165; accord Letter from James Madison to the Marquis de LaFayette (Nov. 1826), *in* 3 Letters and Other Writings of James Madison, supra note 31, at 542; cf. Letter from James Madison to James Monroe, supra, at 55–56 (distinguishing the Bank from legislative precedents in which Congress and the President had acted more hastily and without adequately considering the constitutionality of their measures).

Academics have appropriately emphasized this aspect of Madison's thought,[34] but they have not yet captured the nuances in Madison's concept of "liquidation." Although his usage of the term is now obsolete, in Madison's day "to liquidate" meant "to make clear or plain"; to "liquidate" the meaning of something was to settle disputes or differences about it.[35] Because of the ambiguities of written laws, Madison believed that early interpreters of a law or constitution had some power to affect the law's meaning.[36] But this power was not unlimited. Madison's idea of "liquidation" is like modern notions of "liquidated damages":[37] The interpreter gets to pick a particular interpretation from within a range of possibilities, but the interpreter is not at liberty to go beyond that range. Madison drew a sharp distinction between the question of "whether precedents could expound a Constitution" and the question of "whether precedents could alter a Constitution."[38] Indeed, Madison thought this distinction "too obvious to need elucidation": While "precedents of a certain description fix the interpretation of a law," no one would "pretend that they can repeal or alter a law."[39]

For Madison, then, when the early interpreters of a statute or constitutional provision that was obscure or "controverted" gave it a permissible construction, they helped to "settle its meaning"; subsequent interpreters could be bound to follow that construction even if they would have adopted a different one as an original mat-

---

[34] See generally H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 935–44 (1985) (discussing Madison's theory of constitutional interpretation and the role of precedent).

[35] 8 Oxford English Dictionary 1012 (2d ed. 1991) (reporting the word's obsolete meaning of "[t]o make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes)," and offering numerous examples of this usage from the eighteenth century).

[36] See, e.g., Letter from James Madison to Spencer Roane, supra note 32, at 143 (indicating that there is an extent to which the meaning of a law or constitution "depends on judicial interpretation").

[37] Cf. Black's Law Dictionary 392 (6th ed. 1990) (noting that damages for breach of a contract "may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach [and other related considerations]").

[38] Letter from James Madison to N.P. Trist (Dec. 1831), *in* 4 Letters and Other Writings of James Madison, supra note 31, at 211.

[39] Id.

ter.[40] The fact that a series of independent interpreters had all reached the same construction, moreover, might itself be evidence that the construction was permissible.[41] But if, after giving precedents the benefit of the doubt, subsequent interpreters remained convinced that a prior construction went beyond the range of indeterminacy, they did not have to treat it as a valid gloss on the law. There might be a presumption that past interpretations were permissible, but once this presumption was overcome and the court concluded that a past interpretation was erroneous, there was no presumption against correcting it.

In sum, Madison's concept of "liquidation" closely tracks the theory described in Part I. If a past decision was demonstrably erroneous—if it "alter[ed]" the determinate law rather than "expound[ing]" an ambiguity—it lacked the binding force of true liquidations.

2. "Liquidation" in Antebellum Case Law

The Madisonian concept of "liquidation" dominated antebellum case law. Court after court used its framework to think about the effect of past decisions interpreting written laws.

To the extent that a statutory or constitutional provision was ambiguous, a regular course of practice (including but not necessarily limited to court decisions) could settle its meaning for the future. Constructions that had been acted upon ever since the law was first adopted had special force.[42] But even in the absence of

---

[40] Letter from James Madison to Professor Davis (c. 1833) (not sent), *in* 4 Letters and Other Writings of James Madison, supra note 31, at 249.

[41] Cf. Letter from James Madison to C.E. Haynes, supra note 33, at 165 (suggesting this point, though adding that "cases may occur which transcend all authority of precedents"); see also infra text accompanying notes 124–26 (elaborating upon antebellum discussions of the difference between an isolated decision and a series).

[42] See, e.g., Packard v. Richardson, 17 Mass. (17 Tyng) 121, 143 (1821) (describing how, "[i]f there is ambiguity in [a statute's] language," the contemporaneous construction can "become[] established law," and adding that the community's understanding and application of the statute—when acquiesced in by the legislature and the courts—"is the strongest evidence that it has been rightly explained in practice"); Respublica v. Roberts, 1 Yeates 6, 7 (Pa. 1791) (following the "constant practice" that unmarried people could be guilty only of fornication and not of adultery under Pennsylvania's statute, even though "the decision of the court might be different from what it now is" if the case had "been *res integra*"); Minnis v. Echols, 12 Va. (2 Hen. & M.) 31, 36 (Va. 1808) (opinion of Roane, J.) ("If . . . this were *res integra*, I should desire further to

such contemporaneous interpretations, a regular course of decisions could "settle[]" the construction of statutes "so far as that construction depended upon the [courts]."[43]

This was true even if later courts would have resolved the ambiguity in a different way, as long as the prior interpretation was not demonstrably erroneous. Consider, for instance, an 1840 case in which the Supreme Court of New York declined to overrule its past interpretation of a statute. The court explained that "the question is undoubtedly one of construction upon the words of an act which, when taken generally, sustain the decision which has been made upon them"; under these circumstances, "even if the balance of our minds should now be the other way," the doctrine of *stare decisis* counseled against "indulg[ing] the inclination."[44] Wisconsin's highest court agreed that "when it is apparently indifferent[] which of two or more rules is adopted," the one selected by past decisions "will be adhered to, though it may not, at the moment, appear to be the preferable rule."[45] As the Ohio Supreme Court put it, "the simplest justice to our predecessors as well as the public should prevent us from interfering with decisions deliberately made, merely because a difference of opinion might exist between them and us upon a doubtful and difficult question of construction."[46]

---

consider whether the provision, respecting the reading the deposition of an aged, infirm, or absent witness, applied also to this case: but I believe that the practice and general understanding of the country has decided the question in the affirmative, and I am not now disposed to disturb it.").

[43] Goodell v. Jackson, 20 Johns. 693, 720 (N.Y. 1823) (Kent, C.); see also, e.g., Peter S. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 81–82 (Phil., Abraham Small 1824) (indicating that legislation inevitably leaves much "to the sound discretion of the constitutional expositors of the laws," expressed in "the successive decisions of Judges on points which the textual laws . . . have not sufficiently explained"); Verplanck, supra note 24, at 28 (discussing how usage and judicial decisions can "fix[] th[e] interpretation" of ambiguous language in statutes and constitutions); cf. Ex Parte Burford, 7 U.S. (3 Cranch) 448, 449 (1806) (finding precedent "decisive" in a case in which "[t]here is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution").

[44] Bates v. Relyea, 23 Wend. 336, 340 (N.Y. Sup. Ct. 1840).

[45] Pratt v. Brown, 3 Wis. 603, 609 (1854); cf. id. at 609–10 (urging courts to remain vigilant against "error" in past decisions).

[46] Kearny v. Buttles, 1 Ohio St. 362, 367 (1853); accord, e.g., Lemp v. Hastings, 4 Greene 448, 449–50 (Iowa 1854) ("When a rule or principle of law has been fully recognized by the supreme court, it should not be overruled, unless it is palpably

This presumption against overruling past decisions, however, did not extend beyond the statute's range of ambiguity. If convinced that a past decision was erroneous, courts would overrule it *unless* people had relied upon it or there were other substantial reasons for adherence. Courts assumed, in other words, that they should ordinarily correct past errors.

We can trace this assumption in judicial rhetoric from the 1780s through the Civil War and beyond. Listen, for instance, to the Pennsylvania Supreme Court in the 1786 case of *Kerlin's Lessee v. Bull*:[47]

> A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law.[48]

One might be tempted to view this statement skeptically, on the assumption that courts make such comments when they want to overrule a troublesome past decision. But the Pennsylvania Su-

---

wrong . . . ."); Breedlove v. Turner, 9 Mart. 353, 366–67 (La. 1821) (noting that past decisions interpreting a statute are "evidence of what the law is," and although "it is the duty of the [current] court to see that they are correct," they are binding "unless we are clearly, and beyond doubt, satisfied that they are contrary to law or the constitution"); Bellows v. Parsons, 13 N.H. 256, 263 (1842) (noting that because no "clear and undoubted mistake" had been shown in the past decisions, the court did not have to determine how it would have resolved the ambiguity "were it for the first time submitted to our consideration"); Proprietors of Cambridge v. Chandler, 6 N.H. 271, 289 (1833) ("We have carefully reconsidered the question settled in *Sayles v. Batchelder* [regarding the meaning of a statute], and find it one that is not without doubt and difficulty. It is a question upon which much may be said on either side. And as we are by no means satisfied that the question was incorrectly settled in *Sayles v. Batchelder*, we feel ourselves bound by the decision.").

[47] 1 Dall. 175 (Pa. 1786).

[48] Id. at 178. The Pennsylvania Supreme Court drew this language from Chief Justice John Vaughan's opinion in Bole v. Horton, 124 Eng. Rep. 1113 (C.P. 1673). But the court made an interesting modification that fits well with the concept of "liquidation." Vaughan had declared that "if a Judge conceives a judgment given in another Court to be erroneous, he . . . ought not to give the like judgment," for he is "sworn to judge according to law, *that is, in his own conscience.*" Id. at 1124 (emphasis added). By rearranging Vaughan's words, the Pennsylvania court omitted Vaughan's gloss on the phrase "according to law." This omission seems significant: The Pennsylvania court was suggesting that when a statute could be interpreted in several different ways, a past court's judgment might be "according to law" even if the current court would have chosen a different resolution.

preme Court's statement is hard to impeach on this basis: The court ended up adhering to the precedent in question, concluding that the proper interpretation of the statute was "doubtful" and that the precedent had given rise to substantial reliance interests that deserved protection.[49]

Or consider judicial treatment of Connecticut's statute of limitations for quieting claims to real estate. In 1807, Connecticut's highest court had endorsed a broad interpretation of a tolling provision in the statute.[50] But in the 1810 case of *Bush v. Bradley*,[51] Justice Nathaniel Smith went out of his way to say that this construction was erroneous. "On a doubtful point," Smith noted, "I should consider myself bound by [the court's past interpretation]; but as the statute, in my judgment, is perfectly plain, I am constrained to say that its obligations are paramount to any precedent, however respectable."[52] A few years later, the full court agreed with Smith and overruled the past interpretation. As Chief Justice Zephaniah Swift explained, "the construction given to the statute [in the prior case] is not warranted by the fair import of it," and the

[49] See *Kerlin's Lessee*, 1 Dall. at 179 ("[A]s this construction of the Act has been so long accepted and received as a rule of property, . . . it is but reasonable we should acquiesce and determine the same way in so doubtful a case . . . ."); cf. infra note 62 and accompanying text (discussing "rules of property" and how reliance interests could overcome the normal presumption that erroneous precedents should be overruled).

[50] See Eaton v. Sanford, 2 Day 523, 527 (Conn. 1807). The relevant statute extinguished rights of entry that were not asserted within a certain number of years after they first accrued. But the statute made an exception for anyone who, "at the time . . . the said right or title first . . . accrued," was "within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas"; such people had to assert their rights "within five years next after . . . their full age, discoverture, or coming of sound mind, enlargement out of prison, or coming into this country." An Act (or Acts) Concerning Possession of Houses, Lands, &c., tit. 97, ch. 3, § 4, 1808 Conn. Pub. Acts 434, 435 (originally enacted May 1684). In *Eaton*, the court indicated that even if only one of the listed disabilities had existed at the time the right of entry first accrued, the elimination of that disability did not start the five-year clock if another disability had arisen in the interim. Thus, someone who was under twenty-one when her right first accrued, and who subsequently became a *feme covert* before turning twenty-one, did not have to assert her claim within five years after attaining majority, but instead had until five years after discoverture.

[51] 4 Day 298 (Conn. 1810).

[52] Id. at 309–10 (opinion of Smith, J.).

past decision therefore "ought not to be considered as possessing the authority of a precedent."[53]

Even when courts were divided about the effect of past interpretations, the majority and the dissent often used the same framework for their analyses, disagreeing only about how it applied to the particular case at hand. Consider, for instance, judicial treatment of the Takings Clause in the Ohio Constitution, which declared that private property would "ever be held inviolate" but remained "subservient to the public welfare, provided a compensation in money be made to the owner."[54] When the City of Cincinnati took property in order to widen one of its streets, it proposed to compensate owners for the difference between the value of their original property before the street's improvement and the value of their remaining property *after* the street's improvement. Property owners protested that this approach gave them too little; they were supposed to be compensated "in money," and the city was effectively proposing to give them part of their compensation in the form of a wider street. Concluding that "the meaning of the [constitution] is obscure" on this point, a majority of the Ohio Supreme Court's members sided with the city on the strength of "[l]ong contemporaneous construction" by the state's legislative and judicial authorities.[55] A dissenter conceded that "contemporaneous construction . . . may be resorted to, in construing doubtful written laws and constitutions," but noted that "where there is no ambiguity, there is no room for construction; and the laws, as written, must prevail."[56] According to the dissenter, "there is neither doubt nor ambiguity in the wording of the constitution," and the past constructions were simply wrong.[57]

---

[53] Bunce v. Wolcott, 2 Conn. 27, 33 (1816).

[54] Ohio Const. of 1802, art. VIII, § 4.

[55] Symonds v. City of Cincinnati, 14 Ohio 147, 175 (1846).

[56] Id. at 180 (Read, J., dissenting).

[57] Id. at 180–81 (Read, J., dissenting); cf. Stoolfoos v. Jenkins, 8 Serg. & Rawle 167, 173 (Pa. 1822) ("[U]sage ought only to prevail when the construction is doubtful. . . . Usage against a Statute, is an oppression of those concerned, and not an exposition of the law.").

For a mirror image of *Symonds*, in which the majority voted to reject a past interpretation that the dissent wanted to retain, see Leavitt v. Blatchford, 17 N.Y. 521 (1858). There, the judges in the majority believed that they could demonstrate the "error" of the past interpretation. See, e.g., id. at 543–44 (opinion of Johnson, C.J.); id. at 533 (opinion of Harris, J.) ("When a question has been well considered and de-

This framework for assessing the force of past decisions was remarkably widespread. The same courts that recognized a presumption against overruling permissible past constructions of "doubtful" provisions also acknowledged the need to overrule constructions that went beyond the range of ambiguity.[58] The overruling rhetoric used by courts across the country confirms this point: A court could explain why it was overruling a past interpretation of a statute or constitutional provision simply by showing that the past interpretation was mistaken, without claiming that the past interpretation was causing any other problems.[59] In other words, once courts concluded that a past decision was demonstrably erroneous, they needed no special reasons to justify overruling

---

liberately determined, whatever might have been the views of the court if permitted to treat it as *res nova*, the question should not again be disturbed or unsettled. On the other hand, I hold it to be the duty of this court, as well as every other, freely to examine its own decisions, and, when satisfied that it has fallen into a mistake, to correct the error by overruling its own decision."). According to the dissenter, however, the choice between the two possible interpretations of the statute was at most "a mere conflict of opinion"; the prior interpretation was not "manifestly erroneous," and so "no valuable end is to be attained by reversing what has been heretofore decided." Id. at 560 (Selden, J., dissenting).

[58] See, e.g., Goodell v. Jackson, 20 Johns. 693, 722 (N.Y. 1823) (Kent, C.); Pratt v. Brown, 3 Wis. 603, 610 (1854); see also cases cited supra notes 46 and 57.

[59] See, e.g., Louisville R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 556 (1844) (overruling two prior decisions because "upon our maturest deliberation we do not think that [they] . . . are sustained by a sound and comprehensive course of professional reasoning"); Talcott v. Marston, 3 Minn. 339, 343–44 (1859) ("[U]pon a careful review of the statute, the Court is now of the unanimous opinion that the rule established as the measure of damages in the case above referred to, is erroneous."); Gwin v. McCarroll, 9 Miss. (1 S. & M.) 351, 371 (1843) ("We are now satisfied that [a prior decision] is not the law."); Pike v. Madbury, 12 N.H. 262, 267 (1841) (overruling a prior decision because "the construction we now hold to is the true construction of the act"); Kottman v. Ayer, 32 S.C.L. (1 Strob.) 552, 573 (1847) (overruling a past decision because "[t]his construction of the Act, a majority of this Court are of opinion was error"); Crowther v. Sawyer, 29 S.C.L. (2 Speers) 573, 578 (1844) ("[A]lthough the wisdom of the maxim *stare decisis*, is acknowledged, and we rarely think it prudent to overrule a former decision, yet when it . . . has proceeded upon a plain mistake of the law, it is our duty to put it out of the way."); Purvis v. Robinson, 1 S.C.L. (1 Bay) 493, 495 (1795) ("[The judges] admitted that the general practice hitherto had been otherwise, but that the act, when fully considered, did not warrant it."); Sharp v. Nelson, 17 Tenn. (9 Yer.) 34, 36 (1836) ("We feel satisfied that the case cannot have been very fully discussed or attentively considered by the court, and we are unable to yield to its authority."); cf. Livingston v. Story, 36 U.S. (11 Pet.) 351, 399–400 (1837) (Baldwin, J., dissenting) (urging the Court to adhere to the "settled construction" of a state law, but "freely admit[ting] that a court may and ought to revise its opinions[] when, on solemn and deliberate consideration, they are convinced of their error").

it; the presumption favored correcting such errors, not letting them stand.

Indeed, some people suggested that courts should *never* adhere to a past interpretation that they were now convinced was erroneous. In an 1854 dissent, Supreme Court Justice Peter Daniel suggested that even the desire to protect substantial reliance interests could not justify adhering to an erroneous interpretation of the Constitution. *Stare decisis*, he noted, "is a rule which, whenever applied, should be derived from a sound discretion, a discretion having its origin in the regular and legitimate powers of those who assert it."[60] For Daniel, it followed that *stare decisis* could never be used to enshrine demonstrably erroneous interpretations of the Constitution. "Wherever the Constitution commands, discretion terminates."[61]

Most courts did not go this far. Judges frequently indicated that if past decisions had established "rules of property"—if titles had passed in reliance on them or if people had otherwise conducted transactions in accordance with them—the resulting reliance interests could provide a reason to adhere to the decisions even if they were now deemed erroneous.[62] The conclusion that a past decision

---

[60] Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 343 (1854) (Daniel, J., dissenting).

[61] Id. at 344 (Daniel, J., dissenting); see also, e.g., Goodell v. Jackson, 20 Johns. 693, 722 (N.Y. 1823) (Kent, C.) (indicating that a court might be "bound" to overrule its former interpretation of a statute if its members "had become entirely satisfied, that they had previously mistaken the law"); Sheldon's Lessee v. Newton, 3 Ohio St. 494, 506 (1854) (suggesting that even where substantial reliance interests had built up over a twenty-year period, overruling might be proper if it was "unquestionabl[e]" that "the rules of law have been violated, and the rights of the parties disregarded").

[62] See, e.g., Rogers v. Goodwin, 2 Mass. (2 Tyng) 475, 477 (1807); Bevan v. Taylor, 7 Serg. & Rawle 397, 401–02 (Pa. 1821); Girard v. Taggart, 5 Serg. & Rawle 19, 539–40 (Pa. 1818) (opinion of Duncan, J.); Kerlin's Lessee v. Bull, 1 Dall. 175, 179 (Pa. 1786); Nelson v. Allen, 9 Tenn. (1 Yer.) 360, 376–77 (1830); Taylor v. French, 19 Vt. 49, 53 (1846); Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351, 353–55 (1860); see also Thomas Emerson, Advertisement, *in* 1 Tenn. (1 Overt.) xxi, xxi (1813) (noting that when decisions are "wrong," the publication of case reports will help them "be corrected in time, before they are sanctioned by long acquiescence").

