

# PRECEDENT, HUMILITY, AND JUSTICE

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## ABSTRACT

*When resolving cases, appellate courts must quickly decide how much respect to give precedent decisions and the analytical approaches they embody. While the logical and philosophical justifications for reliance on precedent have been frequent topics in jurisprudential studies, this Article takes a unique perspective that will reinforce the role of precedent by emphasizing its necessary pride of place in any outcome that can be considered substantively just. Arguing against more decisionist models of adjudication and building upon prior pragmatic and Dworkinian justifications for the special role of precedent, this Article suggests first that appellate judges must approach their profession with humility to achieve substantively just results. After more fully defining the partially constitutive relationship between judicial humility and justice, the Article then contends that such humility necessarily implies respect for precedent. This respect for precedent has both a cross-generational dimension, in light of the refinement of the law over time, and a horizontal dimension, in light of the collegiality required for appellate judges to agreeably resolve the cases on their dockets. Precedent is therefore vital in all cases, even those decided on constitutional grounds. Such a humble, precedent-based approach to adjudication also has several implications for the process of appellate decisionmaking.*

## INTRODUCTION

In the aisles of any Anglo-American law library, the breadth of volumes confronting law students is somewhere between overwhelming and alarming. New attorneys struggle to conceive of internalizing such a vast network of previously announced decisions covering almost any subject in detail far too minute to distill into a 10-page course outline. The easiest (and perhaps most common) reaction is to regard those volumes as the dead hand of authors who lack contemporary relevance, focusing instead on the

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business of determining the proper outcome of legal controversies in the present.

Such reactions are understandable from an overwhelmed new jurist. Yet appellate court judges take the same approach with alarming frequency when confronted with interminable volumes of precedent. Rather than carefully investigating and understanding those authorities, many judges react by determining the “correct” decision and either utilizing snippets of supporting case law or ignoring prior decisions altogether.<sup>1</sup> To the layman that reaction seems apropos. At first blush, when a court relies on precedent in reaching its conclusion it counterintuitively follows the course laid down in a past decision without regard for that decision’s accuracy in principle.<sup>2</sup> But does an appellate judge really work an injustice by largely relying upon precedent, even at the level of adopting the analytical approach suggested in prior cases, when rendering a decision?<sup>3</sup> In this paper, I aim to describe the role precedent should play for such a judge, offering a fresh theoretical review of the issue and a new approach to precedent’s function. My argument proceeds in two steps; after first arguing that the idea of a just decision necessarily leaves some internal space for a conception of judicial humility, I argue that that conception of judicial humility leaves space for reliance on precedent. I

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<sup>1</sup> This is not to say that all appellate judges disregard the value of precedent, at least not explicitly. See Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEORGETOWN L.J. 1, 30 (2010) (noting the affirmations of *stare decisis* from then-judges Roberts and Alito during their confirmation hearings).

<sup>2</sup> “Stare decisis demands that courts conform their decisions to decisions reached by previous courts, and sometimes those previous decisions will have been unjust. Stare decisis, that is, sometimes requires courts to reach unjust decisions.” Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2033 (1996).

<sup>3</sup> I do not distinguish here between the approaches that should be taken by intermediate appellate and supreme courts in a jurisdiction, although some distinctions may be possible. Some have argued that the number of cases truly decided by precedent is far higher at the Circuit Court rather than at the Supreme Court level. FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 90 (2009) (“[T]he population of appellate cases, especially at the Supreme Court level, is heavily weighted toward disputes whose outcomes are not determined or even very much guided by existing precedents. When we examine the United States courts of appeals, however, things are different. Where appellate jurisdiction is a matter of right and not discretionary with the court and where more than 80 percent of the decisions are not only unanimous but also not thought deserving of even an officially published opinion, we find far more cases in which an existing mandatory authority appears to dictate a particular outcome but for the existence of binding precedent.”). Though Schauer’s understanding of how a precedent might “determine” an outcome does make it far less likely at the Supreme Court level, I argue against his sensibility that precedent is only useful when it is so wholly determinative of outcomes.

therefore contend that a just decision is necessarily crafted by a humble judge who has consistently and robustly relied on precedent.

Again, this position is counterintuitive; many have claimed that *stare decisis* requires unjust results at the retail level of individual cases. The classic objection to judicial reliance on precedent places more faith in the individual judge to properly decide a present controversy and suggests that thoroughgoing reliance on precedent will frequently compound initial errors in subsequent cases with disastrous results.<sup>4</sup> Such views are intuitively appealing, especially to a party who feels that her legal claim was denied by the dead hand of prior judges.

There are several existing responses to this challenge, which I consider in turn before presenting my own supplementary theory. The first line of defense consists of what I call pragmatic (and others have called “consequentialist”)<sup>5</sup> theories of precedent.<sup>6</sup> According to these theories, consistent judicial reliance on precedent generates an assortment of ends, such as predictability in the law,<sup>7</sup> apparent stability in legal precepts,<sup>8</sup> preservation of private expectations,<sup>9</sup> limitations on judicial discretion,<sup>10</sup> or efficiency in judicial decisionmaking.<sup>11</sup> Though the theories vary, each describes these ends as external to substantive justice itself. The ends are said to promote justice on a wholesale level, while admitting that in individual cases unjust results will be generated with some frequency.

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<sup>4</sup> See *infra* Part II.

<sup>5</sup> Peters, *supra* note 2, at 2040. Peters also notes that these terms may be interchangeable. *Id.* at 2040 n.32.

<sup>6</sup> See *infra* Part III.A.

<sup>7</sup> See, e.g., Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-96 (1987); Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW 89, 91 (Laurence Goldstein ed., 1987). I have made my own modest contribution to this intellectual history. See Michael Gentithes, *In Defense of Stare Decisis*, 45 WILLAMETTE L. REV. 798 (2009).

<sup>8</sup> Peters, *supra* note 2, at 2039 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853-68 (1992)).

<sup>9</sup> *Id.*

<sup>10</sup> “To avoid an arbitrary discretion in the courts, 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; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.” THE FEDERALIST NO. 78, at 442 (Alexander Hamilton) (Isaac Kramnick ed., Penguin Books 1987).

<sup>11</sup> See, e.g., Schauer, *supra* note 7, at 599 (citing B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149-50 (1921)); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989).