The force of these "rules of property" derived from prevailing views of the nature of judging. In general, people assumed that courts could not overrule their past interpretations of a statute purely prospectively; courts sat to declare what the law was, not what the law would be in the future. When a court overruled its past interpretation, then, it was declaring that the statute had always meant something other than what the past decision had said. This conclusion might unsettle titles that had passed in re-

was erroneous, then, merely established a rebuttable presumption that it should be overruled; this presumption could be overcome if there were special reasons for adherence.

The important point, however, is that few antebellum lawyers endorsed a presumption *against* overruling erroneous decisions. For most courts, the demonstrated error of a past interpretation of a statutory or constitutional provision was reason enough to overrule the past interpretation *unless* there were special reasons (such as the need to protect reliance interests) for adhering to it.

In sum, Americans from the Founding on believed that court decisions could help "liquidate" or settle the meaning of ambiguous provisions of written law. Later courts generally were supposed to abide by such "liquidations," for precisely the reasons identified in Part I. To the extent that the underlying legal provision was determinate, however, courts were not thought to be similarly bound by precedents that misinterpreted it.

B. The Common Law and Stare Decisis

Antebellum notions of *stare decisis* in the unwritten common law followed the same framework. But explaining this point is complicated, because antebellum Americans did not share modern conceptions of the common law itself. Their views of the common law, moreover, went through some changes over time, with corresponding effects on the prominence of *stare decisis*. This Section accordingly proceeds in stages.

As Section II.B.1 notes, many American lawyers in the late eighteenth and early nineteenth centuries thought that at least part of the common law had external sources, such as custom and reason. Section II.B.2 explains that in the unwritten law as in the written law, *stare decisis* played its greatest role where those external sources were deemed silent or ambiguous. In areas where the law's external sources were thought to yield determinate answers to the questions that judges confronted, it was possible for past decisions to be demonstrably erroneous, and courts were expected to

---

liance on the past interpretation's view of the law. See *Bevan*, 7 Serg. & Rawle at 401. In order to avoid such retrospective effects, many people thought it preferable for erroneous decisions that had established "rules of property" to be corrected by the legislature rather than the courts. See, e.g., White v. Denman, 1 Ohio St. 110, 115 (1853).

overrule such decisions unless there were special reasons to retain them.

As time went by, some commentators attacked the notion that the common law rested on determinate and discoverable external sources. In their view, common-law decisionmaking amounted to "judicial legislation"; instead of deriving pre-existing principles from external sources, judges were exercising their own discretion to make up rules for each occasion. Mainstream lawyers in the antebellum period disagreed, but even they lost some of their faith in the external sources of the common law. As Section II.B.3 explains, *stare decisis* became correspondingly more prominent; people saw the doctrine as a brake on the discretion that the incompleteness of the law's external sources would otherwise give judges.

The commentators who criticized the common law did not consider *stare decisis* an adequate solution to the problem of judicial discretion. They wanted to abandon the common-law system entirely and to replace it with statutory codes. Predictably, these reformers tended to put considerable stock in the determinacy of their proposed codes. Section II.B.4 shows that they expected *stare decisis* to play a correspondingly narrow role in their system.

Throughout the antebellum period, then, we can track a strong relationship—across a range of different ideological views—between *stare decisis* and perceptions of legal indeterminacy. This is precisely what the theory set forth in Part I would lead us to predict.

1. Views of the Common Law in the Early American Republic

From our modern vantage point, it is easy to identify the common law with *stare decisis*. As Stanley Reed asserted before his appointment to the Supreme Court, "the doctrine of *stare decisis* has a philosophic necessity in the common law system which is not found elsewhere," because the common law "amounts to no more than a collection of decided cases."[63]

[63] Stanley Reed, *Stare Decisis* and Constitutional Law, 9 Pa. B. Ass'n Q. 131, 133 (1938); see also, e.g., Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review 116 (1989) ("The fundamental premise of systems based on common law is that *stare decisis* . . . is the primary justification acceptable for most court decisions.").

In the late eighteenth century, however, many American lawyers would have rejected this positivist conception of the common law. Much of the common law was thought to rest on external sources. Lawyers of the day might not always have agreed with each other about exactly what those sources were; some accounts of the common law stressed the dictates of natural reason,[64] others stressed the customs adopted in some relevant community,[65] and many wove reason, custom, and divine revelation together.[66] But each of these sources of law had an existence separate and apart from judicial decisions. To a large extent, then, courts were thought to *discover* rather than to *make* the rules and principles that they applied.[67]

Most lawyers would have been willing to concede that *some* aspects of the common law had no external source, but simply derived from what courts had done in the past. Few people thought, for instance, that there had been anything foreordained about the technical rules of pleading, such as the distinction between "trespass *vi et armis*" and "trespass on the case." But the basic idea that there ought to be remedies for such trespasses was different: The fundamental principles of justice required remedies to be available for those injuries, even though the precise forms

---

[64] See, e.g., Rhodes v. Risley, N. Chip. 84, 91 (Vt. 1791) (opinion of Chipman, C.J.) (asserting that "the principles of the common law" are "the principles of common justice as they apply to the general circumstances and situation of this Commonwealth"); 1 Zephaniah Swift, A System of the Laws of the State of Connecticut 46 (Windham, John Byrne 1795) (indicating that "reason and justice" are "the basis of all laws").

[65] See, e.g., Lessee of George Woods v. Galbreath, 2 Yeates 306, 307 (Pa. 1798) (observing that "[c]ourts of justice are frequently governed in their determinations by the customs of the country"); Campbell's Lessee v. Rheim, 2 Yeates 123, 124–25 (Pa. 1796) (noting, at least with respect to the rules of real property, that "the law itself has been said to be nothing but common usage"); Gorgerat v. M'Carty, 1 Yeates 94, 95 (Pa. 1792) (opinion of M'Kean, C.J.) (seeking to resolve a case by identifying "the custom of merchants"); 1 St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia app. E at 406 (Phil., William Young Birch & Abraham Small 1803) (indicating that unwritten laws "acquire their force and obligation by long usage and custom, which imply a tacit consent").

[66] See generally James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, 58 U. Chi. L. Rev. 1321 (1991).

[67] See, e.g., White, supra note 26, at 129 ("[C]ommon law doctrines, as articulated by judges, were seen as principles that had been discovered rather than new laws that were being made.").

that litigants needed to use reflected decisions made by past courts.[68]

Zephaniah Swift, the future Chief Justice of Connecticut, put the point more generally in his 1795 treatise *A System of the Laws of the State of Connecticut*. "The science of the law," he explained, "is grounded on certain first principles," which either have been introduced by statute or have been "derived from the dictates of reason, and the science of morals."[69] This foundation of discoverable principles did not answer all possible questions; "our courts have erected an artificial fabrick of jurisprudence" on top of it.[70] Still, the common law was not *entirely* "artificial." The foundational principles of the common law enjoyed an existence independent of any judicial decisions, and the courts' goal was to "square their decisions to the fundamental doctrines on which [the science of jurisprudence] is established."[71]

Even within the "artificial fabrick of jurisprudence" that had been built on top of the foundational principles, Swift identified some external sources of law. Certain "principles and doctrines," he noted, had "become law by the usage and practice of the people";[72] even though these customs could not necessarily be derived by reason, they remained binding on courts in cases to which they applied. In addition, the principles reflected in a state's written laws—its constitution and statutes—could also inform decisions on questions of the unwritten law.[73]

---

[68] See 2 Swift, supra note 64, at 20–21. Swift notes that before "trespass on the case" was recognized, the writ of trespass covered only those injuries that were "[a]ccompanied by force." As society became increasingly commercial and "the principles of jurisprudence were better understood," it became "apparent that new remedies must be devised." Swift suggests that the courts of that day had a choice about exactly how to cure the "imperfection" of the existing forms of action: They could either "extend the old remedies to supply the defect" or use their statutory authority to "establish some new actions." But they did not have a choice about providing some avenue of relief; this was "absolutely necessary." Id.; cf. Du Ponceau, supra note 43, at xvi ("I consider it as of very little consequence whether an ejectment suit is brought in the fictitious names of John Doe and Richard Roe, or in the real names of the plaintiff and defendant, provided justice is done to the parties in the end. But what I think is not to be tolerated in any system of law, is actual *injustice* . . . .").

[69] 1 Swift, supra note 64, at 39.

[70] Id.

[71] Id.

[72] Id. at 2.

[73] See, e.g., id. at 1–2, 39, 44.

Writing in 1793, Judge Jesse Root of the Connecticut Superior Court offered a similar taxonomy that identified three overlapping sources of common law. Root acknowledged that part of the common law was judge-made; he described "the adjudications of the courts of justice and the rules of practice adopted in them" as an "important source of common law."[74] Two other "branch[es] of common law,"[75] however, had external sources. First, many types of cases were to be resolved according to "usages and customs" that had been "universally assented to and adopted in practice by the citizens at large, or by particular classes of men, as the farmers, the merchants, etc."[76] These commercial customs, if "reasonable and beneficial," formed "rules of right" that courts ought to apply "in the construction of transactions had and contracts entered into with reference to them."[77]

The second external source of rules of decision was more fundamental. In contrast to both judge-made rules and man-made customs, it was not a human creation at all; it "ar[ose] from the nature of God, of man, and of things, and from their relations, dependencies, and connections."[78] While this aspect of common law was "the perfection of reason,"[79] it was "[not] a matter of speculative reasoning merely[,] but of knowledge and feeling";[80] the principles of this law were "within us, written upon the table of our hearts, in lively and indelible characters."[81] This source of law cov-

---

[74] Jesse Root, Introduction, *in* 1 Root i, xiii (Conn. 1793).

[75] Id. at xi.

[76] Id.

[77] Id. at xi–xii.

[78] Id. at ix.

[79] Id. The phrase, of course, comes from Coke. See 1 Edward Coke, The First Part of the Institutes of the Lawes of England 97b (London, Societie of Stationers 1628) (asserting that "the Common Law itselfe is nothing else but reason, which is to be understood of an artificiall perfection of reason gotten by long studie, observation and experience and not of every mans naturall reason").

[80] Root, supra note 74, at xi.

[81] Id. at x. As this passage suggests, Root associated this branch of the common law with God. See id. at x ("[B]y it we are constantly admonished and reproved, and by it we shall finally be judged . . . ."); id. ("The dignity of its original, the sublimity of its principles, the purity, excellency and perpetuity of its precepts, are most clearly made known and delineated in the book of divine revelation . . . ."); id. ("[H]eaven and earth may pass away and all the systems and works of man sink into oblivion; but not a jot or tittle of this law shall ever fail."); cf. 1 Swift, supra note 64, at 8 (indicating that God has "invested [man] with social feelings" that prompt man "to enter into a

ered a broad range of topics, such as which injuries are actionable, what conduct is criminal, and what obligations members of the family unit owe each other.[82] It was completely determinate, being "in itself perfect, clear and certain."[83] And its content did not depend on judicial decisions: "[T]he decisions of the courts of justice serve to declare and illustrate the principles of this law[,] but the law exists the same."[84]

For further evidence that the common law was thought to have external sources, one need only consult the fledgling states' "reception" laws—statutes or constitutional provisions enacted shortly after Independence in order to confirm that pre-existing laws would remain in force. When incorporating British *statutes* into their law, states carefully adopted only those statutes that they had already been observing or that had been passed before a certain date; states wanted to make clear that the British Parliament was not still legislating for them.[85] Many of the same provisions, how-

---

state of society" and "to adopt and observe those rules and regulations which are necessary to secure the rights of individuals, and preserve the peace and good order of society").

[82] See Root, supra note 74, at x. Initially, in fact, Root suggested that this branch of common law "embraces all cases and questions that can possibly arise." Id. at ix. It seems unlikely that Root really believed that this branch of common law was quite so comprehensive, because that conception would leave no room for the other two branches of common law that he discussed. Still, Root plainly thought that the universal part of the common law covered many different fields.

[83] Id. at ix.

[84] Id. at xi.

[85] See, e.g., Del. Const. of 1776, art. 25 (limiting reception to statutes "heretofore adopted in Practice" in Delaware); Md. Decl. of Rights of 1776, art. III (limiting reception to "such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used, and practised by the courts of law or equity"); N.J. Const. of 1776, art. XXII (limiting reception to "so much of the statute-law, as have been heretofore practised" in New Jersey); An Act to revive and put in force such and so much of the late laws of the Province of Pennsylvania as is judged necessary to be in force in this commonwealth, and to revive and establish the Courts of Justice, and for other purposes therein mentioned, § 2, ch. II, 1776–1777 Pa. Acts 3, 4 (limiting reception to "such of the Statute Laws of England as have heretofore been in force in the said Province"); Ordinance of Virginia Convention, May 1776, *in* 9 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, at 127 (William Waller Hening ed., Richmond, J. & G. Cochran 1821) (limiting reception to English statutes "made in aid of the common law prior to [1606], and which are of a general nature, not local to that kingdom"); see also An Act Adopting the Common and Statute Law of England, 1782 Vt. Laws 3, 3–

ever, adopted "the common law of England" without imposing any similar qualifications.[86] The people who drafted this language surely did not expect the newly independent states to be bound by English decisions handed down after the Revolution.[87] Rather, they simply did not equate "the common law of England" with judicial decisions (whether pre- or postrevolutionary). As Virginia Chancellor Creed Taylor confirmed, "it was the common law we adopted, and not English decisions."[88]

---

4 (June session) (limiting reception to statutes passed before October 1, 1760). For an overview of the reception of British statutes, see Elizabeth Gaspar Brown, British Statutes in American Law 1776–1836 (1964).

[86] See Del. Const. of 1776, art. 25; Md. Decl. of Rights of 1776, art. III; N.J. Const. of 1776, art. XXII; An Act to revive and put in force such and so much of the late laws of the Province of Pennsylvania as is judged necessary to be in force in this commonwealth, and to revive and establish the Courts of Justice, and for other purposes therein mentioned, § 2, ch. II, 1776–1777 Pa. Acts 3, 4; An Act Adopting the Common and Statute Law of England, 1782 Vt. Laws 3, 3 (June session); Ordinance of Virginia Convention, May 1776, supra note 85, at 127.

[87] At least five states, in fact, went so far as to ban the mere citation of such decisions in judicial proceedings. See Francis R. Aumann, American Law Reports: Yesterday and Today, 4 Ohio St. L.J. 331, 332 (1938) (identifying such bans in Delaware, Kentucky, New Hampshire, New Jersey, and Pennsylvania); cf., e.g., Chesnut Hill & Spring House Tpk. Co. v. Rutter, 4 Serg. & Rawle 6, 18 (Pa. 1818) ("The laws of the Commonwealth forbid my tracing this point through the English Courts, since the revolution . . . .").

[88] Marks v. Morris, 14 Va. (4 Hen. & M.) 463, 463 (Super. Ct. Ch. 1809); see also, e.g., Young v. Erwin, 2 N.C. (1 Hayw.) 323, 328 (Super. Ct. 1796) (argument of counsel) ("Neither the old nor the modern decisions are the very common law itself—they only profess to ascertain what it is."). But cf. An act adopting the common law of England, 1796 Vt. Laws 4, 4 (explaining a reception provision as an effort "at once to provide a system of maxims and precedents" to guide the state's courts); An Act, repealing a part of the act entitled "An Act, declaring what laws shall be in force in this state," 1806 Ohio Laws 35, 35 (repealing a prior statute receiving "the common law of England," perhaps because Ohio legislators identified that law with English decisions they disliked).

At the very least, it seems clear that Americans of the late eighteenth century did not equate the common law with *individual* judicial decisions. Cf. infra notes 124–26 and accompanying text (discussing the role of a *series* of decisions); see also R. Randall Bridwell, Theme v. Reality in American Legal History, 53 Ind. L.J. 449, 462–65 (1978) (book review) (describing how judicial decisions about the existence of a particular custom could accumulate to the point that they were taken as conclusive evidence of the custom, but stressing that the courts still were not considered the "ultimate source" of the resulting common-law rule).

2. Stare Decisis *in the Common Law*

a. "A Principle . . . Which Corrects All Errors and Rectifies All Mistakes"

To the extent that common-law rules were thought to have external sources, we should not assume that all common lawyers placed great weight on *stare decisis*. To the contrary, some of the commentators who emphasized the external sources of the common law did so precisely to explain why a state's courts were *not* bound to follow English precedents despite the state's reception of "the common law of England."

In 1792, for instance, Vermont Chief Justice Nathaniel Chipman wrote a detailed essay analyzing Vermont's reception statute, which adopted "so much of the common law of England, as is not repugnant to the Constitution, or to any act of the Legislature of this State."[89] This statute, Chipman emphasized, did not require Vermont courts to follow English precedents that were irrational.[90] Quoting Lord Mansfield, Chipman argued that even English courts were supposed to treat precedents only as "illustrat[ing]" and "giv[ing] . . . a fixed certainty" to the "principles" on which the common law truly depended.[91] According to Chipman, those principles "are the true principles of right, so far as discoverable."[92]

To the extent that the true principles of the common law could be derived by reason, it was possible for judicial decisions to be demonstrably erroneous. Indeed, Chipman suggested that many English precedents *were* erroneous. Some had been wrong from the start, having been "made . . . in an age when the minds of men were fettered in forms" and "clouds . . . hung over the reasoning faculties."[93] Others may have made sense at one time, but depended upon circumstances that had since changed.[94] As various rights and principles "were investigated, and better understood,"

---

[89] An Act Adopting the Common and Statute Law of England, 1782 Vt. Laws 3, 3 (June session).

[90] See Nathaniel Chipman, A Dissertation on the Act Adopting the Common and Statute Laws of England, *in* N. Chip. 117, 123–39 (Vt. 1793).

[91] Id. at 136–37 (quoting Jones v. Randall, 98 Eng. Rep. 954, 955 (K.B. 1774)).

[92] Id. at 135.

[93] Id. at 124–26.

[94] See id.

English courts had overruled some of their erroneous precedents.[95] But the eradication of error had been far from complete: English courts had failed to recognize some of their past mistakes, and other erroneous decisions had already generated "rule[s] of property" that insulated them from reversal in England.[96] Still other English precedents might be perfectly valid as applied to England, but did not accord with Vermont's circumstances or the republican nature of Vermont's government.[97]

Notwithstanding the Vermont legislature's adoption of "the common law of England," Chipman maintained that Vermont courts were not bound by such precedents. "[I]nstead of entertaining a blind veneration for ancient rules, maxims and precedents," Chipman urged Vermont courts "to distinguish between those, which are founded on the principles of human nature in society, which are permanent and universal," and those which were erroneous or reflected circumstances unique to England.[98] To the extent that English precedents conflicted with the "principles and reasons, which arise out of the present state," the presumption favored discarding the precedents; Vermont courts should follow them only if they had already been "adopted in practice" and had therefore given rise to rules of property in Vermont.[99]

Chipman's other writings suggest that he did not limit this analysis to *English* precedents. In the preface to his published reports of Vermont decisions (which appeared at a time when books of American decisions were quite unusual[100]), Chipman explained why

---

[95] Id. at 126.

[96] Id. at 124, 126–27; see also supra note 62 and accompanying text (discussing "rules of property" and the protection of reliance interests).

[97] See Chipman, supra note 90, at 137–38.

[98] Id. at 129 n.*, 137–38.

[99] Id. at 128–29; accord, e.g., Rhodes v. Risley, N. Chip. 84 (Vt. 1791).

[100] America did not have any indigenous volumes of case reports until 1789, when both Ephraim Kirby's *Connecticut Reports* and Francis Hopkinson's *Judgments in Admiralty in Pennsylvania* appeared. See Erwin C. Surrency, Law Reports in the United States, 25 Am. J. Legal Hist. 48, 53 (1981). In the fifteen years after these two books appeared, only a handful of other reports were published. Not until the nineteenth century did any state have an official reporter or subsidize the publication of its case reports. See Aumann, supra note 87, at 340; see also, e.g., Letter from James Kent to Thomas Washington (1828?), *excerpted in* William Kent, Memoirs and Letters of James Kent, LL.D. 116 (Boston, Little Brown & Co. 1898) (recalling that when appointed to the New York bench in 1798, "I never dreamed of volumes of reports" because "[s]uch things were not then thought of"). In many states, indeed, judges did

case reports were valuable. He stressed that case reports help courts preserve "what is right in their decisions." But he also emphasized that case reports help courts identify and overrule "what is wrong." As Chipman explained, the publication of reports "may enable [judges] to correct their former errors, and at leisure to discover those principles of Justice, and the exceptions and limitations of each, which might have escaped their utmost sagacity in the hurry of the circuit."[101]

Zephaniah Swift believed in a similar type of error-correction. To be sure, Swift saw considerable room for *stare decisis* to operate; he endorsed the notion that "when a court ha[s] solemnly and deliberately decided any question or point of law, that adjudication bec[omes] a precedent in all cases of a similar nature, and operate[s] with the force and authority of a law."[102] But Swift's emphasis on *stare decisis* simply reflected his view that the external sources of the common law did not themselves answer all questions.[103] Swift did *not* expect courts presumptively to adhere to decisions that were demonstrably erroneous. To the contrary, courts were free to depart from a common-law decision if it "has been founded upon mistaken principles."[104] Borrowing from Blackstone, Swift added that in such cases, the overruling courts "do not determine the prior decisions to be bad law; but that they are not law."[105] Swift then gave Blackstone a telling gloss: "Thus in the very nature of

---

not even issue written opinions in most cases. See id. at 117; see also William Johnson, Preface, *in* 1 Johns. Cas. iii, iii (N.Y. 1808) (noting that Johnson's first volume of New York reports began with decisions from 1799 "because, except in a few cases . . . , sufficient materials could not be obtained for an authentic and satisfactory account of the decisions prior to that time").

[101] Nathaniel Chipman, Preface to the Reports, *in* N. Chip. 4, 4–5 (Vt. 1793).

[102] 1 Swift, supra note 64, at 40.

[103] See supra text accompanying notes 69–73 (describing Swift's view of the common law).

[104] 1 Swift, supra note 64, at 41. Swift indicated that past decisions should also be overruled if they conflicted with the *internal* sources of the law. See id. (discussing decisions that were "repugnant to the general tenor of the law"). Even if a precedent was not erroneous in this sense—that is, even if it did not conflict with either the external or the internal sources of the law—Swift added that it could be overruled if "the rule adopted by it be inconvenient." Id. Thus, while the presumption favored adhering to precedents in the absence of demonstrated error, this presumption could be overcome by practical considerations.

[105] Id.; cf. 1 William Blackstone, Commentaries on the Laws of England *69–70 (1765) (using this language to refer to decisions that are "manifestly absurd or unjust").

the institution [of precedent], is a principle established which *corrects all errors and rectifies all mistakes*."[106]

Based partly on this passage, Morton Horwitz asserts that "Swift . . . came as close as any jurist of the age to maintaining that law is what courts say it is."[107] But Swift himself would surely have rejected this suggestion. In Swift's view, judges were free to overrule past decisions precisely because the common law was *not* just what courts said it was; it rested in part on principles that stood independent of past decisions, and judicial decisions could be tested against those principles.[108]

Other jurists of the day shared this conception of the unwritten law. Jacob Radcliff of the Supreme Court of New York, for instance, agreed with Swift and Chipman that common-law decisions could be erroneous, and he suggested that erroneous decisions should not be followed unless overruling them would have a "retrospective influence" or "affect pre-existing rights."[109] Radcliff explained that if courts gave "binding force" to decisions that were "founded on mistake," then "error might be continued, or heaped on error."[110] Radcliff could not imagine that such a system would be sustainable; eventually, "the common sense of mankind[] and the necessity of the case" would "oblige us to return to first principles, and abandon precedents."[111] Edmund Pendleton of the Virginia Court of Appeals agreed that if "in any instance" the Court were to "discover a mistake in a former decision," and if the Court were to do so before there had been time for reliance interests to develop, "we should surely correct it, and not let the error go forth to our citizens, as a governing rule of their conduct."[112]

---

[106] 1 Swift, supra note 64, at 41 (emphasis added).

[107] Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 25 (1977).

[108] Cf. Bridwell, supra note 88, at 468 ("The fundamental error in Horwitz's analysis lies in confusing the terms 'precedent' and 'law,' and a consequent failure logically to pursue the ramifications of maintaining a once well-understood distinction between the two in analyzing early cases.").

[109] Silva v. Low, 1 Johns. Cas. 184, 190 (N.Y. Sup. Ct. 1799) (opinion of Radcliff, J.).

[110] Id. at 191.

[111] Id; cf. Horwitz, supra note 107, at 26 (discussing this passage).

[112] Jollife v. Hite, 5 Va. (1 Call) 301, 328 (1798) (opinion of Pendleton, P.J.). *Jollife* happened to be an appeal from a decree in equity, but Pendleton's formulation covers actions at law too. The same is true of Cadwallader v. Mason, Wythe 188, 189 (Va. High Ct. Ch. 1793) ("[T]o a decision, by any court, which results not, by fair deduc-

b. The Role of Precedent

Of course, the courts' willingness to overrule erroneous decisions hardly means that precedents had no influence. Just as precedents could "liquidate" the meaning of ambiguous provisions in the written law, so they could resolve questions that the external sources of the unwritten law did not settle. As Part I predicts, the less completely people thought that the external sources of law addressed a particular area, the more emphasis people put on precedents in that area.

Consider, for instance, the technical rules of pleading and practice. As we have seen, many jurists did not think that the unwritten law's foundational principles had dictated particular rules of procedure; appropriate rules had instead been built up by the custom of the courts.[113] These customary rules might be arbitrary, in the sense that different rules could equally well have been developed. For the most part, however, courts tended to think that the existing customs fell within an acceptable range; they did not conflict with any discoverable principles, and hence could not be labeled demonstrably erroneous. On technical questions of pleading and practice, then, courts frequently followed precedents even when they would have chosen a different rule as an original matter.[114] Indeed, one meaning of the word "precedent" was a form of pleading that courts had found acceptable in the past.[115]

---

tion, from the principles alleged to warrant it, the authority of a precedent, which ought to govern in like cases is denied.").

[113] See supra notes 68 and 74 and accompanying text.

[114] See, e.g., Waldron v. Hopper, 1 N.J.L. 339, 340 (1795) (opinion of Kinsey, C.J.); State v. Carter, 1 N.C. (Cam. & Nor.) 210, 212 (Ct. Conf. 1801) (opinion of Johnston, J.); Cooke v. Simms, 6 Va. (2 Call) 39, 48 (1799); Cabell v. Hardwick, 5 Va. (1 Call) 345, 355 (1798) (opinion of Fleming, J.); Hill v. Pride, 8 Va. (4 Call) 107, 108 (Gen. Ct. 1787) (opinion of Lyons, J.). Even in later years, lawyers still cast their arguments for adherence to precedents in these terms. See, e.g., Wakeman v. Banks, 2 Conn. 445, 461 (1818) (Gould, J., dissenting) (noting that the lawyers who were advocating adherence to a particular precedent had sought to cast the relevant question as "a point of *practice*, which might be settled, indifferently, either way").

This is not to say that the forms of pleading remained completely stable throughout the years. Although courts presumptively adhered to precedents that were not demonstrably erroneous, courts might be able to identify special reasons for departing from such precedents. See supra note 104. Statutory reforms also played a role in changing the forms of pleading. Cf. Nelson, supra note 24, at 77–88 (describing how the writ system in Massachusetts broke down).

[115] See Thomas Walter Williams, A Compendious and Comprehensive Law Dictionary (London, Gale & Fenner 1816) (unpaginated, definition of "precedents") (noting

Some judges discussed the influence of past cases in precisely these terms. In one case before the Supreme Court of New Jersey, a man's will had directed that a particular female slave was "to be sold . . . for the term of fifteen years, and at the end of that term to be free."[116] The woman had a son during the fifteen-year period, and her owner claimed the son as a slave. In support of this claim, the owner cited some cases about legacies. But the Court rejected this argument, pointing out that the "arbitrary" rules reflected in those cases were "inapplicable to this case of personal liberty."[117]

Discussions of the law of evidence neatly reflect the correlation between the role of precedents and people's views about the comprehensiveness of the law's external sources. While Zephaniah Swift thought that "[t]he rules of evidence are of an artificial texture" and are "not capable in all cases of being founded on abstract principles of justice,"[118] Spencer Roane insisted that "[t]here is no subject or doctrine of our law . . . which is more a system of right reason, depending upon just inference and deduction by enlightened minds from plain and self evident principles."[119] When convinced that prior decisions about evidence law conflicted with those discoverable principles, Roane seemed willing to disregard the past decisions.[120] Judges who shared Swift's view, by contrast, often treated precedents as conclusive on questions of evidence.[121]

---

that "[t]here are also *precedents* or *forms* for conveyances, and pleadings in the courts of law, which are to be followed, and are of great authority"); see also, e.g., Ward v. Clark, 2 Johns. 10, 12 (N.Y. Sup. Ct. 1806) (referring to *Morgan's Precedents*, a book of templates that lawyers could copy in drafting pleadings for a variety of different actions).

[116] State v. Anderson, 1 N.J.L. 36, 36 (1790).

[117] Id. at 37.

[118] Zephaniah Swift, A Digest of the Law of Evidence, in Civil and Criminal Cases xi (Hartford, Oliver D. Cook 1810).

[119] Baring v. Reeder, 11 Va. (1 Hen. & M.) 154, 161 (1806).

[120] See id. at 163 (expressing a willingness to correct "the errors of former times").

[121] See, e.g., Church v. Leavenworth, 4 Day 274, 280 (Conn. 1810) (Swift, C.J.) (adhering to an established rule about the admissibility of evidence, lest "all principles [be] again thrown afloat on the ocean of uncertainty, without any compass but the discretion of the judge"); State v. Lyon, 1 N.J.L. 403, 406–07 (1789) (noting that a defendant's motion to exclude oral testimony raised no great principles—"[t]he objections that have been urged apply wholly to the convenience of the judges"—and then deciding to follow past practice and receive the testimony); see also Swift, supra note 118, at x (explaining that his evidence treatise included "some of the most important cases that have been reported" because "it will often be necessary to recur to the original cases, to ascertain the tendency and bearing of general rules, and to facilitate

Aside from their influence on questions that the external sources of the unwritten law were not thought to answer, precedents also enjoyed a second type of influence. Even where the external sources of the unwritten law *were* thought to provide answers, current courts were not supposed to be arrogant, or to assume that they were always better acquainted with those sources than their predecessors had been. To the contrary, the views of respected past judges or other learned commentators were entitled to some respect. To the extent that the principles of the unwritten law could be derived by reason, later judges might trust the logic of Lord Mansfield more than their own.[122] Likewise, to the extent that the unwritten law rested on customs adopted throughout the mercantile world (or in some smaller community), past decisions by people familiar with the relevant customs constituted good evidence of what those customs were.[123]

This was particularly true when a long line of decisions had all reached the same conclusion. If a series of judges had all deemed something to be a "correct" statement of the unwritten law, a later judge who doubted the statement ought to be modest enough to question his own position. According to many courts, then, a series of decisions could settle the law in a way that individual judges

---

their application"); cf. Gorgerat v. M'Carty, 1 Yeates 94, 100 (Pa. 1792) (opinion of Bradford, J.) ("This is not a question of general law, but a question of evidence, which must always be regulated by the particular rules of that tribunal to which a plaintiff applies himself for relief.").

[122] See, e.g., Comm'rs of the Treasury v. Brevard, 3 S.C.L. (1 Brev.) 11, 13 (1794) ("I do not feel myself at liberty to contradict the opinion of a judge of so much wisdom and liberality as Lord Mansfield, who . . . ever was careful to examine exceptions which seemed more nice than useful, and bring them to the test of reason and sound sense. He has decided that a variance like the present is fatal; and his reasoning seems to be conclusive."); cf. Kempin, supra note 16, at 38 (noting that in early Maryland decisions, "the citation of cases appears to rest as much on the authority of the particular judge as on the decision itself").

[123] In keeping with the logic behind this principle, the circle of people whose decisions were entitled to respect extended well beyond judges. See, e.g., Parker v. Kennedy, 1 S.C.L. (1 Bay) 398, 414 (1795) (Waties, J., dissenting) (invoking a past jury verdict as "a respectable authority" on a commercial question, because the jury had included "some of the best informed and most judicious merchants in this city"); see also Tims v. Potter, 1 N.C. (Mart.) 22, 24 (Super. Ct. 178_) (opinion of Ashe, J.) (mentioning the judgment of "professional[s]" in the same breath as "judicial opinions formerly given"); Gorgerat v. M'Carty, 1 Yeates 94, 97 (Pa. 1792) (opinion of Yeates, J.) (emphasizing that "the latest writers on the law of bills of exchange" recognized a particular case as being part of the law).

would not dare to reject.[124] Yet even this phenomenon is not quite the same thing as a presumption against overruling erroneous precedents. The influence of a series of decisions did not rest on the notion that judges should presumptively adhere to past decisions even when convinced of their error, but rather on the notion that judges should be exceedingly hesitant to find error where a series of their predecessors had all agreed.[125]

---

[124] See, e.g., Fisher v. Morgan, 1 N.J.L. 125, 126–27 (1792) (referring to "the law as it has long been established," and expressing a need to follow "settled principles" rather than "our individual ideas of justice and fitness"); Le Roy v. Servis, 1 Cai. Cas. iii, vii (N.Y. 1801) (indicating that "a series of uniform decisions" could bind down the law "in a manner not to be shaken," though finding this principle inapplicable to the issue at hand because "[t]he cases on this question are contradictory"); Reports of Cases Argued and Determined in the Superior Courts of Law in the State of South Carolina, Since the Revolution 12 (Elihu Hall Bay 2d ed., 1809) (editor's note appended to White v. M'Neily, 1 S.C.L. (1 Bay) 11 (1784)) ("This case has been relied upon ever since [its decision], and the principle . . . has been sanctioned by the judges, as a correct and just one in all similar cases, down to the present day. It may, therefore, be considered as part of the common law of *South-Carolina*."); id. at 235 (appending a similar note to Johnston v. Dilliard, 1 S.C.L. (1 Bay) 232, 235 (1792)); cf. George M. Bibb, Introduction, *in* 4 Ky. (1 Bibb) 15, 16 (1815) (suggesting that each individual decision is but a "fact," and that it requires "multiplication of facts" to produce "precedents"); see generally Kempin, supra note 16, at 30 (distinguishing between reliance upon "the accumulated experience of the courts," which was common in late eighteenth-century opinions, and the use of a single precedent as binding authority, which was not so common). But see Young v. Erwin, 2 N.C. (1 Hayw.) 323, 327 (Super. Ct. 1796) (argument of counsel) (asserting that courts can reconsider "even a series of decisions," and noting "how that which hath been supposed to be the common law in a great variety of points, hath undergone successive changes by subsequent determination, founded . . . upon better reasons"); 1 James Kent, Commentaries on American Law 444 (N.Y., O. Halsted 1826) ("Even a series of decisions are not always conclusive evidence of what is law . . . .").

[125] See, e.g., Fitch v. Brainerd, 2 Day 163, 176 (Conn. 1805) (argument of counsel) ("The precedent . . . will have its due weight, in proportion to the soundness of the reasons, on which it was founded, and the number and respectability of the judges, who acted upon it."); see also Burton v. Kellum, 1 Del. Cas. 83, 84 (C.P. 1795) ("If this plea is wrong, the courts have been [wrong] five hundred times since my remembrance, for I think I have known [the plea] put in that many times."); State v. Carter, 1 N.C. (Cam. & Nor.) 210, 212 (Ct. Conf. 1801) (opinion of Johnston, J.) (following "all the authorities," for "I am not disposed to give a judgment which might appear in any respect to run counter to the opinion of the most learned and respectable judges, who have written or decided in like cases"). As a practical matter, of course, if "[a] long course of uniform decisions" had put a particular principle on such firm ground that no current judge would dare to question its validity, it was "very unimportant" whether courts thought of themselves as "follow[ing] the precedents, or the principle which they establish." *Fitch*, 2 Day at 177 (argument of counsel).

Indeed, the respect that courts accorded to a series of past decisions was premised on the understanding that judges would *not* presumptively adhere to a decision that they were convinced was erroneous. The reason people trusted a series of decisions more than an individual judge's opinion was that the series reflected a *collective* judgment. This logic, in turn, assumes that the judges in the series did not follow their predecessors' views blindly, but instead conducted independent analyses. After all, if each judge in the series had felt bound by the first decision on the issue, then there would have been no difference between a series of decisions and an isolated precedent; the chance that the series was correct would be identical to the chance that the first decision was correct. A uniform series of decisions was particularly strong evidence of the correctness of a particular rule *precisely because* the judges in the series would have overruled decisions that they deemed demonstrably erroneous.[126]

Precedents did enjoy one type of influence that applied even when current courts were convinced of their error. In the unwritten law as in the written law, courts gave great weight to precedents that had established "rules of property" or had otherwise generated commercial reliance interests.[127] Chief Justice McKean of the

---

[126] In keeping with this point, when judges in late eighteenth-century America invoked isolated past decisions, they frequently saw fit to add that they had reconsidered those decisions and continued to think that they were correct. See, e.g., Miller v. Spreeher, 2 Yeates 162, 163 (Pa. 1796) ("The same point was determined in this court some years ago between *Baron* v. *Hoare*, and we see no reason for adopting a different decision in the present case."); Evans v. Jones, 1 Yeates 172, 173 (Pa. 1792) ("We still adhere to that opinion."); Horde v. M'Roberts, 5 Va. (1 Call) 337, 337 (1798) ("This case stands upon the same ground as that of Kennon v. M'Roberts. The Court have revised and considered that decision; and, unanimously approve it.").

[127] See, e.g., Welles v. Olcott, Kirby 118 (Conn. Super. Ct. 1786) (following two precedents on construction of wills and noting that "[u]niformity of decision is to be preserved"); Evans v. Gifford, 1 N.J.L. 197, 198 (1793) (following precedent in enforcing an informal instrument of conveyance); Ruston v. Ruston, 2 Yeates 54, 69 (Pa. 1796) (opinion of Smith, J.) (asserting that where usage or judicial decisions have made English laws "the land marks of property," a judge "is bound by them, although he would not in the first instance have adjudged them applicable to us"); Fuller v. M'Call, 1 Yeates 464, 470 (Pa. 1795) (following precedents in insurance law); Syme v. Butler, 5 Va. (1 Call) 105, 111–12 (1797) (opinion of Fleming, J.) (following precedent in contract law); see also Lee, supra note 22, at 688–90 (discussing English cases to the same effect); cf. Hynes v. Lewis's Ex'rs, 1 N.C. (Tay.) 44 (Super. Ct. 1799) (postponing decision during the illness of one judge, "in order that a case which is likely to

Pennsylvania Supreme Court explained that even if the decisions were "originally founded on fallacious grounds," changing course could sometimes cause "greater injury to society" than simply adhering to the error; "[i]t is not of so much consequence what the rules of property are, as that they should be settled and known."[128] Again, however, the importance of precedents that had generated "rules of property" does not reflect any general presumption against overruling erroneous decisions. At most, the importance of "rules of property" merely shows that the presumption in favor of *correcting* past errors was rebuttable: Courts would adhere to erroneous decisions when reliance interests provided a special reason to do so.[129] This use of precedent is perfectly consistent with the theory set forth in Part I.