Alternatively, some argue for judicial reliance on precedent as a component of what is sometimes referred to as formal justice,<sup>12</sup> the idea that the legal system must treat like cases alike.<sup>13</sup> These accounts are apparently deontological, claiming some inherent normative value in adjudicative consistency or equality outside and apart from substantive justice itself, a value which can be weighed against other normative goods.<sup>14</sup> Such theories may in part derive the inherent normative value of precedent from the way similar treatment of similar controversies inures the progression of law with some fairness or comparative justice, giving it a more meaningful appearance than a succession of wholly unrelated decisions. However, these views are subject to criticism due to their sequential arbitrariness and potentially circular nature.

A more nuanced approach to the value of precedent is contained in Ronald Dworkin's hugely influential law-as-integrity theory.<sup>15</sup> This position can similarly be classified as deontological in that it constructs a norm, integrity, which has its own value distinct from justice.<sup>16</sup> However, his theory tends toward a respect for precedent simply because of its temporal priority. It ultimately fails to take a wide-lens view of the development of law, which requires significant changes to occur cross-generationally, not instantaneously.

While I do not wholly reject these previous defenses of reliance on precedent, I do believe a supplemental defense is required. I take the same side as these theories in the wider contest against more decisionist models that critique genuine reliance on precedent and place faith in individual judges to reach just decisions. I only highlight the limitations of those prior

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<sup>12</sup> Leslie Green, *The Germ of Justice*, 10-11 (Oxford Legal Studies Research Paper No. 60/2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1703008##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1703008##).

<sup>13</sup> E.g. H.L.A. HART, *THE CONCEPT OF LAW* 159 (2nd ed. 1994) ("Justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently.' " (emphasis in original)). Ronald Dworkin also adopted this position in earlier work. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1090 (1975) ("The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future."). For my discussion of these views, see *infra* Part III.B.

<sup>14</sup> Christopher Peters describes such arguments as deontological theories of *stare decisis*. Peters, *supra* note 2, at 2041.

<sup>15</sup> See *infra* Part IV.

<sup>16</sup> This largely borrows from Christopher Peters's description of Dworkin's view. See Peters, *supra* note 2, at 2043-44. As I describe in more detail later, Peters suggests that Dworkin ultimately fails in his effort to erect a norm of integrity whose value lies entirely outside our understanding of justice. *Id.* at 2080-2111.

theories in an effort to demonstrate the utility of my supplemental position. In the spirit of the very claim I am making, I seek to build upon the work of prior defenders of precedent in devising a more refined understanding of precedent's role.

Because a single judge cannot consider all the factual variations covered by the law, she can only be a limited participant in the momentous task of developing and adjusting its course over time. Given this difficulty, the judge must temper her own ego and, rather than seek to make her own indelible jurisprudential mark, work as part of a larger project with colleagues past and present. She must therefore take a humble approach,<sup>17</sup> allowing her to balance the competing aims of maintaining social cohesion while advancing our understanding of legal ideals. Judicial humility is partially constitutive of a just decision, and in turn precedent is partially constitutive of that needed humility.<sup>18</sup>

As a first step in my argument, I define the relationship between humility and justice, which admits of several possible variations. In the first instance, humility could be a normative value in and of itself that remains wholly separate and distinct from substantive justice. Humility thus conceived would be similar to the value of treating like cases alike (or possibly Dworkinian integrity), and would have independent normative weight outside of its tendency to either serve or obstruct justice. Secondly, humility might be an external instrument useful in the pursuit of just results. Although on this conception humility lacks normative weight, it derives significance from its tendency to produce a legal system that is just overall, aligning roughly with the traditional pragmatic defenses. I argue that humility ought to be conceived of in a third way: as an internal aspect of justice. Humility is thus partially constitutive of substantive justice in the adjudicative context, not something external to the idea of a just decision.<sup>19</sup>

The second step of my argument posits that humility (as an internal aspect of justice) demands, or is partially constituted by, reliance on precedent even at the thick level of analytical principle. Humility requires such reliance in two ways, which I refer to as the horizontal and cross-generational dimensions. First, humble judges must act collegially on a horizontal level with one another.<sup>20</sup> Only by respecting the analytical dimension of established precedent in a given area and reasoning from the

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<sup>17</sup> Tremendous credit is due to David Strauss for having similarly highlighted the importance of judicial humility in his work. See DAVID STRAUSS, *THE LIVING CONSTITUTION* 40-41 (2010).

<sup>18</sup> See *infra* Part V.

<sup>19</sup> While this is my preferred understanding of the relationship between humility and justice, I note that my theory is not clearly incompatible with the two alternative understandings I have described.

<sup>20</sup> See *infra* Part VI.

same point of analytical departure can judges hope to reach consensus with the other members of their court on deeply divisive issues. Second, judges must acknowledge their place in a larger historical project that (one hopes) will extend for many years and across countless future generations.<sup>21</sup> More than a means to another normative end, this common law-like process is inherently valuable in that it allows for ongoing refinement of the law through time and experience.<sup>22</sup> While the existing defenses of judicial reliance on precedent describe important components of that practice's value, only this additional line of argument explains the direct connection between that practice and a just outcome in an individual case. These two dimensions of reliance on precedent are therefore internal to the value of judicial humility,<sup>23</sup> and in turn are situated internal to substantive justice itself. The argument that *stare decisis* actually disserves justice in certain specific cases is based upon a misunderstanding of the requirements of justice in an adjudicatory context.

Humility and its incumbent respect for precedent seems most clearly required in the common law, but I also argue for its application in statutory and, perhaps controversially, constitutional cases.<sup>24</sup> Rather than disserving justice in the weightiest of conflicts, reliance on precedent in the constitutional arena is actually a positive development. It is an inherent dimension of any constitutional decision that can be considered just, and is therefore a requirement for any judge who seeks to serve well the court on which she sits.

In the final sections of the paper, I briefly consider some of the implications of my position in prescribing an adjudicatory method for appellate judges. Specifically, I focus on the way in which a judge crafts her opinions<sup>25</sup> and the best approach to overruling precedent on rare occasions.<sup>26</sup> Finally, I conclude with a brief summary of my remarks.<sup>27</sup>

## II. THE OBJECTION TO JUDICIAL RELIANCE ON PRECEDENT

Although there are a variety of purposes served by a theory of

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<sup>21</sup> See *infra* Part VII.