3. Stare Decisis *as a Constraint on the Discretion of Common-Law Judges*

The basic framework for *stare decisis* in the unwritten law remained similar as the antebellum period wore on. But the *application* of that framework changed, because people started to

---

settle an important rule of property may be decided with all the advantage it can derive from a more deliberate examination").

[128] Lessee of Haines v. Witmer, 2 Yeates 400, 405 (Pa. 1798). Indeed, several early reporters saw the protection of rules of property and commercial reliance interests as one of the principal reasons to publish case reports. See, e.g., Ephraim Kirby, Preface, *in* Kirby iii, iii (Conn. Super. Ct. 1789) (asserting that the lack of reports in Connecticut had caused "a confusion in the determination of our courts;—the rules of property became uncertain, and litigation proportionably increased").

[129] On one view, indeed, following common-law precedents that had generated "rules of property" did not involve adhering to error at all. For judges who agreed with Jesse Root that the unwritten law governing property and business transactions rested largely on the usages and customs of the people, see supra text accompanying note 76, a decision that was wrong when rendered could become correct by the time courts reconsidered it. Even if the legal rule announced by the decision had not accurately reflected the customs and usages that prevailed when the decision was rendered, people might alter their practices in reliance on the decision. If that happened, the decision would be a self-fulfilling prophecy; by the time the courts reconsidered the decision, it would accurately reflect the relevant community's customs and usages, which courts were supposed to enforce. To the extent that the decision really had generated a "rule of property," then, it would no longer be erroneous.

This argument, however, does not explain why courts respected "rules of property" in the *written* law. See supra note 62 and accompanying text. Accordingly, it may be simpler to think of reliance as something that could provide a special reason for letting a past error stand.

change their views of the unwritten law itself. The less determinate the unwritten law's external sources were thought to be, the more questions were governed by *stare decisis*.

Some radical reformers denied that the common law had any external sources at all. In the 1810s, the most prominent of these reformers was the English utilitarian philosopher Jeremy Bentham, who wrote the American people a series of open letters attacking orthodox views of the common law. Bentham charged that whenever a common-law case comes up for decision, the judge either "makes for the purpose a piece of law of his own" or "adopts, and employs for his justification, a piece of law already made . . . by some other Judge or Judges."[130]

A loose-knit group of American reformers was soon expressing similar views.[131] In a celebrated 1823 speech, William Sampson argued that the "mummery" reflected in traditional claims about the sources of the common law was "out of date."[132] Instead of pretending that judges discovered the common law, the time had come to "lay[] aside the veil of mystery" and acknowledge the law to be "a human, not a preternatural institution."[133] Sampson's allies bluntly asserted that "the whole of the common law is the mere creature of judicial legislation."[134]

---

[130] Jeremy Bentham, Supplement to Papers Relative to Codification and Public Instruction 105–08 (London, J. McCreery 1817); see also Samuel Romilly, Review of Bentham's *Papers Relative to Codification*, 29 Edinburgh Rev. 217, 223 (1817) (agreeing that in common-law cases, "the Judges, though called only expounders of law, are in reality legislators").

[131] For a detailed discussion of attacks on the common law during this period, see Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (1981). For commentary on the broader historical context of these calls for law reform, see Robert W. Gordon, Book Review, 36 Vand. L. Rev. 431, 436–41 (1983).

[132] William Sampson, An Anniversary Discourse, Delivered before the Historical Society of New York, on Saturday, December 6, 1823; Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law, *in* Sampson's Discourse and Correspondence with Various Learned Jurists, upon the History of the Law, with the Addition of Several Essays, Tracts, and Documents, Relating to the Subject 1, 10 (Pishey Thompson ed., Wash., Gates & Seaton 1826) [hereinafter Sampson's Discourse].

[133] Id. at 6.

[134] Letter from Thomas Cooper to William Sampson (undated), *in* Sampson's Discourse, supra note 132, at 69; accord, e.g., Letter from Gov. John L. Wilson to William Sampson (Aug. 24, 1825), *in* Sampson's Discourse, supra note 132, at 103.

According to these critics, the indeterminacy of the common law's external sources left each judge free to indulge an arbitrary discretion. In an 1836 speech, Robert Rantoul decried the common law as the "will or whim of the judge," and declared that it "does not exist even in the breast of the judge" until the moment of decision.[135] Edward Livingston added that common-law decisions were continually shaped "by the caprice, or the bigotry, or the enthusiasm of the judge."[136]

Mainstream commentators disagreed. Throughout the antebellum period, it remained common to speak of judges as "professors of a science,"[137] who exercised "no will" of their own[138] and were "without discretion."[139] But in explaining why this was so, the mainstream legal community put increasing emphasis on the restraining force of past judicial decisions; as people lost some of their faith in the determinacy or comprehensiveness of the common law's external sources, its *internal* sources became correspondingly more central.[140] Indeed, what was meant by legal science itself began to

---

[135] Robert Rantoul, Jr., Oration at Scituate (July 4, 1836), *in* Memoirs, Speeches and Writings of Robert Rantoul, Jr. 251, 280 (Luther Hamilton ed., Boston, John P. Jewett and Co. 1854); accord, e.g., Edward Livingston et al., To the Honorable the Senate and House of Representatives of the State of Louisiana 8 (New Orleans, J.C. de St. Romes 1823) (denying that the common law exists before any judge "creates and applies" it).

[136] Edward Livingston, A System of Penal Law for the State of Louisiana 56 (Phil., James Kay, Jr. & Brother 1833).

[137] 2 Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts 768 (Boston, White & Porter 1853) (remarks of Richard Dana, Jr.).

[138] Id. at 766.

[139] Henry A. Boardman, The Federal Judiciary 16 (Phil., William S. & Alfred Martien 1862); see generally White, supra note 26, at 82–105, 144–54 (tracing views of legal science in the antebellum period); see also Caleb Nelson, A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 Am. J. Legal Hist. 190, 210–15 (1993) (discussing the dominance of the "scientific" view of law on both sides of antebellum debates about whether judges should be elected).

[140] For an illustration of this shift in emphasis, consider the writings of Zephaniah Swift. His 1795 treatise about Connecticut's "system of laws" puts noticeably more stress on the external sources of the common law than the revised version of the treatise that he published in 1822. Compare, e.g., 1 Swift, supra note 64, at 44 (asserting that if Connecticut courts confront a question that they have not yet analyzed, and if the English rule on the subject is not "reasonable and applicable," they must "decide the question on such principles, as result from the general policy of our code of jurisprudence, and which are conformable to reason and justice"), with 1 Zephaniah Swift,

become less deductive and more inductive:[141] The primary objects of its study became the current of past decisions and the principles that could be derived from them.[142]

Mainstream lawyers in antebellum America still spoke of the common law as having some external sources. As Chief Justice Lemuel Shaw of Massachusetts asserted in 1854, its principles were "founded on reason, natural justice, and enlightened public policy."[143] These "general considerations," however, were "too vague and uncertain for practical purposes" to provide determinate answers in all of "the various and complicated cases" that arose each day.[144] Even the usage of the community did not always isolate a single right answer. What really made the common law's general principles "precise, specific, and adapted to practical use" was "judicial precedent"—which Shaw defined as "judicial exposition" that had been "well settled and acquiesced in."[145]

Shaw conceded that cases would arise for which no settled principles were directly on point. While courts in such cases "must be governed by the general principle[] applicable to cases most nearly analogous," they would have to "modif[y] and adapt[]" it for application to the new circumstances, and there might be some doubt

---

A Digest of the Laws of the State of Connecticut 9–10 (New Haven, S. Converse 1822) [hereinafter Swift, Digest] ("When cases occur, that are new, *primæ impressionis*, judges must resort to the principles of analogous cases for their determination.").

[141] For a recent discussion of changing notions of legal "science," see Howard Schweber, The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education, 17 Law & Hist. Rev. 421 (1999).

[142] The increasingly inductive approach to the common law eventually led to the "case method" of legal education, pioneered by Christopher Columbus Langdell in 1870. Compare, e.g., Bates v. Relyea, 23 Wend. 336, 341 (N.Y. Sup. Ct. 1840) (asserting that court decisions are "the same to the science of law, as a convincing series of experiments is to any other branch of inductive philosophy"), with Eugene Wambaugh, Professor Langdell—A View of His Career, 20 Harv. L. Rev. 1, 2 (1906) (calling Langdell's plan "an extremely early attempt to apply the inductive method of the laboratory to matters foreign to the natural sciences"). See also Thomas C. Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1, 16–21 (1983) (analogizing Langdell's view of legal science to late nineteenth-century views of geometry, which treated axioms "as especially well-confirmed inductive generalizations about the physical world").

[143] Norway Plains Co. v. Boston & Me. R.R., 67 Mass. (1 Gray) 263, 267 (1854); see also id. (asserting that the common law "has its foundations in the principles of equity, natural justice, and that general convenience which is public policy").

[144] Id.

[145] Id.

about how to do so.[146] Still, any "controversy and litigation" would soon die down, as the new questions—like previous ones—"come to be settled by judicial exposition."[147] Thus, Shaw put great emphasis on the capacity of precedents to liquidate unsettled areas of the common law.

Joseph Story expressed similar views. He continued to speak of "natural justice" and "natural reason" as forming the "basis" of much of the common law;[148] in a variety of speeches and articles, he celebrated great jurists of the past who had rejected unsystematic thinking and had recognized principles that put various areas of the law on "the foundation of reason and justice."[149] But even after these "general principles" had been recognized, courts still had to decide how to *apply* them to "the circumstances of particular cases,"[150] and these questions of application would always produce "immeasurable uncertainties."[151] Like Shaw, Story relied upon

---

[146] Id. at 267–68.

[147] Id. at 268; see also, e.g., Claflin v. Wilcox, 18 Vt. 605, 610–13 (1846) (discussing the "exposition of the common law" in decided cases, and suggesting that governing rules emerge as "the principle evolved from all the cases").

[148] E.g., Report of the Commissioners Appointed to Consider and Report upon the Practicability and Expediency of Reducing to a Written and Systematic Code the Common Law of Massachusetts, or Any Part Thereof 9 (Boston, Dutton & Wentworth 1837) [hereinafter Story Commission Report] (asserting that "the principles of natural justice . . . constitute the basis of much of the common law"); Joseph Story, The Value and Importance of Legal Studies (speech delivered Aug. 25, 1829), *reprinted in* The Miscellaneous Writings of Joseph Story 503, 524 (William W. Story ed., Boston, Charles C. Little & James Brown 1852) (describing the common law as "a system having its foundations in natural reason").

[149] Joseph Story, An Address Delivered Before the Members of the Suffolk Bar (Sept. 4, 1821), *reprinted in* 1 Am. Jurist 1, 6 (1829) [hereinafter Story, Address] (discussing Lord Holt's contributions to commercial law); see also, e.g., id. at 7 (praising Lord Mansfield for articulating doctrines that cause contracts to "be expounded upon the eternal principles of right and wrong"); Joseph Story, Course of Legal Study, 6 N. Am. Rev. 7 (1817) (book review), *reprinted in* The Miscellaneous Writings of Joseph Story, supra note 148, at 67 (similar) [hereinafter Story, Course of Legal Study]; Story, Law, Legislation, and Codes, supra note 24, at 330 (asserting that during the period of Holt and Mansfield, many doctrines were "reduc[ed] . . . to systematical accuracy, by rejecting anomalies, and defining and limiting their application by the test of general reasoning").

[150] Story Commission Report, supra note 148, at 21. I am grateful to G. Edward White for focusing my attention on this point.

[151] Story, Course of Legal Study, supra note 149, at 70–71; see also Story Commission Report, supra note 148, at 21–22 (noting that the settled principles of the common law "are rather recognized than promulgated in our courts of justice," but that the settled *applications* of those principles to particular cases "can rarely be as-

court decisions to resolve those uncertainties and liquidate the law. Once courts had fully settled how to apply a recognized principle in a particular context, the doctrine became an "established" part of the common law, and judges were not free to reject it "to suit their own views of convenience or policy."[152]

Story explicitly linked this rule with the need to "control[] the arbitrary discretion of judges."[153] If judges were not "hemmed round by authority," cases might be decided according to "the peculiar opinions and complexional reasoning of a particular judge."[154] As it was, however, "'the progress of jurisprudence'" could be seen as "'withdrawing every case, as it arises, from the dangerous power of discretion'" and "'gradually contracting within the narrowest possible limits the domain of brutal force and of arbitrary will.'"[155] Even in new cases, the need for judges to derive the governing principles "from other analogies of the law" imposed a "very strong restraint[] upon the judgment of any single judge."[156]

In sum, the common law's internal sources picked up the slack left by the indeterminacy or incompleteness of its external sources. The less confidence people had in the ability of the law's external sources to point out the judges' duty in particular cases, the more they emphasized *stare decisis* as a way to avoid fluctuations in the governing rules. Indeed, a commission that Story chaired in 1836 went so far as to suggest that "[t]he whole of the judicial institutions in England and America rest upon [*stare decisis*] as their only solid foundation."[157] As the Supreme Court of Pennsylvania de-

---

certained with perfect exactness from any other sources [than judicial decisions]"); cf. 1 Swift, Digest, supra note 140, at 3 ("Though the general rules may be so well ascertained, that there will be little doubt, or uncertainty concerning them in the abstract; yet so infinite is the diversity of shades in cases nearly resembling each other, that the application of them in particular instances, may be a matter of great nicety and difficulty.").

[152] Story Commission Report, supra note 148, at 28.

[153] Story, Law, Legislation, and Codes, supra note 24, at 359.

[154] Id.

[155] Story, Address, supra note 149, at 33 (quoting Sir James Mackintosh, A Discourse on the Study of the Law of Nature and Nations 57 (1799)); cf. Story Commission Report, supra note 148, at 15 (noting the Continental tradition of using the term "jurisprudence" to refer to applications of settled principles to particular circumstances).

[156] Story, Law, Legislation, and Codes, supra note 24, at 359.

[157] Story Commission Report, supra note 148, at 29; cf. White, supra note 26, at 151 ("By the 1830s Story had come to identify the common law, and even American law

clared in 1853, without *stare decisis* "we are without a standard altogether," and the law would depend "on the caprice of those who may happen to administer it."[158]

To be sure, the "mere blunders" of prior courts should not be consecrated.[159] To the extent that a past decision was demonstrably erroneous, courts continued to assume that it should ordinarily be overruled.[160] As one of Chief Justice Shaw's predecessors put it, "when a whole bench shall be unanimous in their opinion, that any former decision of their own, or of others, is wrong; the duty is as imperative to overrule it, as it is to adhere, where there may only be doubts of its correctness."[161] The Ohio Supreme Court agreed that "[i]nfallibility is to be conceded to no human tribunal," and that "[a] legal principle, to be well settled, must be founded on *sound reason*, and tend to the *purposes of justice*."[162]

But where those external sources of law left off, *stare decisis* was essential to prevent judges from manufacturing variable rules "out of [their] own private feelings and opinions."[163] The external

---

generally, with judicial declarations."); see also, e.g., Palmer's Adm'rs v. Mead, 7 Conn. 149, 158 (1828) (assuming that without *stare decisis*, each successive bench would enshrine its own "opinion[s]," and a never-ending cycle of reversals would result); Francis Hilliard, The Elements of Law 2 (Boston, Hilliard, Gray & Co. 1835) (asserting that if common-law decisions did not form binding precedents, "there could in fact be no such thing as law, [and] the rights and obligations of individuals must be involved in absolute confusion and uncertainty").

[158] McDowell v. Oyer, 21 Pa. 417, 423 (1853).

[159] Id.

[160] See, e.g., id. ("A palpable mistake, violating justice, reason, and law, must be corrected . . . .").

[161] Guild v. Eager, 17 Mass. (17 Tyng) 615, 622 (1822); see also, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) (noting that individual court decisions "are often reexamined, reversed, and qualified . . . whenever they are found to be either defective, or ill-founded, or otherwise incorrect"); Haines v. Dennett, 11 N.H. 180, 184–85 (1840) (declaring that a prior decision "cannot be held to be law" if the reasoning on which it rested "be unsound").

[162] Leavitt v. Morrow, 6 Ohio St. 71, 78 (1856).

[163] *McDowell*, 21 Pa. at 423; see also Callender's Adm'r v. Keystone Mut. Life Ins. Co., 23 Pa. 471, 474 (1854) (rejecting both the "conservatism" under which "all reasoning [about the correctness of past decisions] becomes illegal" and the "radicalism" under which each new court measures the governing rules "by its own idiosyncracies").

Even when courts did find "demonstrable error" in a past decision, they gave signs of the decline in the perceived determinacy and completeness of the common law's external sources. Courts came to find demonstrable error most often when they concluded that a past decision conflicted with the common law's *internal* sources. See, e.g., id. at 474–75 (asserting that a past decision was a "mistake" and therefore "ought

sources of the law were not sufficiently complete to provide such restraints on their own. As Daniel Chipman of Vermont explained, in the absence of case reports, "the discretion of the Judge" would "in a great degree" be "unlimited."[164]

A comparison of two antebellum commentators helps confirm the link between the perceived centrality of *stare decisis* and the perceived indeterminacy of external brakes on judicial discretion. Timothy Walker, a protégé of Joseph Story,[165] thought that the common law had no real external sources at all; despite the fictional stories about its origins, "it has been made from first to last by judges."[166] Correspondingly, he urged judges to treat past decisions as "absolutely binding."[167] While conceding that judges sometimes "overrul[ed] former principles, and substitut[ed] new ones," Walker asserted that "this . . . kind of discretion always produces evil . . . ."[168] In contrast, James Kent continued to describe judicial decisions as mere "evidence" of the common law, and as "the application of the dictates of natural justice, and of cultivated

---

not to be followed," but finding this "plain error" only because the precedent had "diverge[d] from the beaten path of the law" and had disturbed a "well established doctrine"); Graham v. M'Campbell, 19 Tenn. (Meigs) 52, 55–58 (1838) (similar); cf. Aud v. Magruder, 10 Cal. 282, 291–92 (1858) (noting that the commercial law "is not local," and overruling an idiosyncratic state decision because it conflicted with "a principle recognized . . . for many years everywhere else in the commercial world"); McFarland v. Pico, 8 Cal. 626, 631 (1857) ("We would not disregard a decision of this Court, deliberately made, unless satisfied that it was clearly erroneous. But the highest regard for the doctrine of *stare decisis* does not require its observance when a plain rule of law has been violated. The decision in *Toothaker v. Cornwall*, is in direct conflict with the law, as to presentation and notice [of commercial paper], as settled by all the authorities, both of England and the United States.").

[164] Chipman, supra note 24, at 30–31; see also id. (asserting that in cases of first impression, "[t]he Judge has a discretion in ascertaining what the law is," but thereafter the judge "is bound by [that decision]"); cf. Cranch, supra note 24, at iii ("Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public.").

[165] See, e.g., Walter Theodore Hitchcock, Timothy Walker: Antebellum Lawyer 231 (1990).

[166] Timothy Walker, Introduction to American Law 53 (Phil., P.H. Nicklin & T. Johnson 1837); see also id. (describing the common law as "the stupendous work of *judicial legislation*").

[167] Id. at 54.

[168] Id. at 649.

reason, to particular cases."[169] Kent saw correspondingly less room for *stare decisis* to operate. "It is probable," he wrote,

> 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, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.[170]

The bottom line is simple. As the nineteenth century wore on, the legal community's rhetoric tended to put increasing emphasis on the importance of *stare decisis* in common-law cases.[171] By 1835, indeed, Alexis de Tocqueville could make a trenchant observation about the practice of law in common-law countries: "The English and American lawyers investigate what has been done, the French advocate inquires what should have been done; the former produce precedents, the latter reasons."[172] But the reason for the American legal community's increased emphasis on *stare decisis* had less to do with changes in the framework for *stare decisis* than with changes in people's conceptions of the common law itself. The less people believed that the external sources of the common law would specify the judges' duty in each case, the more they looked to *stare decisis* to avoid "ceaseless and interminable fluctuations" in judicial decisions.[173] In sum, antebellum Americans embraced *stare decisis* for precisely the reason suggested by Part I: The broader the range of indeterminacy left by the external sources of the unwritten law, the more *stare decisis* was necessary to keep each new court from giving effect to its own whims.

---

[169] 1 Kent, supra note 124, at 439; see also John H. Langbein, Chancellor Kent and the History of Legal Literature, 93 Colum. L. Rev. 547, 569 (1993) (describing Kent's belief that the principles embodied by the common law were "universal").

[170] 1 Kent, supra note 124, at 444; see also id. at 443 ("If . . . any solemnly adjudged case can be shown to be founded in error, it is no doubt the right and the duty of the judges who have a similar case before them, to correct the error.").

[171] Cf., e.g., Kempin, supra note 16, at 50 (asserting that "[t]he formative period of the doctrine . . . was in the years from 1800 to 1850").

[172] 1 Alexis de Tocqueville, Democracy in America 276 (Phillips Bradley ed. & Francis Bowen trans., Knopf 1945) (1835).

[173] Palmer's Adm'rs v. Mead, 7 Conn. 149, 158 (1828).

4. Stare Decisis *and the Radical Codifiers*

The common law's Benthamite opponents[174] insisted that even *stare decisis* could not save the common law. According to these reformers, precedents would be just as indeterminate and manipulable as the external sources of the unwritten law, and so they would not effectively restrain judicial discretion.[175] In any event, reformers were troubled by what they saw as a paradoxical attempt to control the discretion of current judges by enshrining the discretionary choices of past judges.[176] The reformers therefore urged Americans to abandon the common law altogether and to replace it with statutory codes. Robert Rantoul explained that such codes would restrain judges' "arbitrary power, or *discretion*," by giving them "a positive and unbending text" to apply.[177]

---

[174] See supra text accompanying notes 130–36.

[175] See, e.g., Rantoul, supra note 135, at 279 (noting that in order to favor or disfavor a particular litigant, the common-law judge "has only to *distinguish*, and thereby make a new law"). In a sign of the salience of this objection, the Ohio Supreme Court took an unusual step to reduce the manipulability of its precedents. In the 1850s, it announced that when it decided a case, it would prepare a syllabus setting forth the precise rules that it thought it was deciding. See Note, 6 Ohio St. iii (1857); Rule of Court VI, 5 Ohio St. v, vii (1858). To this day, the Court's members join only in the syllabus; to the extent that the accompanying opinion goes beyond the syllabus, it is technically only the dictum of its author. See Ohio Supreme Court Rules for the Reporting of Opinions, Rep. Rule 1(B) (2000); see also, e.g., World Diamond, Inc. v. Hyatt Corp., 699 N.E.2d 980, 985–86 (Ohio Ct. App. 1997) (applying this rule); cf. Thomas R. McCoy, Note, Deceptive "Certainty" of the Ohio Syllabus, 35 U. Cin. L. Rev. 630 (1966) (urging change).

[176] The desire to avoid enshrining the results of judicial discretion inspired a well-publicized proposal in Louisiana (a state whose civil-law influences put it well ahead of the other states in codification). Louisiana's codifiers recognized that statutory codes would not be able to provide firm rules for every unforeseen set of facts. Under Edward Livingston's proposed Civil Code of 1825, judges would therefore rule as they thought justice demanded in all cases not governed by the code. But such "discretionary judgments" would "have no force as precedents, unless sanctioned by the legislative will." Letter from William Sampson to Thomas Cooper, *in* Sampson's Discourse, supra note 132, at 61 (praising Livingston's proposal); accord Livingston et al., supra note 135, at 10. Instead, the judges would be required to give the legislature a report of every case in which "they have thought themselves obliged to recur to the use of the discretion thus given," and the legislature could use this information to pass new statutes to "supply deficiencies" and "explain ambiguities" in the code. Id. In this way, judicial decisions "may be the means of improving legislation, but will not be laws themselves." Id.

[177] Rantoul, supra note 135, at 278.

As this comment suggests, the reformers tended to have considerable faith in the determinacy of their proposed codes.[178] The advocates of total codification thus give us an opportunity to test the link between the perceived determinacy of the law's external sources and the perceived need for *stare decisis*. To the extent that these reformers expected their codes to provide determinate answers to the questions that courts faced, the theory laid out in Part I suggests that they would see little role for *stare decisis*: They would expect that after codification, precedents would no longer be necessary to provide many rules of decision, because the codes themselves would point out the judges' duty.

This is precisely what many reformers envisioned. William Sampson asserted that instead of resorting to "[p]articular cases," judges would simply consult the relevant statutory language; "[t]he law will govern the decisions of judges, and not the decisions the law."[179] Charles Watts agreed that a code "leads to the decision of every suit on the principles and rules of law applicable to it, and but little attention is paid to decided cases."[180]

Indeed, advocates of total codification saw the common law's growing reliance on precedents as one of the signs that the common law was corrupt. Sampson made fun of the legal system reflected in the case reports, "where the arguments of counsel are reported by clouds of cyphers, indicating nothing but the pages of books most commonly cited as law for both sides."[181] Watts added that common-law judges stressed precedents in order to cover up

---

[178] Indeed, some reformers expected codification to make the law clear to laymen as well as to lawyers. Jeremy Bentham touted codification as a means of making "[e]very man his own lawyer," Bentham, supra note 130, at 115, and newspaper correspondents agreed that codification would enable "the people at large . . . to comprehend the provisions of the law necessary for the security of property and person." Charleston Courier, Sept. 9, 1825, *quoted in* Cook, supra note 131, at 91; see also Romilly, supra note 130, at 222–23 (observing that "the plain text of a comprehensive ordinance" would be "open to all men to consult"). But cf. Thomas S. Grimké, An Oration, on the Practicability and Expediency of Reducing the Whole Body of the Law to the Simplicity and Order of a Code 22 (Charleston, A.E. Miller 1827) (disagreeing with the idea that codification would make "the people at large . . . better acquainted with the laws," but advancing other reasons for the reform).

[179] Sampson, supra note 132, at 38.

[180] Letter from Charles Watts to William Sampson (c. 1824), *in* Sampson's Discourse, supra note 132, at 91.

[181] Sampson, supra note 132, at 39.

the defects in the common law. In contrast to a codified system, which set forth general rules and principles in great number, the principles of the common law were "so wholly insufficient to serve as the means of regulating the affairs of life" that judges had to cite precedents "to give their decisions the appearance of being predicated on some existing rule of law."[182]

People who had less faith in the determinacy of the written laws saw much more need for courts to rely upon their predecessors' decisions. One newspaper correspondent, for instance, argued that any sensible written code would undoubtedly leave "a great deal . . . to the breast of the judge"; according to the correspondent, the codified system therefore would produce "endless uncertainty" unless each judge were "bound to follow the decisions of his predecessors."[183] Again, this argument reflects the link between *stare decisis* and the perceived indeterminancy of external sources of law.

C. Is the Theory Counterintuitive?

Cynics and public-choice theorists might find my historical argument counterintuitive. My argument suggests that Americans embraced *stare decisis* as a way to limit the discretion that the perceived indeterminacy of the underlying sources of law would otherwise have given judges. But the doctrine of *stare decisis*, even if advocated by people outside the judiciary, was implemented chiefly by judges. Why would judges have embraced a device to restrict their own discretion?

There are a variety of obvious responses to this objection. Among other things, judges may be more public-spirited than the objection assumes. But even if one were to embrace the cynic's premise, one could offer various stories to explain why restraints on judicial discretion are consistent with judges' self-interest. Perhaps judges are less concerned with maximizing their discretionary power than with maximizing some function in which their popular-

[182] Letter from Charles Watts to William Sampson, supra note 180, at 91.
[183] N.Y. Statesman, Apr. 7, 1825, *quoted in* Cook, supra note 131, at 116.

ity and prestige play major roles,[184] and perhaps the harmful effects of excessive judicial discretion tend to reduce people's regard for judges. Or perhaps judges are willing to accept some restrictions on their ability to overrule their predecessors' discretionary choices in exchange for the promise that their own discretionary choices in cases of first impression will bind future courts.[185] Or perhaps voters, legislators, or other groups outside the judiciary have an interest in restraining judicial discretion, and perhaps judges have an interest in responding to some such outside pressures.[186] One can tell a variety of stories about why it is in judges' self-interest to accept some constraints on their discretion.[187]

---

[184] For speculations along these lines, see, e.g., Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1 (1993).

[185] For commentary focusing on this trade-off, see, e.g., Richard A. Posner, Economic Analysis of Law 589 (5th ed. 1998); William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & Econ. 249, 273 (1976); Erin O'Hara, Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis, 24 Seton Hall L. Rev. 736 (1993).

[186] During the first half of the nineteenth century, many states were moving to shorten judicial terms, with the result that incumbent judges may have had to worry about winning reappointment from governors, legislatures, or (by the end of the period) voters. See Francis R. Aumann, The Changing American Legal System: Some Selected Phases 185–86 (1940). More direct forms of pressure were also possible. In 1858, for instance, the Georgia legislature enacted a statute declaring that the unanimous decisions of all three judges of the state supreme court "shall not be reversed, overruled or changed" by any Georgia court, including the state supreme court itself. Kempin, supra note 16, at 42 (quoting An Act to Make Uniform the Decisions of the Supreme Court of this State; to Regulate the Reversals of the Same, and for Other Purposes, No. 62, 1858–1859 Ga. Acts 74).

[187] See, e.g., Jonathan R. Macey, The Internal and External Costs and Benefits of Stare Decisis, 65 Chi.-Kent L. Rev. 93, 111–12 (1989). Macey emphasizes that "following precedent . . . allows judges to maximize leisure time"—a modernized version of Cardozo's classic observation that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . ." Cardozo, supra note 1, at 149. If it is true that enforcing a (rebuttable) presumption against overruling past decisions saves time for judges, a system without this presumption might either impinge upon judges' leisure time (by requiring individual judges to work harder) or dilute their prestige (by requiring more judgeships to be created). See Macey, supra, at 111–12; Posner, supra note 184, at 37–38. As Tom Lee points out, however, advocates of this theory have not explored how it applies to courts of last resort that have discretionary jurisdiction and can therefore control how many cases they hear. See Thomas R. Lee, Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent, 78 N.C. L. Rev. 643, 649–50 (2000).

Whatever psychological stories one tells, this Part has sought to establish that the link between *stare decisis* and perceptions of legal indeterminacy is not a mere matter of armchair theory, but instead is a historical fact. Far from seeming counterintuitive, this connection strikes me as perfectly natural. Assuming that people want to avoid the "intertemporal cycling" of judicial decisions,[188] it is natural to indulge a presumption against overruling past decisions that reflect permissible exercises of discretion, even when current courts would make different discretionary choices. Many people will not find it so natural, however, to indulge a presumption against overruling precedents that are "demonstrably erroneous." And the more determinate one considers the underlying rules of decision in a particular area, the more likely one may be to conclude that a past decision in that area is "demonstrably erroneous."

I do not contend that the link between *stare decisis* and perceptions of legal indeterminacy is inevitable or that it has held true for all people at all moments in our history. But the link identified in this Part does have some continuing relevance on today's Supreme Court. Of the Court's current members, Justices Scalia and Thomas seem to have the most faith in the determinacy of the legal texts that come before the Court.[189] It should come as no surprise

---

[188] See Stearns, supra note 14, at 1357.

[189] See, e.g., Antonin Scalia, Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 45 (Amy Gutmann ed., 1997) (asserting that the original meaning of constitutional provisions "usually . . . is easy to discern and simple to apply"); Clarence Thomas, Judging, 45 U. Kan. L. Rev. 1, 2 (1996) (criticizing the view that the Constitution and federal statutes leave judges "great latitude within which to express their personal preferences"); id. at 5 ("My vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions.").

The Court's current composition should not mislead people into thinking that faith in the Constitution's determinacy is always confined to conservatives. Although this faith is currently associated with Justices Thomas and Scalia, in a previous era it was associated with Hugo Black, one of the Court's great liberals. See, e.g., Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 801 n.204 (1999). Tellingly, Justice Black's approach to precedent in constitutional cases resembled the approach now taken by Justice Scalia. According to Michael Gerhardt, in fact, "no two justices in this century have called for overruling more precedents than Justices Black and Scalia." Michael J. Gerhardt, A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia, 74 B.U. L. Rev. 25, 33 (1994).

that they also seem the most willing to overrule the Court's past decisions.[190]

To be sure, this fact *does* come as a surprise to some. According to Andrew Jacobs, Justice Scalia's "view that law creates one correct answer" is in "deep tension" with his willingness to overrule precedents.[191] Prominent journalists and other commentators suggest that there is some contradiction between these Justices' mantra of "judicial restraint" and any systematic re-examination of

---

[190] See, e.g., Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 916 (2000) (Thomas, J., dissenting) ("[O]ur decision in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976),] was in error, and I would overrule it."); Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (suggesting willingness to overrule the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)); Mitchell v. United States, 526 U.S. 314, 341–43 (1999) (Thomas, J., dissenting) (suggesting willingness to overrule Griffin v. California, 380 U.S. 609 (1965), and Carter v. Kentucky, 450 U.S. 288 (1981)); Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 79 (1999) (Thomas, J., dissenting) ("Because [Irving Independent School District v. Tatro, 468 U.S. 883 (1984),] cannot be squared with the text of [the relevant statute], the Court should not adhere to it . . . ."); E. Enter. v. Apfel, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring) (expressing willingness to reconsider Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)); Campbell v. Louisiana, 523 U.S. 392, 404 (1998) (Thomas, J., concurring in part and dissenting in part) (calling for the Court to overrule Powers v. Ohio, 499 U.S. 400 (1991)); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 609–40 (1997) (Thomas, J., dissenting) (suggesting that the Court should repudiate its "'dormant' Commerce Clause" jurisprudence and overrule Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869)); M.L.B. v. S.L.J., 519 U.S. 102, 130–39 (1996) (Thomas, J., dissenting) (indicating willingness to overrule Griffin v. Illinois, 351 U.S. 12 (1956), and its progeny); Lewis v. Casey, 518 U.S. 343, 365 (1996) (Thomas, J., concurring) (suggesting willingness to overrule Bounds v. Smith, 430 U.S. 817 (1977)); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518–28 (1996) (Thomas, J., concurring in part and concurring in the judgment) (urging rejection of the balancing test adopted in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)); Missouri v. Jenkins, 515 U.S. 70, 123–33 (1995) (Thomas, J., concurring) (urging reappraisal of the equitable powers of federal courts); United States v. Lopez, 514 U.S. 549, 584–85 (1995) (Thomas, J., concurring) (suggesting willingness to return in the direction of the original understanding of the Commerce Clause); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285–97 (1995) (Thomas, J., dissenting) (calling for the Court to overrule Southland Corp. v. Keating, 465 U.S. 1 (1984)); Holder v. Hall, 512 U.S. 874, 936–45 (1994) (Thomas, J., concurring in the judgment) (calling for the Court to overrule Thornburg v. Gingles, 478 U.S. 30 (1986)); see also Gerhardt, supra note 189, at 34 (providing a similar citation list for Justice Scalia).

[191] Andrew M. Jacobs, God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric, 63 U. Cin. L. Rev. 1119, 1178 n.320 (1995).

precedents.[192] But if one believes in the determinacy of the underlying legal texts, one need not define "judicial restraint" solely in terms of fidelity to precedent; one can also speak of fidelity to the texts themselves. We already acknowledge that the Justices' views of legal indeterminacy will affect the scope that they see for *Chevron* deference in administrative law.[193] When we use *Chevron*'s insights to refine our understanding of *stare decisis*, we can appreciate how the Justices' views of legal indeterminacy may also affect the pull of *stare decisis*.

III. SOME NORMATIVE SPECULATIONS

To say that a connection exists is not to say that it is desirable. My argument thus far has been primarily descriptive: I have tried to show that the theory set forth in Part I can help explain patterns in the growth of *stare decisis* in America, and I have suggested that it continues to have some relevance today. But my description raises some obvious normative issues. Even if the development of *stare decisis* has in fact been consistent with the theory described above, do we want courts to think about *stare decisis* in these terms?

The conventional academic wisdom suggests that we do not. Suppose that the current court, if not bound by precedent, would reach a different conclusion than the one announced by its prede-

---

[192] See, e.g., Linda Greenhouse, Judicious Activism: Justice Thomas Hits the Ground Running, N.Y. Times, Mar. 1, 1992, § 4, at 1 (implying that Justice Thomas's professed belief in "judicial restraint" is inconsistent with "a wholesale reexamination of recent precedents"); Anthony Lewis, Beware, Judicial Activist!, N.Y. Times, June 2, 1997, at A15 (suggesting that conservative critics of "judicial activism" are hypocritical because "some of the most radical, precedent-breaking ideas these days come from judges called conservative"); cf. Christopher E. Smith, The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution, 79 Ky. L.J. 317, 338 (1990–91) (suggesting that Justice Scalia is not "a true judicial conservative" because "he is concerned with advancing his own views of the Constitution regardless of contrary case precedents"). I should disclose that I am not an entirely disinterested observer of the current Court and its critics: I had the honor of clerking for Justice Thomas from 1994 to 1995.

[193] See, e.g., Antonin Scalia, Judicial Deference to Administrative Interpretation of Law, 1989 Duke L.J. 511, 521 (1989) ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.").

cessor. Under the version of *stare decisis* suggested by today's conventional academic wisdom (which I will call the "stronger" version), the current court will not ask whether the precedent is demonstrably wrong about the underlying law. Instead, the court will follow the precedent unless the precedent has proved unworkable or is causing other problems. Only these sorts of practical disadvantages would justify overruling the precedent.

Under the "weaker" version of *stare decisis* suggested by Parts I and II, by contrast, the court would begin by asking whether the past decision reflects a permissible or an impermissible view of the underlying law. If the court deems the precedent a permissible discretionary choice (albeit a different one than it would have made), it will proceed as under the stronger version: It will follow the precedent unless there is some practical reason for overruling. But if the current court concludes that the precedent is demonstrably erroneous, it will overrule the precedent unless there is some practical reason for *adhering* to it.

The essential difference between these two versions of *stare decisis* is simple. Under both approaches, courts can overrule precedents when there are practical reasons for doing so. The "weaker" version, however, recognizes an additional ground for overruling: Courts can also overrule precedents when they deem the precedents demonstrably erroneous and see no special reason for adherence.

Given modern views of the common law, this additional ground for overruling is unlikely to make much difference in common-law cases. In one way or another, most modern lawyers take a policy-oriented view of the common law: We judge common-law rules by their practical results. But if we take this view, the same facts that make a rule seem "demonstrably erroneous" will also provide practical justifications for overturning it. For instance, if we think that common-law rules should promote economic efficiency, and if we believe that a particular common-law rule is demonstrably erroneous because it is inefficient, we are also likely to see practical reasons to abandon it. Whether we apply the "weaker" or the "stronger" version of *stare decisis*, then, the outcome will be the same.