<sup>22</sup> This claim is, of course, largely similar to the argument that the rules of society “work themselves pure” through common law judicial decisionmaking. See RONALD DWORKIN, *LAW’S EMPIRE* 400 (1986) (describing this idea behind the common law tradition).

<sup>23</sup> Admittedly, the concept of judicial humility may be broader than the two dimensions I describe in this paper. See *infra* Part V.

<sup>24</sup> See *infra* Part VIII.

<sup>25</sup> See *infra* Part IX.

<sup>26</sup> See *infra* Part X.

<sup>27</sup> See *infra* Part XI.

adjudication, any plausible one seeks to reliably decide cases as justly as possible.<sup>28</sup> Without deeper examination, it therefore seems that little priority of place should be reserved for precedent amongst the inputs to a judicial decision. Reliance on precedent, after all, seemingly requires courts to occasionally reach unjust results, since one cannot assume that all prior decisions were correct in either analytical principle or ultimate outcome.<sup>29</sup>

The objection to judicial reliance on precedent has historical roots in a more decisionist adjudicative model, one which claims that a judge can grasp the notion of justice personally and bring it to bear in individual cases. Plato's vision of the utopian state included philosopher-kings with the power to both lead the state and adjudicate law suits.<sup>30</sup> These philosophers could perceive the "Form" of justice itself and apply that Form in individual cases.<sup>31</sup> Such leaders should possess "a mind naturally well proportioned and graceful whose native instincts will permit it to be easily led to apprehend the Forms of things as they really are," including justice.<sup>32</sup> A decisionist model of judges working from a "clean surface" therefore seems preferable to one based upon discussion and deliberation with the authors of prior decisions.<sup>33</sup> The philosophical intellect will be capable of deciding justly itself, not as the product of any reliance upon the work of prior decisionmakers.<sup>34</sup>

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<sup>28</sup> In *The Republic*, Socrates contends that when the rulers of the state adjudicate law suits, "their judgments [will] be guided above everything by the desire that no one may appropriate what belongs to others nor be deprived of what is his own . . . [b]ecause that is just." PLATO, *THE REPUBLIC* \*433.

<sup>29</sup> "Stare decisis demands that courts conform their decisions to decisions reached by previous courts, and sometimes those previous decisions will have been unjust. Stare decisis, that is, sometimes requires courts to reach unjust decisions." Peters, *supra* note 2, at 2033. Peters concludes that occasional unjust results may be necessary in order to address the pragmatic concerns I outlined above, which he considers a part of a more wholesale conception of justice. Before doing so, Peters does provide an eloquently-phrased critique of *stare decisis* as a requirement of treating like cases alike in most cases outside the constitutional context.

<sup>30</sup> PLATO, *supra* note 28, at \*433, \*473. It is the "natural province" of such philosophers to rule. *Id.* at \*474.

<sup>31</sup> Socrates argued to Glaucon that "those who are able to apprehend the eternal and immutable are philosophers, while those who are incapable of this and who wander in the region of change and multiformity are not philosophers." *Id.* at \*484. Therefore, philosophers "are to be thought capable of guarding the laws and customs of states and [should] be appointed guardians." *Id.*

<sup>32</sup> *Id.* at \*486.

<sup>33</sup> *Id.* at \*500. Philosopher-kings will only work on such a clean surface, and "they will refuse to meddle with man or city and hesitate to pencil laws until they have either found a clear canvas or made it clear by their own exertion." *Id.*

<sup>34</sup> Plato's decisionist model is also reflected in his reliance upon expertise to flexibly respond to particular exigencies, rather than rigidly constructed codes or texts. *See* PLATO, *THE STATESMAN* \*293.

The more modern strand of the objection to precedent also emphasizes that precedent is a poorly-tailored constraint to judicial discretion.<sup>35</sup> While many objectors believe judicial discretion ought to somehow be cabined, they maintain that precedent is not up to the task. Emphasis is given to the potential for blind faith to earlier decisions to compound the errors of the past, solidifying early misguidance because “the basic data [of past decisions] are flawed and decisionmaking by analogy will simply entrench the errors.”<sup>36</sup> Objectors thus argue that reliance on precedent will require an unacceptable sacrifice of justice at the retail level in individual cases which cannot be redeemed by broader gains in wholesale justice.<sup>37</sup> While a court’s discretion should be restrained in difficult cases where any decision will be controversial, principles other than prior cases, such as legislative deference or original intent, should guide decisions.<sup>38</sup> More straightforward reasoning about the best possible outcome, all things considered, may even be preferable to reliance on the frequently erroneous decisions of prior courts.<sup>39</sup>

Such arguments against precedent are at least intuitively appealing. It is surely little salve to those wronged by a particular legal decision to explain that theirs is a sacrifice necessary for greater society, that they cannot obtain just results immediately because to grant such relief would require a more drastic alteration in the landscape of legal principles than society can currently bear and instead the outcome of their case must be dictated by decisions in earlier cases. Because any robust theory of precedent has the potential to compound the mistakes of the past in present cases, such a theory seemingly requires just this type of sacrifice from individuals who

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<sup>35</sup> For my own views on the potential for precedent to act as a meaningful constraint both on judicial discretion and on costly and repeated litigation of similar issues, see *infra* Part IX.

<sup>36</sup> Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1185 (1999) (citing the concerns expressed by Larry Alexander in *Bad Beginnings*, 145 U. PA. L. REV. 57, 80-87 (1996)).

<sup>37</sup> These sorts of individual sacrifices are an unacceptable consequence in a Platonic utopian state, as injury to an individual member of that state through a particular injustice is felt throughout the community, much as an injury to a man’s finger is an injury to the man, not merely to a distinct component of his frame. PLATO, *supra* note 28, at \*433.

<sup>38</sup> See, e.g., Michael Stokes Paulsen, *Book Review: The Constitution in Conflict*, 10 CONST. COMMENT. 221, 229-31 (1993). Such criticism may have particular resonance in constitutional cases, where it seems that “[i]f the Constitution is not alterable whenever the judiciary shall please to alter it, then ‘a [judicial precedent] contrary to the constitution is not law.’ ” Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2732 (2003) [hereinafter Paulsen, *Marbury*] (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>39</sup> Alexander, *supra* note 36, at 70 (touting reflective equilibrium in judicial decisionmaking).

find themselves on the wrong side of a longstanding and seemingly irrelevant legal precedent.

In answer to the objection to precedent, theorists have constructed a multitude of responses of varying efficacy. While these responses represent important discussions of the possible value of precedent and its primacy as a guide for the exercise of judicial discretion, I ultimately conclude that they fail to fully respond to the objection. As I clarify later in the paper, the objection rests on a misconceived distinction between a just decision and a decision which humbly relies on the work of past judges.<sup>40</sup> This misconception of a just decision emerges but subtly deviates from the traditional defenses of reliance on precedent. I therefore turn to a description of those positions as a means to illuminate my own view.

### III. TRADITIONAL DEFENSES OF PRECEDENT

As noted in the introduction, the traditional defenses of reliance on precedent follow several common lines. The two typical retorts are the argument for wholesale gains offsetting any particular unjust results and the claim that reliance on precedent in all cases is a normative good distinct from justice itself. I discuss these traditional defenses in turn below.<sup>41</sup>

#### A. Pragmatic Theories

The first traditional defense of judicial reliance on precedent highlights the pragmatic gains derived from that practice. The laundry list of claims made under this rubric is long and amoebic, but the important connection between these views is that each posits a distinct practical end allegedly achieved by judicial reliance on precedent, thereby offsetting any retail-level infractions against justice.<sup>42</sup> Thus, individual injustices can be tolerated for corresponding gains in (for example) predictability,<sup>43</sup> stability,<sup>44</sup> correction of judicial bias,<sup>45</sup> preservation of private expectations,<sup>46</sup> limitation of judicial discretion,<sup>47</sup> or judicial efficiency.<sup>48</sup> In

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<sup>40</sup> See *infra* Part V.

<sup>41</sup> In the following section, I turn to the subtly distinct account provided by Ronald Dworkin, which I use as a springboard for my own arguments. See *infra* Part IV.

<sup>42</sup> A useful example of this approach is the Supreme Court's discussion of the value of *stare decisis* in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>43</sup> See, e.g., Schauer, *supra* note 7, at 595-96; Benditt, *supra* note 7, at 91; Gentithes, *supra* note 7.

<sup>44</sup> Peters, *supra* note 2, at 2039 (citing *Casey*, 505 U.S. at 853-68).

<sup>45</sup> Sherwin, *supra* note 36, at 1186.

<sup>46</sup> Peters, *supra* note 2, at 2039.

<sup>47</sup> "To avoid an arbitrary discretion in the courts, it is indispensable that they should

combination, these practical ends serve as a bulwark against devolution to complete societal chaos.<sup>49</sup> Any number of fundamental legal principles established in prior cases must be essentially beyond the bounds of argument in future litigation, for holding otherwise would lead to “massive destabilization” that could undermine the state’s viability.<sup>50</sup> The judiciary must follow a principle of *stare decisis* at least robust enough “to prevent disruption of practice and expectations so settled, or to avoid the revitalization of a public debate so divisive, that departure from the precedent would contribute in some perceptible way to a failure of confidence in the lawfulness of fundamental features of the political order.”<sup>51</sup>

In general, the distinct ends described by these theories are considered conducive to a system that is wholesale more just than it would otherwise be. That posited relationship is not consistent amongst the authors of these approaches; in some cases the pragmatic ends are assigned some normative value in themselves. Perhaps the most that can be said is that each of these positions suggests reliance on precedent will “serve justice-related ends,”<sup>52</sup> whether or not these ends have inherent value or derive their normative worth through their eventual production of justice. Nonetheless, the variety of theories directed towards those ends can usefully be grouped together under the “pragmatic” heading given their common orientation towards an end distinct from justice itself.<sup>53</sup> As illustrated below, that orientation places the ends served by reliance on precedent external to a conception of justice.

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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; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 10, at 442.

<sup>48</sup> See, e.g., Schauer, *supra* note 7, at 599 (citing CARDOZO, *supra* note 11, at 149-50); Kornhauser, *supra* note 11; Richard H. Fallon, Jr., *Stare Decisis and The Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 573 (2001).

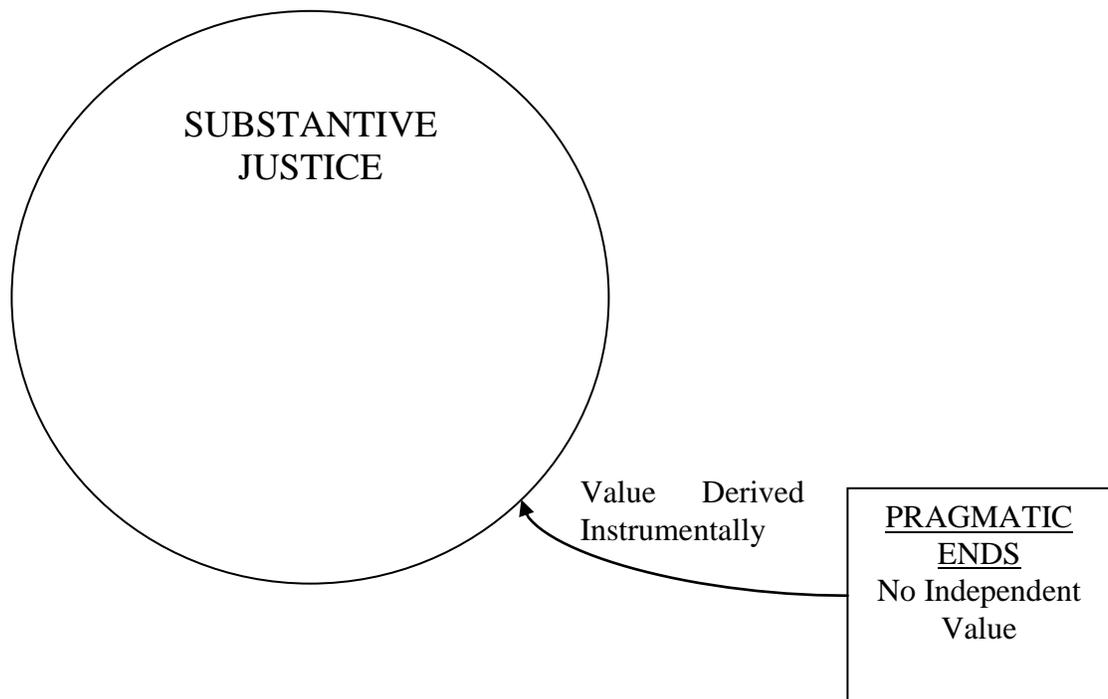
<sup>49</sup> Fallon, *supra* note 48, at 584-85.