The difference between the two versions of *stare decisis* is more likely to matter in cases involving the written law, where a past in-

terpretation of a statute or constitutional provision might be deemed "demonstrably erroneous" even though its practical results are not noticeably worse than those that the "correct" interpretation would produce. Accordingly, this Part focuses on the written law rather than the common law.

My goal in this Part is relatively modest: I hope to persuade readers that *if* one accepts certain jurisprudential assumptions (of the sort commonly identified with the current Supreme Court's more "conservative" Justices), then one might sensibly favor the weaker version of *stare decisis* over the stronger version. Section III.A explains how those assumptions might lead one to expect the weaker version of *stare decisis* to produce considerable benefits. Section III.B explains why one might think that those benefits justify the costs that the weaker version of *stare decisis* will also produce. Section III.C considers whether this cost-benefit analysis can sensibly be applied to cases of statutory interpretation, where some commentators have advocated especially strong doctrines of *stare decisis*. Finally, Section III.D considers two likely objections to the basic premises of the weaker version of *stare decisis*.

A. The Potential Benefits of the Weaker Version of Stare Decisis

Assume, for the moment, that the concept of "demonstrable error" is not an illusion: Some interpretations of statutory or constitutional provisions are objectively wrong. Even with this assumption (which we will refrain from questioning until Section III.D), one might still find it hard to believe that anyone could favor the weaker version of *stare decisis* over the stronger version. After all, the weaker version is likely to have significant costs, which are worth absorbing only if it will also produce some offsetting benefits. The weaker version is *supposed* to have the benefit of substantially reducing the number of demonstrably erroneous precedents on the books. But there are at least two reasons why one might doubt that it will actually do so.

First, even if one accepts the theoretical possibility of "demonstrably erroneous" precedents, one might think that few such precedents will really exist. As Frederick Schauer notes, "it seems highly unlikely that, where there is a clear answer, there will be

cases refusing to recognize it."[194] Indeed, where there is a clear answer, there may be relatively few cases, period. Both parties to the case will recognize the right answer, and they will settle the matter (or simply drop it) rather than spending money to have courts tell them what they already know. In cases that are litigated all the way to a court of last resort, then, the underlying rules of decision are unlikely to provide clear answers.[195]

Second, even if "demonstrable errors" are more common than this argument suggests, one might expect later courts to make them just as often as earlier courts. Later courts will be no more competent, on average, than their predecessors.[196] Some commentators therefore suggest that if later courts give precedents no binding force and treat all previously decided questions as being open, "decisions overruling prior precedents will be about as likely to be wrong as the earlier precedents themselves."[197]

This Section responds to these objections. It explains why, if one accepts certain assumptions about the nature of law and of legal argument, one might expect the weaker version of *stare decisis* to eliminate a significant number of demonstrably erroneous precedents.

1. The Advantages of Later Courts

Frederick Schauer is certainly correct that if a particular legal question has a "clear" answer, we can expect courts to arrive at it. But sometimes the right answer to a legal question will not be clear. This does not automatically mean that no right answer exists;

---

[194] Frederick Schauer, Precedent and the Necessary Externality of Constitutional Norms, 17 Harv. J.L. & Pub. Pol'y 45, 48 (1994).

[195] See Posner, supra note 185, at 588–89 (suggesting that cases with only one correct outcome are likely to be settled); cf. Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177, 232 (1989) ("There appears to be a consensus that the majority of statutory interpretation cases the Supreme Court deals with yield no objectively correct answers.").

[196] See Geoffrey R. Stone, Precedent, the Amendment Process, and Evolution in Constitutional Doctrine, 11 Harv. J.L. & Pub. Pol'y 67, 71 (1988) (stressing that later courts "have no greater interpretive authority than their predecessors").

[197] Daniel A. Farber, Statutory Interpretation, Legislative Inaction, and Civil Rights, 87 Mich. L. Rev. 1, 12 n.45 (1988). Professor Farber goes on to qualify this conclusion. See id. ("If courts overrule precedents only when there are *strong reasons* to believe that the early precedents were wrong, they can increase the chances that in the long run statutes will be correctly interpreted.") (emphasis added).

some legal questions may simply be more difficult than others. A particular statutory provision, for instance, may have a single best interpretation, but identifying that interpretation might require some specialized knowledge or analytical abilities; courts might need to understand some sophisticated terms of art, or to be familiar with the problem that Congress was addressing, or to appreciate how the relevant provision fits into the background of other statutes. It is quite possible, then, that a law will have a determinate meaning even though that meaning is not easy to discern.

Different judges have different specialties and different levels of ability. There is no guarantee that the first set of judges to address an issue will have the specialized knowledge or abilities necessary to analyze the issue correctly. To the contrary, judges often will *not* be well positioned to decide cases of first impression; the judges who happen to confront an issue first may have only average abilities and be relatively unfamiliar with the relevant body of law. In theory, the adversary system can help bring these judges up to speed. But the lawyers involved in the case may themselves be nonspecialists of only average ability, and they may fail to recognize all the arguments at their disposal. Alternatively, the lawyers on one side may be much better than the lawyers on the other side; even though this disparity may be unrelated to the merits of the particular issue in question, it may well affect the court's thinking. Given all these considerations, it would be surprising if courts did *not* make some mistakes in cases of first impression.

Of course, these considerations are not confined to cases of first impression; they apply to the litigation process in general. Later cases are just as likely to come before judges who are not especially able and who are not specialists in the relevant field. But the greater the number of judges who have addressed an issue in the past, the more likely it is that the issue has been addressed by some specialists or especially competent judges. The opinions written by those judges may well explain arguments that other judges would miss, and those opinions are then available as resources for all subsequent judges. To the extent that judges are exposed to prior analyses of the relevant issue, they can take advantage of their own

wisdom and expertise while simultaneously benefiting from the wisdom and expertise of their predecessors.[198]

In order to think that these extra resources matter, one must make certain assumptions about the nature of legal argument. But these assumptions tend to go hand in hand with the general concept of "demonstrable error." The people who believe most strongly in that concept, and who think that most legal questions have a relatively narrow set of right answers, are likely to believe that reasoned analysis can demonstrate which answers are right and which are wrong. Such people are also likely to believe that one can meaningfully distinguish between "good" arguments (demonstrating the permissibility of a correct answer or the impermissibility of an erroneous answer) and "bad" arguments (purporting to demonstrate the permissibility of an answer that is actually erroneous or the impermissibility of an answer that is actually permissible). Finally, they are likely to believe (1) that judicial opinions can be reasonably effective at communicating good arguments to future judges and (2) that good arguments, by their very nature, will tend to be more persuasive in the long run than bad arguments.

If one accepts these premises, one may well think that courts' preferred decisions are significantly more likely to be erroneous in

---

[198] Cf. Macey, supra note 187, at 102–03 (discussing the advantages of drawing on other judges' opinions). Professor Macey presents this point as an advantage of *stare decisis*; he argues that "the practice of *stare decisis* permits judges to 'trade' information among one another, thereby enabling them to develop areas of comparative advantage." Id. at 95. This argument, however, does not rely upon presumptively giving binding effect to precedents; it relies only on giving judges access to each other's opinions. Indeed, the more strongly judges feel bound to follow the first decision on any issue, the less well the process that Macey discusses will work.

In another sign that there is nothing new under the sun, critics of the common law made essentially this point more than 180 years ago. "[I]t must necessarily happen," one advocate of total codification noted, "that even the most learned and experienced lawyers will not have had occasions, in the course of the longest study and practice, to make themselves complete masters of every portion of [the law]." Romilly, supra note 130, at 231. If one wanted to create a statutory code setting forth the governing rules in each area, "the subject would probably be divided into its different branches, and each would be assigned to those who were understood to have devoted to it almost exclusively their attention and their care." Id. at 232. Under the common law's system of "legislation[] by means of judicial decisions," however, "the duty of legislation must often be cast on those, who are ill qualified to legislate upon the particular subject which accident may allot to them." Id. at 231–32.

cases of first impression than in later cases. Even in cases of first impression, of course, courts often will be exposed to good arguments and will reach permissible results. But when that happens, the courts' opinions will tend to communicate those arguments effectively to future judges, and future judges will tend to recognize that the past decision was at least permissible. By contrast, when the first court relies on bad arguments to reach an erroneous result, its opinion will be less persuasive; the workings of the adversary process,[199] coupled with the reasoning abilities of future judges, will tend to expose its errors. On these assumptions, good arguments will tend to perpetuate themselves even under the weaker version of *stare decisis*, while bad arguments will have less staying power.

The mere fact that current courts can double-check their conclusions against those of their predecessors is also a considerable advantage. When the first court to decide a case makes a mistake, it will not be alerted to think twice about its conclusion by the fact that five prior courts have reached the opposite decision. Later courts, by contrast, will find it easier to identify opinions that may be idiosyncratic.[200] In this respect as in others, judges have fewer resources to draw upon in cases of first impression.

Admittedly, these effects are likely to be more pronounced in *true* cases of first impression (involving issues that *no* court has ad-

---

[199] The adversary process itself may tend to work better in later cases than in cases of first impression. Precedents are resources for lawyers as well as judges: Both the courts' opinions and the records of prior lawyers' approaches may well prompt thoughts that the current lawyers would not otherwise have had. In addition, even if the lawyers on one side of the current case happen to be better than the lawyers on the other side, the arguments raised in prior opinions may help offset the distorting effects of this disparity. Judges may be more swayed by such disparities in cases of first impression, simply because judges in such cases have fewer other sources of information.

[200] Cf. Macey, supra note 187, at 102 (noting the benefits of letting judges "check their results against the results reached by similar judges"). Again, Professor Macey presents this argument as one of the benefits of *stare decisis*, and as a reason why using *stare decisis* helps judges avoid errors; Macey suggests that the prevailing view on a particular issue is more likely to be correct than an individual court's contrary opinion. As discussed in Part II, however, this suggestion is true only if courts conduct some independent analysis before deciding to follow a past decision. If the prevailing view simply reflects the view of the first court to decide the question (and if subsequent courts follow this view without regard to whether it was erroneous), then the chance that the prevailing view is wrong is identical to the chance that the first court was wrong. See supra text accompanying note 126.

dressed) than in cases that have made it up to courts of last resort. By the time an issue reaches the United States Supreme Court, it typically has percolated through a number of lower courts, and the Court's members therefore have the benefit of seeing how some other judges analyzed it.[201] This fact, indeed, may help explain why the Supreme Court follows stricter notions of precedent than the federal district courts, which do not apply *any* formal presumption against overruling their own prior decisions.[202]

But even though the Supreme Court can draw upon lower-court opinions when it confronts issues for the first time, its successors are still likely to be in a better position to analyze those issues. The Court's successors will have the benefit of subsequent commentary and briefing about whatever opinion the Court releases, and this subsequent commentary and briefing may well expose flaws in that opinion. The prior lower-court opinions will not always prevent such flaws from cropping up. Lower-court opinions will be more helpful in some cases of first impression than in others, in part because the identity of their authors is largely a matter of chance. In any event, the Supreme Court does not always confine itself to matters that the lower courts have discussed; instead of precisely tracking the analysis in the briefs or in some lower-court opinion, the Court may well make an unanticipated move. Despite its eminence, the Supreme Court is not always well positioned to make such moves.

Quite apart from these considerations, later courts often have the benefit of experience; they have more information about how the rule chosen by their predecessors has worked in practice.[203] While this experience will not always be relevant to whether a

---

[201] See, e.g., Marshall, supra note 195, at 231–32 (stressing the thoroughness of the Supreme Court's deliberative process).

[202] See, e.g., United States v. Cerceda, 172 F.3d 806, 812 n.6 (11th Cir. 1999) ("The opinion of a district court carries no precedential weight, even within the same district."); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority.").

[203] See Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 423 (1988) ("Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects . . . and improve on the treatment of the earlier case."); Richard A. Posner, The Constitution as an Economic Document, 56 Geo. Wash. L. Rev. 4, 36 (1987) (noting that "the overruling decision is somewhat more likely to be correct than the overruled one, if only because the former will be based on more experience than the latter").

precedent is demonstrably erroneous,[204] it sometimes will highlight issues that the prior court overlooked. In at least some cases, this additional experience will help expose an error.

In sum, later courts have a variety of advantages over their predecessors. If judicial opinions can shed light on a court's reasons for deciding a legal question in a particular way, and if good reasons tend to be more persuasive (and better able to withstand subsequent objections) than bad ones, we can expect decisions preferred by the current court to be erroneous less often than decisions preferred by the past court.

2. The Possibility of Selection Bias

Suppose, however, that this conclusion is wrong: The decisions preferred by current courts are just as likely to be demonstrably erroneous as the decisions preferred by their predecessors. Even so, one might still expect the weaker version of *stare decisis* to improve the accuracy of case law.

This claim seems paradoxical. But a court applying the weaker version will not automatically overrule precedents with which it disagrees. Even if the current court would prefer a different decision, precedents that it deems "permissible" will continue to benefit from the presumption against overruling. If we assume (plausibly enough) that courts are more likely to deem a precedent "permissible" if it is in fact permissible than if it is demonstrably erroneous, then the weaker version incorporates a useful form of selection bias: The precedents that the current court selects for overruling will come disproportionately from the group of erroneous decisions. It follows that even if the two courts have identical error rates for their initially preferred decisions, the current court is more likely to be correct than the prior court *in the cases in which the current court opts to substitute its preferred decision for*

[204] If a court interprets a statute or constitutional provision to establish a rule that ends up producing bad results, it need not follow that the original decision was impermissible. On many theories of statutory and constitutional interpretation, the bad consequences of a prior decision bear less on whether the decision was permissible than on whether there are practical reasons for replacing it with some other permissible interpretation.

that of the prior court.[205] For this reason too, the weaker version of *stare decisis* is likely to reduce the number of erroneous decisions on the books.

B. Some Questions About the Weaker Version's Potential Costs

Once we have established that people who accept certain assumptions about the nature of legal argument might expect the weaker version of *stare decisis* to have some benefits, we are close to establishing that they might sensibly prefer the weaker version of *stare decisis* to the stronger version. To be sure, the weaker version of *stare decisis* is likely to have costs too: More decisions will be overruled under the weaker version of *stare decisis* than under the stronger version, and change can be costly. But it is hard to prove that the costs of the weaker version of *stare decisis* will outweigh the benefits, because the costs and benefits involve incommensurable values.

Someone who accepts the premises of the weaker version of *stare decisis*, and who believes that the weaker version will substantially reduce the number of demonstrably erroneous decisions on the books, is likely to claim that the weaker version promotes

---

[205] A numerical example may help illustrate this point. Suppose that the past court heard 1000 equally difficult cases and reached erroneous decisions in 50 of them. By hypothesis, we are assuming that when the current court revisits the 1000 cases, its own preferred decisions will not be affected by its predecessor's opinions; the current court will also have a 5% error rate, and the fact that the past court reached a permissible decision in a particular case will not make the current court any less likely to prefer an erroneous decision in that case. We will suppose, however, that the current court is fairly likely to think that erroneous precedents really are erroneous; the current court deems 40 of the 50 erroneous decisions to be demonstrably erroneous, and it reaches this conclusion about "only" 160 of the 950 permissible decisions.

For simplicity, assume that the current court never identifies any practical reasons to *adhere* to decisions that it deems erroneous or to *overrule* decisions that it deems permissible. On these assumptions, the current court will substitute its own preferred decisions in 200 cases, and it will let the past court's decisions stand in the remaining 800 cases. Many of the current court's changes will admittedly be unnecessary; the current court will simply be switching from one permissible decision to another. In addition, because we are assuming that 5% of the current court's preferred decisions are "demonstrably erroneous" (and that this error rate is independent of whether the past court reached a permissible decision), the 200 changes will introduce 10 new errors. But at the end of the day, there will be only 20 erroneous precedents on the books (counting both the 10 errors that the current court did not detect and the 10 new errors that it introduced). In this example, selection bias alone has more than halved the number of erroneous precedents.

"democratic values" by bringing the law enforced in court closer to the collective judgments that our representatives have authoritatively expressed.[206] Of course, advocates of the weaker version might conceivably claim some other benefits too: They might suggest, for instance, that the weaker version of *stare decisis* will end up producing a more efficient set of legal rules than the stronger version.[207] But the primary reason we want courts to avoid erroneous interpretations of the written law is that we value democracy, not that we value efficiency.

---

[206] One might object that this formulation too blithely equates "permissible" interpretations of statutes with the judgments actually reached by our elected representatives. Some textualist theories of interpretation, after all, disclaim reliance upon those subjective judgments. But even for such theories, the constitutional and subconstitutional procedures for producing a statute amount to a mechanism for aggregating those individual judgments into a single bill; the final text reflects a network of compromises and agreements that are influenced both by the subjective policy preferences of individual legislators and by the varying intensities of those preferences. While no such aggregation mechanism is perfect, see Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 814–23 (1982), "permissible" interpretations presumably are more accurate than "erroneous" interpretations at reflecting how we have chosen to aggregate those judgments. If we disagreed with this conclusion—if we thought that "permissible" interpretations were consistently less faithful to the authoritative expressions of our representatives' collective judgments than interpretations that our chosen method of interpretation would reject as erroneous—then we surely would be tempted to adopt a new method of interpretation (or perhaps an entirely different aggregation mechanism).

[207] George Priest and others have argued that even if judges themselves have no particular preference for efficient rules, parties will disproportionately choose to relitigate inefficient rules. As long as judges are open to making changes, then, the very process of selecting cases for litigation may tend to produce a more efficient set of rules. See, e.g., George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977). Strong doctrines of *stare decisis* impede the process that Priest describes. See Lee, supra note 187, at 655; cf. William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235, 280–84 (1979) (arguing that Priest's analysis ignores the influence of precedent, which may actually cause "the average efficiency of legal rules . . . to decline over time").

As applied to cases involving the written law, Priest's thesis is more concerned with efficiency than with accuracy; it does not focus on whether a precedent reflects a permissible interpretation of the relevant statute or constitutional provision. But if one believes that legislators generally try to promulgate efficient rules, and that legislators are better positioned than judges to decide which rules will promote efficiency, one might advance a different argument about the economic advantages of overruling erroneous precedents. On this view, there might be a correlation between efficiency and accuracy: Case law adopting permissible interpretations of statutes might tend to produce more efficient outcomes than case law adopting erroneous interpretations.

The costs of change, on the other hand, are much more readily expressed in economic terms. When a court overrules a particular precedent, it frequently generates some transition costs; among other things, public and private actors must make investments to understand and conform to the new rule, and money may have to be spent on litigation to refine and clarify it.[208] To the extent that a court's general willingness to overrule precedents increases uncertainty about which rules the court will apply, it may also generate more systemic costs—costs that cannot be identified with any particular change, but that are no less real. For instance, increased uncertainty may produce inefficient allocations of resources: People might devote too little attention to certain types of long-range planning, or they might spend too much money relitigating issues that the judiciary has already decided.[209]

If we think that the weaker version of *stare decisis* will trigger these economic costs but will also promote "democratic values," then we must make a difficult calculus: We must compare the harms of instability (triggered by making changes) to the harms of inaccuracy (triggered by perpetuating erroneous decisions). To borrow a phrase from Justice Scalia, seeking to compare these two different sorts of harm may be like asking "whether a particular line is longer than a particular rock is heavy."[210] But assuming that this comparison is possible at all,[211] reasonable people can disagree about its outcome. In particular, this Section argues that someone who accepts the premises of the weaker version of *stare decisis* could sensibly conclude that its benefits justify its costs.

1. Which Version of Stare Decisis *Will Really Produce More Uncertainty?*

Some advocates of the weaker version of *stare decisis* may be tempted to deny that it will produce much uncertainty, and hence that it will have many costs. At least in some circumstances, they

---

[208] See, e.g., Lee, supra note 187, at 651–52.