<sup>50</sup> Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988).

<sup>51</sup> *Id.*

<sup>52</sup> Peters, *supra* note 2, at 2040.

<sup>53</sup> In arguing that judicial reasoning by analogy to prior cases produces many of the ends listed above, Emily Sherwin is careful to emphasize that “these advantages are indirect.” Sherwin, *supra* note 36, at 1186.



### B. Formal Justice

An alternative support for a strong theory of precedent is encapsulated by the intuitively appealing doctrine of treating like cases alike. At its heart, this view suggests that precedent is vital (and perhaps even logically required)<sup>54</sup> to achieve consistency in adjudicatory outcomes. There is significant correspondence between this type of consistency and many of the values allegedly supported by the Rule of Law, such as a sphere of predictable freedoms in which one can order her private affairs<sup>55</sup> or the constancy of the law concerning private arrangements amongst citizens that will lead to a prosperous society.<sup>56</sup> Some refer to this idea as the requirement of “formal justice,”<sup>57</sup> suggesting that it is inexorably tied to a

<sup>54</sup> “[A] decision maker who has decided a kind of case in accordance with a given principle today logically commits himself to deciding a similar case tomorrow in accordance with that principle.” Benditt, *supra* note 7, at 89.

<sup>55</sup> See F.A. HAYEK, *THE ROAD TO SERFDOM* 112 (Bruce Caldwell ed., 2007).

<sup>56</sup> See JEREMY BENTHAM, *THEORY OF LEGISLATION* 134 (R. Hildreth ed., 1840).

<sup>57</sup> I use this term to broadly capture all of the arguments derived from the principle of

designation of certain institutions as the means to produce and apply law if society is to hold any hope for just outcomes.<sup>58</sup>

Treating relevantly similar cases in the same way seems normatively sound independent of justice simply because that is the fairest treatment possible.<sup>59</sup> This argument is a familiar one to any parent who (accidentally or intentionally) dotes on only one child, say by giving a cookie to her son Jack but not to her son John. Regardless of the substantive justice of giving a cookie to Jack (that is, whether Jack substantively deserve that cookie given his past behavior or has otherwise merited such a reward), John will inevitably protest that he is likewise entitled to a cookie as a matter of fairness given the lack of an apparent distinction between the two children.<sup>60</sup> Proponents of the like cases alike principle might also argue that similar treatment is a requirement of fairness when two parties raise otherwise identical claims at different times. Fairness seems to demand that claims that are identical in all respects other than the time they were raised be resolved the same way, so long as there is no reason that the timing itself makes a substantive difference. If a meaningful distinction between the cases is lacking, it only seems fair that both claimants receive the same result.

Strong critiques of this approach exist. Although I do not believe they defeat the intuition at its heart, they demonstrate its limitations. In common, these critiques suggest that the principle of treating like cases alike is necessarily distinct from the requirements of substantive justice more broadly understood. For example, treating future cases that are similar to past decisions in the same fashion may be a sequentially arbitrary, and hence substantively unjust, approach. “It makes the rightness or

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treating like cases alike, including claims of so-called “comparative justice” discussed in detail in the following paragraph.

<sup>58</sup> Green, *supra* note 12, at 10-11. The argument for formal justice seems to be based upon analogical reasoning, although some suggest there is a distinction to be made between reasoning from precedent and pure analogical reasoning. For instance, Schauer contends that reasoning from precedent is not the same as reasoning from analogy because it is not a matter of choosing a subject case for comparison; reasoning from precedent requires reliance upon a previous case simply because it was decided previously, not because it is the best factual analogue available. See SCHAUER, *supra* note 3, at 91.

<sup>59</sup> See Raleigh Hannah Levine & Russell Panier, *Comparative and Noncomparative Justice: Some Guidelines for Constitutional Adjudication*, 14 WM. & MARY BILL RTS. J. 141, 147 (2005) (citing JOEL FEINBERG, *SOCIAL PHILOSOPHY* 99-100 (1973)). Again, such arguments are sometimes made in the name of “comparative justice” ultimately designed “to protect comparative rights.” *Id.* I eschew that label here simply to avoid confusion.

<sup>60</sup> There is of course a flip-side to this principle, which requires “[t]reat[ing] relevantly dissimilar cases in different ways.” *Id.* at 149. For instance, if Jack is older he might argue he deserves a later bedtime than younger John based on their dissimilarity in age and (presumably) maturity.

wrongness of a person's treatment contingent upon the sequence in which that person is treated with respect to other identically situated people,"<sup>61</sup> rather than focusing on some concept of desert outside of that comparative viewpoint. *Stare decisis* defined purely as this type of equality amongst like cases is also potentially tautological. As commonly formulated, the position amounts to the claim that "[i]dentically situated people are entitled to be treated identically."<sup>62</sup> As Christopher Peters argues, the phrase "identically situated people" in the traditional expression of equality becomes " 'people identically entitled to the relevant treatment.' The traditional expression now reads like this: 'people identically entitled to the relevant treatment are entitled to be treated identically'—that is, are identically entitled to that treatment. Traditionally expressed, equality is tautological."<sup>63</sup> Even if one denies the tautology thesis, simply insisting that like cases be treated alike gives little guidance to the judge. "Other principles are required to determine what features of a case are the relevant ones for determining how the parties are to be treated, and thus in determining what the relevant similarities and dissimilarities are."<sup>64</sup>

Defenses of precedent that require like treatment of like cases thus seem to rely on a value external to substantive justice, something akin to equality or fairness, as illustrated below. This external value has its own normative weight, although it may derive limited additional value in cases where such equality or fairness supports a substantively just outcome. However, supporters of this view must admit that at least on occasion treating a particular case like a previous one will dictate an unjust result, showing the tenuous connection between this external normative value and substantive justice itself. The view therefore fails to draw a direct connection between precedent and justice, one which I believe can be drawn given a proper understanding of the dimensions of a just decision.

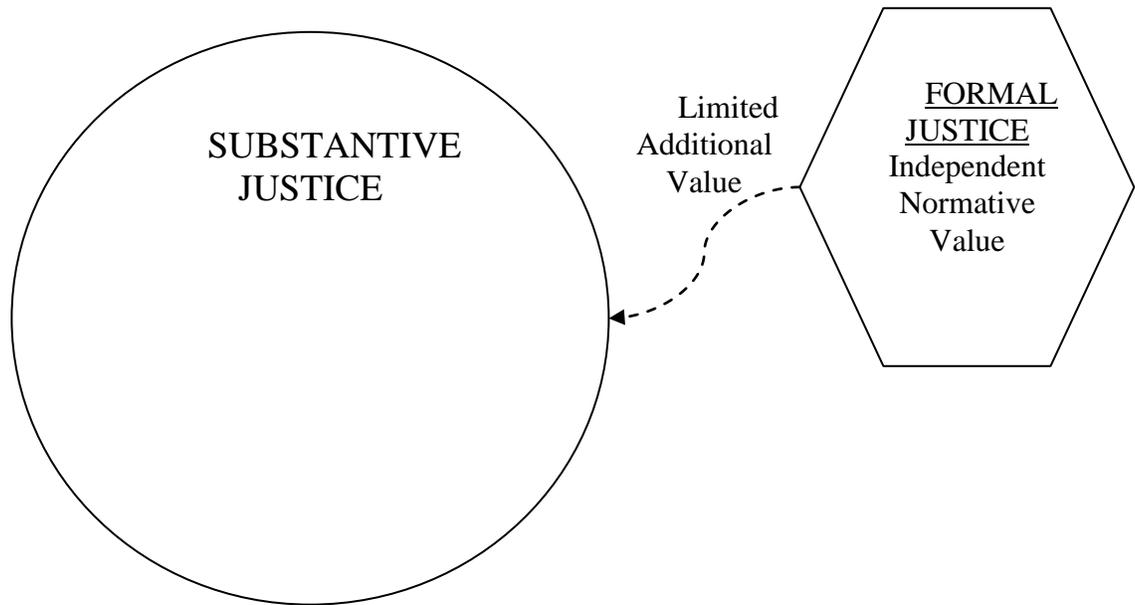
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<sup>61</sup> Peters, *supra* note 2, at 2068.

<sup>62</sup> *Id.* at 2057 (emphasis omitted).

<sup>63</sup> *Id.* This account relies heavily upon PETER WESTEN, *SPEAKING OF EQUALITY* (1990).

<sup>64</sup> Benditt, *supra* note 7, at 90; *see also* Levine & Panier, *supra* note 59, at 147 ("The term 'relevantly' in each of the two precepts of comparative justice points to the need to specify the relevant similarities or dissimilarities in any particular instance of the precept's application."). Others have pointed to a similar circularity in arguments of "horizontal equity" in the tax policy context. *See, e.g.*, Noel B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 *TAX L. REV.* 319, 361-64 (1993). Peters adds further problems with the idea of equality as a value in itself, arguing that it is internally incoherent because treating a given actor unjustly in a subsequent case is to treat her unequally "with respect to everyone who ever has been (or ever will be) treated justly." Peters, *supra* note 2, at 2068.



I do not mean to discard these two traditional defenses altogether. They importantly detail how reliance upon precedent promotes equality and fairness. But each begins with an admission that a theory of precedent necessarily works individual substantive injustices, then fortifies precedent with the other values it serves.<sup>65</sup> I believe an argument in favor of precedent can be made purely on the grounds of achieving substantively just results, if one properly understands a just decision to include a humble approach by its author. This will strike at the heart of the contentions against precedent made in the name of justice as an overarching value in a theory of adjudication. I also believe it will be a useful supplement to many existing theories of adjudication, specifically the work of Ronald Dworkin, to which I turn below.

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<sup>65</sup> Others claim that the concerns I have labeled “pragmatic” are indeed aiming at justice on a wholesale level, rather than on a retail case-by-case basis. *See* Peters, *supra* note 2, at 2039-40. While I agree that those theories are primarily concerned with consequences, I choose not to apply that label to my own theory because it aims to promote justice directly, rather than a separate end like stability or efficiency which will in turn produce justice at a wholesale level.

IV. DWORKIN'S INTEGRITY<sup>66</sup>

Ronald Dworkin's seminal "law as integrity" theory is an astute description of what judges and lawyers are up to in litigating cases and a wonderfully insightful account of most Anglo-American jurists' understanding of the term "law." His observation that judges and lawyers seek to integrate various legal ideals, expounding sometimes into broader policy goals or moral precepts, is descriptively on the mark. But I think the view lacks sufficient logical justification for the role precedent can play in appellate courts. While it suggests that prior decisions expounding our legal ideals are pivotal, it does not fully detail why that prior law should be an anchor for a present judicial decision.<sup>67</sup>

In earlier writing, Dworkin noted the basic fairness inherent in treating like cases alike. He has argued that because "[a] precedent is the report of an earlier political decision," its very existence, "as a piece of political history, provides some reason for deciding other cases in a similar way in the future."<sup>68</sup> But his later work reveals a far more subtle account of the role precedent ought to play in adjudication.<sup>69</sup> For Dworkin, the law at its best seeks a form of "integrity;" that is, it forces us to reflect upon the requirements of the structure of the legal system we have slowly assembled as we extend that system into new areas and eras and decide if changes in that structure are necessary.<sup>70</sup> Integrity, or an internal consistency amongst legal rules, is thus the ultimate aim of the law.<sup>71</sup> The state derives its legitimacy to utilize coercive power through this internal consistency in its

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<sup>66</sup> I do not address the role of precedent in positivist theories of jurisprudence in this section, although it may be that positivists underestimate the role of precedent according to the view I adopt. Others, however, have attempted to reconcile positivism and *stare decisis*. See Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in PRECEDENT IN LAW 73, 85-86 (Lawrence Goldstein ed., 1987).