[209] See id. at 650–51.

[210] Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (criticizing the balancing test used in Dormant Commerce Clause cases).

[211] For a general discussion of incommensurability in the law, see Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779 (1994).

will contend, it will become fairly clear that a precedent is demonstrably erroneous. Once this fact has become clear (whether through scholarly commentary or through the emergence of further information), people will not necessarily be uncertain about the governing legal rule. After all, people's expectations will be partly shaped by their knowledge of the courts' rules of *stare decisis*: If people know that courts apply the weaker version, they might be fairly sure that the relevant court will overrule its discredited decision at the next opportunity.

No matter how strongly one believes in the premises of the weaker version of *stare decisis*, however, people surely will not be able to anticipate each and every decision to overrule a precedent. Encouraging people to predict such overrulings, moreover, may do more harm than good: For many of the same reasons that we do not want lower courts to engage in "anticipatory overruling" of Supreme Court decisions,[212] we may not want private actors to do so either. In any event, as Frederick Schauer reminds us, a decision's error will rarely be clear from the moment the Court announces the decision, or else the Court would not reach the decision in the first place.[213] Even advocates of the weaker version of *stare decisis*, then, should concede that their approach will produce some uncertainty.

Still, they might plausibly argue that it will produce no *more* uncertainty than the stronger version of *stare decisis*. It is certainly true that the weaker version encourages courts to overrule more decisions: When the current court deems a precedent "demonstrably erroneous" but does not see special justifications either for overruling it or for adhering to it, the weaker version favors overruling and the stronger version does not. Even courts applying the stronger version, however, will not be very enthusiastic about applying precedents that they deem demonstrably erroneous. If courts are not allowed to overrule such precedents forthrightly, they might well draw fine distinctions that minimize the prece-

[212] See, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997); Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989); cf. Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817 (1994) (discussing various justifications for doctrines of hierarchical precedent).

[213] See supra text accompanying note 195.

dents' impact. In the long run, those fine distinctions might produce more uncertainty than a clean break from precedent.[214]

In sum, people concerned about the costs of change should not assume that change can occur only through frank overruling, or that a single dramatic change is always more costly than a series of incremental changes. It is at least conceivable that the stronger version of *stare decisis*, while failing to achieve the full benefits of the weaker version,[215] nonetheless imposes *more* total costs of change.

2. *Will the Errors that the Weaker Version of* Stare Decisis *Eliminates Justify the Unwarranted Changes that it Produces?*

Having acknowledged this ironic possibility, let us set it aside. The remainder of this Section assumes that the weaker version of *stare decisis* will generate more total costs of change than the stronger version. On that assumption, the weaker version will be attractive only if one expects the benefits of increased accuracy to outweigh the costs of increased instability. As I explain below, however, someone who accepts the premises of the weaker version might well think this trade-off worth making. The same assumptions that make one expect the weaker version to produce significant benefits will also make one more sanguine about its costs.

Courts applying the weaker version will overrule some decisions that courts applying the stronger version would keep in place. The benefits of the weaker version (if any) result from the fact that some of those decisions *should* be overruled: They are demonstrably erroneous and there is no special reason to adhere to them. But other changes produced by the weaker version would not be made

---

[214] This argument goes far back. See, e.g., Du Ponceau, supra note 43, at xvi ("[I]t is in vain to say that the law is so established and that it is better that it should be certain than that it should be just; I answer that no laws can be certain that are not founded on the eternal and immutable principles of right and wrong; that false theories and false logic lead to absurdities, which being perceived, lead to endless exceptions and to numerous contradictions, and that from the whole results that very uncertainty which is so much wished to be avoided.").

[215] To the extent that courts applying the stronger version of *stare decisis* manage to narrow the scope of demonstrably erroneous precedents, they achieve some of the same benefits as courts applying the weaker version. But this effect is incomplete; even after distinctions have been drawn, the erroneous precedents remain applicable to some cases.

if courts were applying the theory perfectly. We can divide these "unwarranted" changes into two categories: (1) cases in which the precedent being overruled is indeed demonstrably erroneous, but the court has overlooked some special reasons to follow it, and (2) cases in which the precedent being overruled is really permissible, but the court mistakenly believes that it is demonstrably erroneous.

The first category of unwarranted changes might not concern us very much. To be sure, the first category does reflect a real problem: Courts conducting a case-by-case inquiry into transition costs (or into the other marginal costs produced by an extra change) will fail to identify some costs that really do exist. Still, even though the changes in this category do more harm than good, they at least have *some* benefits to offset against their costs: The changes in this category do increase the accuracy of our case law, even though they do so at too high a price. The stronger version of *stare decisis*, moreover, has its own counterpart to this sort of mistake: Even when a precedent is demonstrably erroneous and there are special justifications for overruling it, courts applying the stronger version will sometimes overlook those justifications and adhere to the precedent. It is not clear, then, that the first category of unwarranted changes gives the stronger version much of an advantage over the weaker version.

The second category is more worrisome. Indeed, the tendency of courts applying the weaker version of *stare decisis* to reach "false positives"—to conclude mistakenly that a past court's permissible choice is demonstrably erroneous, and to overrule the past decision for that reason—is the approach's biggest drawback. If we think that courts applying the weaker version will reach nine false positives for every erroneous decision that they correctly overrule, then we will favor the weaker version only if we think that eliminating one erroneous decision is worth absorbing the extra costs associated with ten changes.

The weaker version does take some steps to minimize those costs. Courts applying the approach will not overrule *all* precedents that they deem "demonstrably erroneous"; they will refrain from overruling such precedents if they detect some special justification for adherence. At least where the costs of change are obvious, then, we can expect courts to take account of them. But this safeguard is not perfect. As the first category of unwarranted changes

attests, courts will fail to identify some of the costs of change. The total of all these hard-to-detect costs may be significant.

One might well think that courts applying the weaker version of *stare decisis* will reach "false positives" quite frequently. Even if judges use the same methods as their predecessors to identify and interpret the law, they may fail to appreciate the range of results that those methods permit; judges may have a natural tendency to exaggerate the extent to which their own results are demonstrably superior to all alternative applications of their methods.[216] Perhaps more significantly,[217] the current judges may be committed to an entirely different interpretive method than their predecessors, and they may be too quick to decide that their predecessors' method was illegitimate.

Still, the same assumptions that make one expect the weaker version of *stare decisis* to eliminate a lot of erroneous decisions might also lead one to expect the number of "false positives" to remain tolerable. If one thinks that most legal questions have a relatively narrow set of correct answers, it is somewhat less likely that the current court will disagree with its predecessor's permissible decisions in the first place. In any event, if the past court had good arguments for its position, our working assumptions suggest that the court's opinion will communicate those arguments effectively. Under our assumptions, good arguments tend to be persuasive, in the sense that they help the current court recognize that the precedent is a permissible interpretation of the underlying rules of decision. The assumptions with which we are working, then, suggest that courts will be reasonably good at distinguishing permissible precedents from erroneous ones. The better courts are at this task, the fewer false positives the weaker version of *stare decisis* will generate.

The bottom line is straightforward. If one believes that most legal questions have a relatively narrow set of permissible answers, that courts will not always reach those answers, but that the existence of written opinions (and subsequent commentary and briefing about those opinions) tends to expose bad arguments and

---

[216] See, e.g., Lee, supra note 187, at 667.

[217] See Marshall, supra note 195, at 232 (asserting that "[i]n all likelihood," the claim that a prior Supreme Court decision misinterpreted a statute will rest on differences in interpretive methods).

to perpetuate good ones,[218] then one might rationally surmise that the weaker version of *stare decisis* will increase the accuracy of our case law enough to justify the costs of the extra changes it generates.

3. What About Judicial Legitimacy?

Advocates of the stronger version of *stare decisis* might object that I have failed to acknowledge the full costs of change. According to many commentators, frequent overruling jeopardizes public acceptance of the courts' decisions.[219] This argument is now associated with *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[220] where the joint opinion of Justices Souter, Kennedy, and O'Connor declared that "[t]he Court's power lies . . . in its legitimacy"[221] and that the Court should adhere to *Roe v. Wade*[222] in order to avoid "[t]he country's loss of confidence in the Judiciary."[223] But the argument did not originate in the abortion context, and commentators had developed it at considerable length well before *Casey*.[224]

The argument is simply stated. "Our system of constitutional adjudication," Archibald Cox wrote in 1968, "depends upon a vast

---

[218] Cf. supra text accompanying note 101 (noting Nathaniel Chipman's expectation that case reports would help judges identify both "what is wrong" and "what is right" in their decisions).

[219] For extended presentations of the argument, see, e.g., Hellman, supra note 4; Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344 (1990).

[220] 505 U.S. 833 (1992).

[221] Id. at 865.

[222] 410 U.S. 113 (1973).

[223] *Casey*, 505 U.S. at 867; see also id. at 865–69 (stating that the Court's legitimacy is a matter of "perception" as well as "substance," and suggesting that the decisions reached by the Court should sometimes depend on how the Court thinks the public will perceive them).

[224] Even during the antebellum period, in fact, some people linked *stare decisis* to concerns for the judiciary's appearance. As early as 1828, the Kentucky Court of Appeals noted that overruling a precedent (and thereby treating one litigant differently than another) would shake "the credit and respect due to this court." Tribble v. Taul, 23 Ky. (7 T.B. Mon.) 455, 456 (1828); see also Garland v. Rowan, 10 Miss. (2 S. & M.) 617, 630 (1844) ("If solemn judgments, once made, are lightly departed from, it shakes the public confidence in the law, and throws doubt and distrust upon its administration."); James C. Rehnquist, Note, The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court, 66 B.U. L. Rev. 345, 353–54 n.50 (1986) (quoting a lawyer's argument in the Passenger Cases, 48 U.S. (7 How.) 282, 363 (1849), to the effect that "[d]isrespect follows inconsistency").

reservoir of respect for law and courts."[225] That respect, and the public's concomitant acceptance of judicial decisions, "seems to rest . . . at least partly upon the understanding that what the judge decides is not simply his personal notion of what is desirable but the application of rules that apply to all men equally, yesterday, today, and tomorrow."[226] If members of the Supreme Court were to overrule their predecessors' decisions too often, however, the public would begin to reject this understanding of what judges do. In Earl Maltz's words, people would conclude that instead of "speaking for the Constitution itself," the Court's decisions simply reflect the changing preferences of "five or more lawyers in black robes."[227] This loss of faith in the legitimacy of the Court's decisions would jeopardize the Court's ability to function effectively.

Such claims may be persuasive to people who accept the premises of the stronger version of *stare decisis*. But the legitimacy argument actually has little traction against the weaker version. The same assumptions that would make the weaker version seem attractive in the first place will also tend to make the legitimacy argument seem weak, or even dishonest. Thus, the argument will resonate only with people who would reject the weaker version anyway.

This is true for at least two reasons. First, the legitimacy argument is premised on the idea that the Court cannot adequately explain why it considers a particular precedent erroneous. If the Court could demonstrate that the precedent misinterpreted the provision it purported to construe, then the Justices who voted to overrule the precedent would not be jeopardizing the Court's legitimacy; instead of accusing them of imposing their personal preferences on the country, people would understand that they were following the law (correctly understood). All sensible articulations of the legitimacy argument therefore posit a substantial gap

---

[225] Archibald Cox, The Warren Court: Constitutional Decision as an Instrument of Reform 25 (1968).

[226] Id. at 26; see also Archibald Cox, The Role of the Supreme Court in American Government 50 (1976) (suggesting that when a court is constantly overruling precedents, it creates the impression that the judges are "unrestrainedly asserting their individual or collective wills" rather than "following a law which binds them as well as the litigants").

[227] Earl M. Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467, 484.

between perception and reality: The argument assumes that even when a particular action really *is* principled, it sometimes will not *appear* so to the people who pay attention to the Court.[228] But the people who might be attracted to the weaker version of *stare decisis* will tend to believe that judicial opinions (and reports about such opinions) can communicate good arguments effectively.[229] Of course, no one thinks that the principled nature of good arguments will be apparent to everyone who pays attention to the courts, or even to everyone who is trained in the law. But the more firmly one accepts the premises about legal argument discussed in Section III.A, the more one will think that a court can *appear* principled simply by *being* principled (and providing good explanations of its reasoning).[230]

Second, even if there were a gap between perception and reality, many people who accept the assumptions of the weaker version of *stare decisis* would resist the notion that courts should care. In nearly all versions of the legitimacy argument, the public's acceptance of judicial decisions is premised on the popular belief that judges are more like scientists than like politicians and that legal questions tend to have right and wrong answers. For people who might be attracted to the weaker version of *stare decisis*, however, this belief is not simply a naive fantasy: It is actually true. If one accepts that premise, one might well be surprised—or even "appalled"[231]—by the idea that courts should let concerns about their image influence their decisions.

---

[228] See, e.g., *Casey*, 505 U.S. at 865–69 (noting that "not every conscientious claim of principled justification will be accepted as such," and that even a decision based on "principles worthy of profound respect" might appear to be "[no]thing but a surrender to political pressure"); Hellman, supra note 4, at 1124 ("It is because the principled quality of the principled decision is no longer believed to be readily apparent and understandable that the judge must attend to appearance as a discrete element.").

[229] See supra Section III.A.1.

[230] See, e.g., *Casey*, 505 U.S. at 964 (Rehnquist, C.J., dissenting) (suggesting that "faithful interpretation of the Constitution irrespective of public opposition" is the best way for the Court to enhance its legitimacy); cf. William O. Douglas, Stare Decisis 31 (1949) ("A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.").

[231] *Casey*, 505 U.S. at 998 (Scalia, J., dissenting); see also id. at 963 (Rehnquist, C.J., dissenting) ("The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the

At the very least, people who accept the weaker version's assumptions will be troubled by the lack of candor that the legitimacy argument seems to require. Whenever the legitimacy argument makes a difference, the gap between perception and reality will be the crucial factor in the court's decision: The current court will have concluded (1) that overruling a particular precedent would be a principled thing to do, but (2) that it cannot effectively explain its reasons for reaching this conclusion.[232] Yet the court cannot very well acknowledge what is actually driving its decision, or it would be jeopardizing the very legitimacy that it is trying to preserve.

This point requires a little elaboration. The legitimacy argument suggests that when Court #1 reads a statutory or constitutional provision to mean *X* and Court #2 reads it to mean *Y*, and when this happens time after time, people will lose faith either in the law's underlying determinacy or in the judges' willingness to follow the law. Even if Court #2 is usually right, people will fail to understand its legal arguments; they will come to think that the law does not really constrain judges. The legitimacy argument tells Court #2 to avoid shattering the public's faith: Instead of reaching the conclusion that would otherwise be correct, it should adhere to Court #1's decision. But if Court #2 were to explain exactly why it is doing so—"The statute means *Y*, but we will adhere to our prior decision saying that it means *X* because the public will not understand why this decision was erroneous"—it would be opening the very can of worms that the legitimacy argument tells it to avoid.

To be sure, there are some nuanced distinctions between this opinion and an opinion that actually overrules Court #1's decision.[233] But the whole point of the legitimacy argument is that nuanced distinctions may be lost on the public. If frequent overrulings would really jeopardize the courts' legitimacy, can we be sure that equally frequent declarations of error would not? Indeed,

---

popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.").

[232] If the current court did not think that overruling the precedent would be principled, then it could simply adhere to the precedent without worrying about the legitimacy argument. Similarly, if the current court thought that it could effectively explain why the precedent was erroneous, then it could overrule the precedent without jeopardizing its legitimacy.

[233] See Hellman, supra note 4, at 1146–48 (speculating that candid recognition of the legitimacy argument would not be "self-defeating").

might not the explicit statement that Court #2 is enforcing something other than what the statute requires, and that it is doing so only because it fears how an overruling decision would be perceived, sometimes undermine the courts' legitimacy *more* than a decision to overrule?

One obvious solution is for Court #2 to refrain from explaining what it is doing. But people who accept the assumptions of the weaker version of *stare decisis* will be suspicious of any doctrine that requires such opacity; in their view, judging is all about reasoned analysis of the law, and an important part of judging is communicating that analysis to others.[234] Lack of candor in opinions, moreover, may itself be a threat to judicial legitimacy. For one thing, it is hard to keep a secret: Clerks or internal communications among the Court's members may well expose the fact that the Court acted as it did so as to avoid acknowledging a past mistake.[235] If the public learns that the courts have been adhering to certain precedents solely out of concerns for the judiciary's image, public respect for the courts may be in *more* danger than if the courts had simply overruled the precedents.

In sum, even if one assumes that courts will not always be able to *appear* principled simply by *being* principled, people who accept the assumptions of the weaker version of *stare decisis* are likely to believe that a court protects its legitimacy best when it acts as if public perceptions did not matter. Given their understanding of the judicial duty, moreover, these people are likely to think that courts should not take prestige into account anyway. Indeed, the legitimacy argument may well strike them as a giant ruse: It concedes that the public's acceptance of court decisions rests on the idea that

---

[234] Cf. Eric Talley, Precedential Cascades: An Appraisal, 73 S. Cal. L. Rev. 87, 107–10 (1999) (arguing that opacity increases the likelihood that the process of successive litigation will generate inefficient rules); see also Douglas, supra note 230, at 12 (asserting that it is "vital to the integrity of the judicial process" for the Court to write so that "all could understand why it did what it did").

[235] See, e.g., Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 671 (1983) (noting that "dishonesty always creates the risk of its detection, and, with detection, harm to the courts' stature"); Hellman, supra note 4, at 1142–46 (acknowledging the advantages of candor); cf. Douglas, supra note 230, at 21 ("Respect for any tribunal is increased if it stands ready (save where injustice to intervening rights would occur) not only to correct the errors of others but also to confess its own.").

judges act like scientists rather than politicians, but it tells courts to act like politicians in order to preserve that idea.

C. Two Special Arguments About Statutory Stare Decisis

Whatever the relevance of this analysis to questions of constitutional law,[236] courts and commentators alike frequently argue that questions of statutory interpretation have some special features that call for strong doctrines of *stare decisis*. This Section considers two arguments to this effect, and asks whether people who would otherwise embrace the weaker version of *stare decisis* should be persuaded.

1. Daniel Farber's Argument About Imaginative Reconstruction

The idea that the weaker version of *stare decisis* promotes "democratic values" rests on the notion that when courts substitute permissible interpretations of statutes for erroneous ones, they are more accurately reflecting the enacting legislature's authoritative expression of its collective judgment.[237] According to an ingenious argument by Daniel Farber, however, concerns for "democratic values" may play out differently in cases of first impression than in later cases.

Accepting the invitation to focus on the collective judgment of our representatives in the enacting legislature, Professor Farber asks what those representatives would think about *stare decisis*. Despite their "initial stake in having a statute correctly interpreted,"[238] he speculates that they would not want courts to overrule whatever mistaken interpretations the courts might adopt. At the time of enactment, Farber explains, "members of the winning coalition have no way of knowing whether judicial mistakes

---

[236] Paradoxically, despite the common perception that the language of the Constitution is more open-ended and less determinate than the language of the typical federal statute, *stare decisis* is generally thought to matter less in constitutional cases than in statutory cases. See supra note 6 (citing modern cases to this effect); see also Lee, supra note 22, at 708–33 (discussing the relatively late development of this idea, which did not begin to emerge until after the Civil War). Although there certainly are some counterexamples, current applications of *stare decisis* come far closer to the weaker version in constitutional cases than in statutory cases.

[237] See supra note 206 and accompanying text.