<sup>67</sup> There are many similarities between the questions of how much Justices should rely upon precedent and how to structure a well-reasoned philosophical argument. There is certainly something to be said for relying upon the work of previous thinkers as a starting point for argument, although at the same time inappropriate reliance on inapposite authority or argument against a weakened version of authority are both clear logical fallacies. In many ways, this paper is itself intended as a careful refinement of Ronald Dworkin's law-as-integrity theory, rather than an effort to craft a legal theory anew. Thus, the paper exemplifies a humble legal theorist approaching a particular issue within his discipline by seeking to refine existing ideas in a slow advancement of philosophical doctrine. This example could be considered an aphorism for the approach a judge ought to take in refining abstract legal issues by building with humility upon prior work. The paper argues for a certain analytical position of which it is itself (hopefully) an example.

<sup>68</sup> Dworkin, *supra* note 13, at 1090.

<sup>69</sup> See Peters, *supra* note 2, at 2073-80.

<sup>70</sup> DWORKIN, *supra* note 22, at 87-90.

<sup>71</sup> RONALD DWORKIN, JUSTICE IN ROBES 13 (2006).

laws.<sup>72</sup> Grounded in an understanding of community derived from the French revolution's rhetorical appeal to "fraternity," Dworkin sees integrity as the touchstone that gives rise to the state's legitimacy and the political obligations of its citizens.<sup>73</sup> Integrity in the law is therefore essential to the preservation of the state and of the utmost importance in the work of its judges.

The best way to ensure that the law will develop with integrity is to create legal rules that match closely with "principles of personal and political morality."<sup>74</sup> Applying these views to precedent, Dworkin seems to recommend that a judge consider more than the reasons present in a particular opinion that support the conclusion. She should also turn to the best possible principles that would justify the entire system of precedents (which may or may not be expressed in those precedents directly)<sup>75</sup> in an effort to guide the shape of the law and make it the best it can be.

Precedent as an input for the judge seeking to produce the most just results is thus given a certain priority, but it is at least initially unclear how far the priority goes under the integrity theory.<sup>76</sup> Dworkin seems to suggest that on occasion (and particularly where constitutional rights are at issue)

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<sup>72</sup> "A political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force." DWORKIN, *supra* note 22, at 188.

<sup>73</sup> *Id.* at 206-15.

<sup>74</sup> DWORKIN, *supra* note 71, at 14.

<sup>75</sup> In earlier work, Dworkin seems to suggest that the principles for which a precedent stands will emerge from consideration of the precedent outside of its language, not from any particular statement within it. Dworkin, *supra* note 13, at 1093. However, when the later judge must construct a scheme of justification for his decision, Dworkin recommends that the judge should give "initial or *prima facie* place" to the propositions the author of a prior case relied upon. *Id.* at 1096.

<sup>76</sup> Dworkin suggests that personal or political moral considerations play a vital role in how judges interpret the law according to the most consistent principles possible. DWORKIN, *supra* note 71, at 50 ("Legal reasoning means bringing to bear on particular discrete legal problems . . . a vast network of principles of legal derivation or of political morality."); *id.* at 14 ("A proposition of law is true, I suggest, if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice."). It seems there is limited finality to any given decision, a possibility Dworkin himself acknowledges. *Id.* at 118 ("[O]n some occasions overall constitutional integrity might require a result that could not be justified by, and might even contradict, the best interpretation of the constitutional text considered apart from the history of its enforcement."). Dworkin believes that a judge must at least be cognizant of the potential accusation that the principles she relied on in her decision have been rejected in earlier decisions. *Id.* at 52-53. He also notes that our practices continually evolve to meet our current (and shifting) conception of morality. For instance, our reading of the 8th amendment would change if judges assumed that they must determine what was cruel for people at the time the amendment was enacted under then-prevailing moral visions. *Id.* at 121, 125-26.

“there is a standing and great risk to be set against any reasons there may be for courts postponing recognizing the full implications of their decisions of principle. That is the risk of injustice to a great many people until the day of ripeness is reached.”<sup>77</sup> His conception does not seem to prescribe reliance on precedent as a powerful and meaningful guide to the exercise of judicial discretion, arguing instead that there is little need to cabin judicial discretion and conceding that precedent is not a useful restraint anyway.

Dworkin’s integrity is an ideal distinct from the kind of consistency that the principle of “like cases alike” is designed to serve; “an institution that accepts [integrity] will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole.”<sup>78</sup> A judge following law-as-integrity must apparently steel herself to the corresponding dangers of instability and unpredictability, disregarding precedent if necessary to correct violations of current shared understandings of particular legal values. Such corrections ensure that the law’s internal coherence will sufficiently support the legitimacy of the state’s coercive power. Precedent’s priority in establishing that coherence, if any, is limited.

Lacking from Dworkin’s theory, then, is a genuine suggestion that relying on precedent will engender more just or reasonable results, that part of what makes a decision just is that very reliance. He would likely argue that the views of current judges must remain a plausible account that integrates smoothly with our legal traditions, including the opinions of the judges that have passed previously.<sup>79</sup> But by making integrity itself the goal, this view gives precedent priority only because of its previous existence, not because justice requires reliance upon it in judicial opinions. Breaks from the reasoning in a previous line of cases are actually somewhat desirable, making integrity “a more dynamic and radical standard than it first seemed,” one that “encourages a judge to be wide-ranging and imaginative in his search for coherence with fundamental principle.”<sup>80</sup> A

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<sup>77</sup> *Id.* at 138.

<sup>78</sup> DWORKIN, *supra* note 22, at 219.

<sup>79</sup> DWORKIN, *supra* note 71, at 118 (“Proper constitutional interpretation takes both text and past practice as its object: lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution—an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication.”). A Justice cannot simply state her own original views in an opinion, but must express a viewpoint on what the Justice’s broader ideals point to, a viewpoint which itself will be a controversial interpretation of prior decisions on the point of law at issue. *Id.* at 12 (“A useful theory of an interpretive concept [such as justice] must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures.”).