[238] Farber, supra note 197, at 13.

will favor them (giving them more than the original 'bargain') or injure them (giving them less than they bargained for)." Assuming that judicial mistakes are equally likely to go in either direction, legislators "can expect the errors to balance out"; the occasions when the application of *stare decisis* gives legislators *less* than they bargained for will be offset by the occasions when it gives them *more* than they bargained for. Legislators will therefore see few benefits in a general rule of judicial error-correction.[239] But the same legislators will know that "a rule allowing ready judicial correction of prior mistaken opinions creates a variety of social costs." At the time of enactment, then, legislators would agree that courts should "give strong weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal."[240] On this view, applying *stare decisis* to protect erroneous decisions from reversal may actually *promote* democratic values, in that it effectuates what our elected representatives would want.

For a variety of reasons, we may not value such hypothetical reconstructions of legislative "intent." But even if we do, there are at least two flaws in Professor Farber's reconstruction.

First, it rests on an overly simplistic view of the types of mistakes that courts can be expected to make. Professor Farber acknowledges that if a statute reflects a compromise between legislators who wanted more of Policy *A* and those who wanted more of Policy *B*, courts might make mistakes about exactly where the statute strikes the balance. He assumes, however, that judicial mistakes will always remain on the same continuum as the original legislative deals: Courts will not erroneously read the statute to promote Policy *C* (which *no one* in Congress would have wanted). In fact,

---

[239] Id. at 12–13. Professor Farber's conclusion on this point seems internally inconsistent. If he were right about how legislators would analyze what he calls the "second round" (when courts are asked to correct an initial mistake), he would be wrong about the stakes in what he calls the "first round" (when courts are asked to interpret a statute for the first time). For precisely the same reasons that (in Farber's view) legislators will be "*ex ante* indifferent to judicial mistakes" when they think about the second round, they would also be indifferent to judicial mistakes when they think about the first round; instead of feeling any "initial stake in having a statute correctly interpreted," they would simply expect errors to balance out. See id. at 12. As explained below, Farber's intuitions about the first round are more plausible than his conclusions about the second round.

[240] Id. at 12–13.

some judicial mistakes surely will depart entirely from the framework of the original deal. Even if one accepts the rest of Farber's analysis, legislators will expect only *the mistakes that stay within the original framework* to cancel each other out; other sorts of mistakes will also occur but will not predictably be offset by anything. The net effect of all judicial mistakes, then, will drive the law *away from* the enacting legislators' preferred policies.

Second, even with respect to judicial mistakes that stay within the same framework as the original legislative deal, Professor Farber's analysis rests on unrealistic assumptions about the nature of legislative "bargains." In his model, the "majority coalition" in Congress will be pleased by judicial mistakes that give it "more" than it bargained for, and it will expect those mistakes to offset mistakes that go in the other direction. But what the majority coalition bargained for was presumably the bargain itself. If the statutory bargain reflects a compromise between Policy *A* and Policy *B*, we should be skeptical that the majority coalition actually wants "more" of either policy than the bargain reflects.[241] After all, if a majority of legislators really wanted "more" of Policy *A*, we might have expected the bargain to reflect that majority desire in the first place. Thus, any judicial mistake—whether in the direction of "more" or "less" of a particular policy—is likely to displease a majority of the enacting legislators, because it drives results away from the majority's preferred bargain.

Admittedly, this conclusion is itself oversimplified. In certain circumstances, the bargain reflected in a statute may reflect concessions that a minority block of legislators was able to extract from a legislative majority. Perhaps most legislators wanted to pursue Policy *A* more vigorously than the statute reflects, but had to scale back their approach in order to get the bill through a key committee, or to end a filibuster in the Senate, or to avoid a presidential veto. Still, the power that these possibilities give minority interests in Congress is all part of the complex mechanism that we

[241] Cf. Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 541 (1983) ("[I]t is exceptionally implausible to suppose that legislatures, faced explicitly with the task of selecting a background rule, would . . . charg[e] courts with supplying . . . 'more in the same vein' as the statute in question. In the case of interest group legislation it is most likely that the extent of the bargain—the pertinent 'vein'—is exhausted by the subjects of the express compromises reflected in the statute.").

use to aggregate individual policy preferences into one collective judgment. If we like this aggregation mechanism—if, for instance, we approve of how it makes majorities take some account of minorities and permits expression of different intensities of preference—then we want courts to enforce the collective judgment reflected in the statutory bargain rather than what they think simple majorities in Congress would "really" have wanted if given free rein. Even if we do *not* like our current aggregation mechanism, the appropriate response has nothing to do with *stare decisis*; we should simply switch to a different aggregation mechanism that more accurately reflects the collective judgment we want to enforce.

Whatever aggregation mechanism we ultimately accept, the bottom line for Farber's analysis will be the same. Judicial mistakes in interpreting the statutes that emerge from that mechanism will not "balance out." To the contrary, *all* mistakes drive the law away from the collective judgment reflected in the statute. If one accepts the premises of the weaker version of *stare decisis*, then, Professor Farber's argument will not dissuade one from applying that approach in statutory cases.

2. The Relevance of Legislative Acquiescence

Proponents of strong doctrines of statutory *stare decisis* frequently advance a second, more obvious argument. If a court has misinterpreted a particular statute, subsequent Congresses are free to pass a new statute overriding the erroneous decision and restoring the original bargain. If Congress fails to do so, we might infer that whatever members of the *enacting* Congress may have thought, our *current* elected representatives approve of the policy reflected in the erroneous decision.

The standard rejoinder to this argument is twofold. First, under our current system for aggregating legislative preferences into an enforceable policy, the failure to pass a bill is not something that can have any legal effect on its own; legislative *in*action does not comply with the constitutional requirements of bicameralism and presentment, and so it is not a valid way for our elected representatives to express their collective judgment. Among other problems, if Congress's inaction were taken as an authoritative ratification of the judiciary's decision, then the President would effectively be cut

out of the policymaking loop; a President who wanted to preserve the original legislative bargain would have nothing to veto, because congressional ratification of the new decision could occur without the enactment of any formal bill.[242]

Second, even if we were prepared to let members of Congress authoritatively express their collective ratification of a judicial decision without using the formal legislative process, the failure to pass an override bill is weak evidence of any such collective ratification. In most cases, it is easy to imagine that Congress would not have overridden the opposite decision either. After all, enacting a new statute is a lot harder than *not* enacting a new statute.[243]

Nonetheless, the current Congress's failure to override a decision is at least *some* evidence that members of Congress are content with that decision.[244] And even if we think that Congress has not *authoritatively* expressed its contentment (because it has not used the mechanisms of bicameralism and presentment), Congress's ability to override erroneous decisions still seems relevant to our assessment of the costs of those decisions. If the policies reflected in those decisions bother Congress enough, our elected representatives can override them. This safeguard is not perfect: The difficulty of passing new statutes will cause members of Congress to override fewer erroneous decisions than they would in a world without transaction costs, and the need to enact override bills may keep Congress from enacting useful laws in some other

---

[242] Likewise, even if one House of Congress wanted to override the judiciary's decision, the other House could block this action by refusing to pass the override bill. If we give legal effect to Congress's failure to enact such a bill—if we treat this failure as something that changes the law by authoritatively ratifying the judiciary's decision—we are effectively letting a single House wield legislative power on its own. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989); see also Easterbrook, supra note 203, at 428 ("Inferring legislative authority from inaction is what the one-house veto case was about.") (citing INS v. Chadha, 462 U.S. 919 (1983)).

[243] See *Patterson*, 491 U.S. at 175 n.1 ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation.") (quoting Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting)); see also, e.g., William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1404–05 (1988) (listing "the many possible reasons for legislative inaction").

[244] See Farber, supra note 197, at 10–11; see also William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 334–53 (1991) (presenting empirical evidence about the frequency with which Congress passes bills to override the Supreme Court's interpretation of prior statutes).

area. But while inaccuracy does have some costs, Congress's ability to override inaccurate decisions at least *reduces* those costs. "Democratic values" are less offended by mistakes that our current representatives can override than by mistakes that are beyond Congress's power to correct.

The problem with this argument is that it has no obvious bearing on which version of *stare decisis* we should adopt. Congress's ability to override judicial decisions that it dislikes does reduce the costs of whatever inaccuracy the stronger version might generate. But this very same ability also reduces the costs of whatever instability the weaker version might produce: If judges overlook some social costs associated with overruling a past decision and inadvisedly adopt a new rule, Congress remains free to enact a statute codifying the old rule. Where necessary to protect reliance interests, indeed, Congress often can even act retroactively. Thus, Congress's ability to override harmful decisions reduces the likely costs of *both* versions of *stare decisis*.

Congress's ability to override harmful decisions is obviously a good thing. But it does little to help us choose between the two competing versions of *stare decisis*. In particular, it does not prove that the stronger version is better than the weaker version.

D. Two Fundamental Objections

Ever since Section III.A, we have been making two assumptions that undoubtedly have raised some readers' hackles. First, we have been assuming that the concept of "demonstrable error" has some content: Although we might disagree about how often courts will actually reach demonstrably erroneous decisions, it is possible for interpretations of statutory or constitutional provisions to be objectively wrong. Second, we have been assuming that our formal rules of *stare decisis* matter: They have some effect on how judges actually act.

Because of this Part's modest goals, defending these assumptions is not terribly important to my argument. After all, I am simply trying to show that the weaker version of *stare decisis*, which prevailed for much of our nation's history, is not crazy: People with certain jurisprudential views, including views that remain in common currency today, could sensibly believe that the weaker version is better for society than the stronger version. In this Section, how-

ever, I briefly broaden my focus to consider what one might think about *stare decisis* if one flatly rejects the most basic assumptions of the weaker version.

1. What If One Rejects the Concept of "Demonstrable Error"?

Some readers will scoff at the very concept of "demonstrable error." Indeed, people who believe strongly in the inherent indeterminacy of legal language might conceivably contend that it is not even theoretically possible for interpretations of statutory or constitutional provisions to be demonstrably erroneous. If one takes this view, one will think that the weaker version of *stare decisis* is based entirely on an illusion.

If one believes so strongly in the indeterminacy of legal language, however, *every* version of *stare decisis* is based on an illusion. If statutes and constitutional provisions are incapable of setting out determinate rules for the future, the same is true of judicial opinions; if words are indeterminate when they appear in written laws, they presumably are also indeterminate when they appear as statements of a court's holding. Thus, just as statutes and constitutional provisions cannot really constrain judges, neither can past opinions.[245] For people who believe in the radical indeterminacy of legal language, it is hard to have any meaningful theory of *stare decisis* at all.

Some less radical positions are less vulnerable to this argument. For instance, one might think that legal language in statutes and judicial opinions can be determinate, but that the open-ended language in our Constitution is not. Whatever one thinks of the possibility of "demonstrable error" in the statutory realm, then, one might think that the concept is inapplicable to cases of constitutional interpretation. If one takes this view, one might well reject the weaker version of *stare decisis* in constitutional cases. But it is not clear why one should stop there: If one thinks that the important provisions of the Constitution are essentially indeterminate, why should one support judicial review, and why should there be constitutional cases in the first place? As Frank Easterbrook has

[245] Cf. Easterbrook, supra note 241, at 534 n.2 ("If statutes' words do not convey meaning and bind judges, why should judges' words bind or even interest the rest of us?").

pointed out, "[j]udicial review came from a theory of meaning that supposed the possibility of right answers . . . ."[246] If we reject that theory of meaning (at least as applied to the Constitution), then we need a justification for judicial review different from the one that Chief Justice Marshall offered in *Marbury v. Madison*.[247]

Of course, even if one concedes the theoretical possibility of "demonstrable error" in both statutory and constitutional cases, one might well believe that *in practice* courts will almost never reach demonstrably erroneous results. If an interpretation is plausible enough to be adopted by a court in the first place, one might well doubt that it will be demonstrably erroneous. Section III.A has already acknowledged this contention and has tried to explain why people with certain views about the nature of legal argument might reject it. But if one does not share those views, one might well think that trying to identify "demonstrable errors" will be like looking for needles in a haystack. The fewer "demonstrable errors" actually exist, the more one might think that the benefits of trying to eliminate those errors are outweighed by the risks that courts will reach "false positives." This line of analysis might well lead one toward the stronger version of *stare decisis*.

Still, the *Chevron* doctrine should give one some pause. When an adminstrative agency has authoritatively interpreted the statute that it administers, *Chevron* tells courts to ask whether the agency's interpretation is demonstrably erroneous. We seem to think that courts can conduct this inquiry with acceptable levels of accuracy: They can adequately differentiate between "permissible" and "impermissible" interpretations of statutes. But why do we want courts to conduct this inquiry in the first place? If the agency's trained lawyers, who specialize in the relevant area of law, have adopted a particular interpretation of the statute, shouldn't reviewing courts simply assume that the interpretation is within the range of permissibility? Won't the occasions on which reviewing courts correctly find demonstrable error be dwarfed by the occasions on which they reach "false positives"?

---

[246] Frank H. Easterbrook, Alternatives to Originalism?, 19 Harv. J.L. & Pub. Pol'y 479, 486 (1996).

[247] 5 U.S. (1 Cranch) 137 (1803).

At least two of the possible responses to this challenge relate to *stare decisis* as well as to the *Chevron* doctrine. One possibility is that the agency's lawyers will make enough mistakes to justify having courts ask whether the agency's interpretations are permissible. This possibility tends to reinforce the arguments in Section III.A.1: It suggests that legal questions can be hard, and that the people who must answer these questions in the first instance (whether in agencies or in courts) will make a significant number of mistakes.

The second possibility suggests a different argument in favor of the weaker version of *stare decisis*. If agencies knew that courts would accept even demonstrably erroneous interpretations (unless there were practical reasons not to do so), they might feel less bound by the authoritative expressions of Congress's judgment and more free to adopt whatever policies they themselves deemed beneficial. On this view, we encourage courts to review the permissibility of agency interpretations because we fear the incentives that the contrary rule would give agencies. But just as a world of total *Chevron* deference might create bad incentives for agencies, one could plausibly argue that the stronger version of *stare decisis* creates bad incentives for courts. Even if one thinks that few demonstrably erroneous precedents exist *now*, the weaker version of *stare decisis* might be a useful way of maintaining this happy state of affairs.

2. What if the Formal Rules of Stare Decisis *Don't Affect How Judges Act?*

Skeptics might contend that efforts to compare the stronger and weaker versions of *stare decisis* are simply beside the point: It makes no real difference which doctrine of *stare decisis* we pick, because our formulation of the doctrine does not really affect how judges act. One recent study concludes that precedent "rarely" causes any members of the United States Supreme Court to embrace "a result they would not otherwise have reached."[248] Other commentators assert that *stare decisis* "has always been a doctrine

[248] Harold J. Spaeth & Jeffrey A. Segal, Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court 287 (1999).

of convenience";[249] instead of conscientiously trying to follow predetermined rules of precedent, judges invoke *stare decisis* only when they favor inertia for other reasons.

If we believe that all judges behave this way, then the weaker version of *stare decisis* is neither better nor worse than the stronger version. After all, our formal doctrines of *stare decisis* make little difference if judges pay no attention to them. Perhaps an ironclad rule of absolute adherence to precedent would make it somewhat easier for us to detect such defiance, and perhaps the threat of detection would have some deterrent effect on judges. But given judges' ability to distinguish past cases, even this "ironclad" rule might do little to restrain judges who want to deviate from it. In any event, no version of *stare decisis* that might plausibly be followed in America comes anywhere close to an ironclad rule. As the radical codifiers suggested more than 160 years ago,[250] prudential doctrines like *stare decisis* are unlikely to have significant restraining effects on courts of last resort that want to manipulate them.

Suppose, however, that our skepticism is more nuanced: We expect *some* judges to try conscientiously to follow our formal doctrine of *stare decisis*, even though we expect other judges to behave opportunistically. This more nuanced form of skepticism may actually affect what we want our formal doctrine to say.

Imagine that "conscientious" judges invoke *stare decisis* in a consistent and principled manner, while "willful" judges invoke it only when it furthers their willful agenda. If our formal doctrines of *stare decisis* are strong, they may maximize the "willful" judges' ability to impose their agenda. As Frank Easterbrook has shown, "[t]hose who always follow earlier cases in an institution that generally does not do so will lose power relative to those who follow earlier cases selectively."[251] If we think that this result would be bad, and if we think that significant numbers of judges will invoke *stare decisis* opportunistically rather than following whatever formal rule we set, then we should hesitate before telling the other judges to use strong versions of *stare decisis*. Other things being equal, then, people who believe that many judges will not follow

[249] Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 Cornell L. Rev. 401, 402 (1988).

[250] See supra note 175 and accompanying text.

[251] Easterbrook, supra note 206, at 822.

our formal rules of *stare decisis* anyway should tend to prefer weaker versions of *stare decisis* over stronger ones.

CONCLUSION

In a 1989 address to the bar association of New York City, Justice Lewis Powell declared that "the elimination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."[252] For people who accept the concept of "demonstrable error," however, this criticism misses the mark. To the extent that they are suspicious of *stare decisis*, their suspicions arise precisely because they do *not* always equate the law with judicial decisions; they believe that the underlying rules of decision sometimes have a determinate existence separate and apart from judicial interpretations. Indeed, they might view Justice Powell's criticism as more applicable to his own position than to theirs. Strong doctrines of *stare decisis*, a wag might claim, "represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices *said* it is."

In a sense, Justice Powell's criticism and the wag's response talk past each other. Justice Powell's point assumes that in the absence of *stare decisis*, there would be little check on judicial discretion: Current judges could say whatever they want. The wag's response reflects the opposite assumption: The underlying rules of decision exist with or without judicial decisions, and they themselves dictate the decisions that conscientious judges must reach.

In our post-*Chevron* world, neither assumption seems entirely correct. Statutory and even constitutional provisions surely impose substantial constraints on judges; even in the absence of any binding precedents construing those provisions, the provisions cannot plausibly be read to establish whatever policy judges might like. But while the underlying rules of decision may *constrain* judicial discretion, they do not entirely *eliminate* it; they leave judges with some freedom to pick among permissible interpretations.

I have suggested that *stare decisis* grew in America as a way to restrain exactly this type of judicial discretion—the discretion that

[252] Lewis F. Powell, Jr., *Stare Decisis* and Judicial Restraint, 1991 J. Sup. Ct. Hist. 13, 16.

occupies the space left by the indeterminacy of the underlying rules of decision. Within this space, it is perfectly sensible for courts to apply a rebuttable presumption against overruling precedents. After all, if Court #1's decision is no less accurate than Court #2's preferred view, and if transitions from one rule to another tend to be costly, then Court #2 should make a change only if there is some special advantage to doing so.

Outside of this space, however, things get murkier. If Court #2 believes that Court #1's decision was demonstrably erroneous, and if Court #2 is probably correct, then it is not so clear why Court #2 should automatically indulge a presumption against change. Transitions still have costs, but compliance with the underlying rules of decision might itself be considered an offsetting benefit. If we fear judicial discretion, moreover, we can take comfort in the (partial) determinacy of those rules; we might think that instead of wielding unauthorized power, Court #2 is simply correcting its predecessor's abuse of discretion.

In sum, the conventional academic wisdom about *stare decisis* may go farther than the basic purpose of *stare decisis* demands. To the extent that the underlying rules of decision would themselves impose some constraints on conscientious judges, we may be able to remove some of the weight that we have been asking *stare decisis* to carry. We unquestionably want the presumption against overruling past decisions to protect "permissible" decisions. But if one accepts the assumptions discussed in Part III, one might rationally decline to extend this presumption to "erroneous" decisions.

To be sure, one might well reject those assumptions and conclude that the stronger version of *stare decisis* is far preferable to the weaker version. The people who are most likely to do so, however, are those who put relatively little stock in the idea of "demonstrable error." Such objections only prove my basic point: Our views of *stare decisis* are linked to our perceptions of the determinacy of the underlying rules of decision.