<sup>80</sup> DWORKIN, *supra* note 22, at 220.

precedent is simply one of several inputs from which a judge derives the broader principles of law,<sup>81</sup> not a necessary component of a just decision.<sup>82</sup>

Dworkin thus draws a distinction between the values of integrity and justice. He may fail in this project, however, as Professor Peters contends. On Peters's account, Dworkin's arguments for integrity distill into a strategy to reach more just results, much in the same way that some pragmatic theories suggest a judge should rely heavily on precedent to attain other ends that will produce a more just system overall.<sup>83</sup> Peters denies Dworkin's claim that we would be abhorred by a "checkerboard" statute, such as one permitting abortion only for women born in odd-numbered years, because the statute fails to correspond to an ideal of "integrity" external to justice.<sup>84</sup> Rather, our concern arises from the fact

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<sup>81</sup> "Under law as integrity, judicial precedent is among the data upon which a judge must rely in interpreting 'our present system of public standards' and extracting the principles she will apply in a difficult case. Previous judicial decisions may have articulated some of the principles the judge is attempting to discover in holistically interpreting the legal system. To the extent that the principles discovered by the judge and applicable to the case before her have been articulated by prior decisions, the judge, who is bound to follow those principles, must 'adhere' to those prior decisions." Peters, *supra* note 2, at 2074 (*quoting* DWORKIN, *supra* note 22, at 217-18).

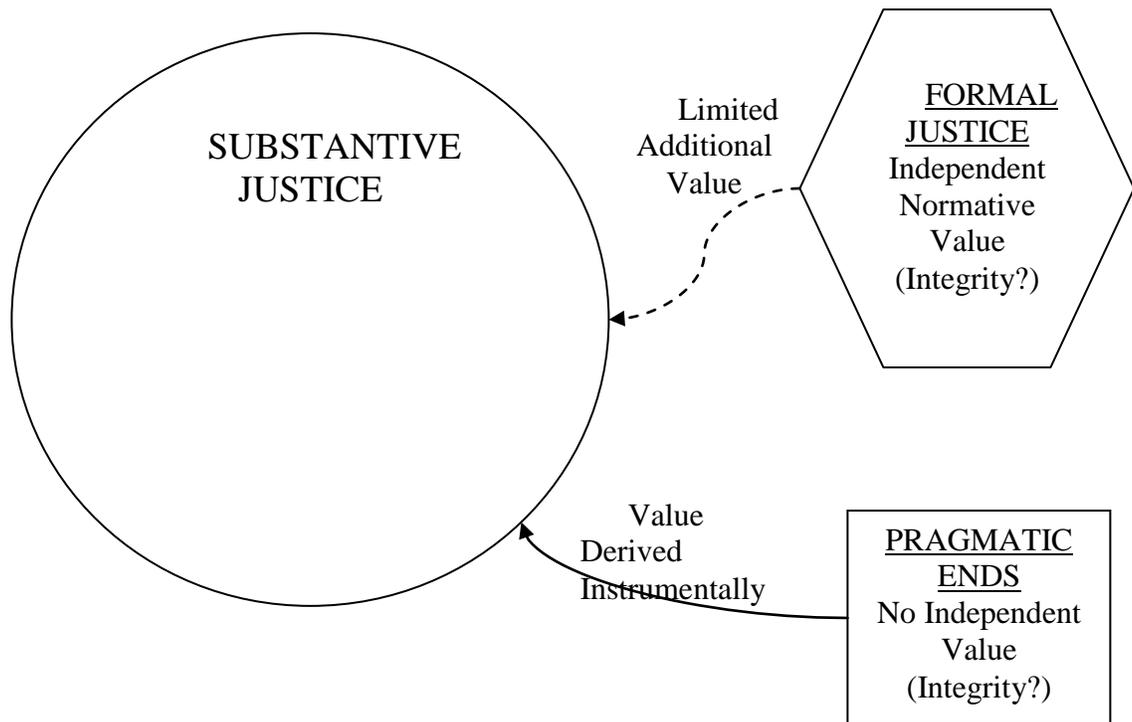
<sup>82</sup> There may be some question as to whether Dworkin's position provides cover for the direct injection of policy preferences into judicial opinions. Even a judge that candidly enacts her policy preferences must have formed some basis for deciding on those as her preferences, likely through a review of broader legal principles similar to, although perhaps less rigorous than, that called for by integrity. That judge could then put those principles into practice by using the policy preferences she derived to guide her decisions. Thus, a judge that rules based upon policy preferences is engaging in at least the same class of activity as a judge following the principles dictated by integrity as far as possible and even candidly incorporating philosophical or moral judgment into divining the appropriate legal precepts to apply in a given case (although perhaps the former is guilty of more self-deception). When one says that she is following a particular course "because it is good public policy," often she has simply added superfluous language to the statement that she followed that course "because it is good."

The potential for such injection of "policy preferences" may be especially acute in the case of a nation's highest court, where cases are more likely to reach the level of ultimate moral judgments under Dworkin's law-as-integrity method, than in lower and intermediate courts, where decisions are more likely to be guided by higher-court pronouncements on legal issues at least related to the present case. The lower court may find an important aspect of the integrity of the system requires it to respect prior decisions and allow an appeal up the hierarchy. The highest court in a jurisdiction will be far less limited, and indeed far less likely to utilize the opinions of lower courts in administering an integrated legal system from the top down. These courts will not be so reluctant to look to greater spheres of judicial principles, perhaps even beyond their own decisions, because the degree to which they are bound by their own previous decisions is unclear and, in any event, certainly less than the degree to which lower courts are bound by those very same opinions.

<sup>83</sup> Peters, *supra* note 2, at 2090.

<sup>84</sup> DWORKIN, *supra* note 22, at 178-86. For an excellent summary of Dworkin's views

that the checkerboard statute treats people according to both of two logically inconsistent principles, only one of which could conceivably be just. Such schemes are offensive because they will always necessarily work some injustice through the application of the wrong principle.<sup>85</sup> Integrity, then, may be nothing more than an instrumental means of achieving justice. Thus, while Dworkin contends that integrity is an ideal of independent normative value, it may in fact be more akin to a pragmatic end described earlier, and hence may fit in either category illustrated previously.



on checkerboard statutes, see Peters, *supra* note 2, at 2088-89.

<sup>85</sup> Peters, *supra* note 2, at 2101-02 (“We know by definition that such schemes require treatment of every person subject to them according to a morally incorrect principle. Again, the inconsistency embodied in the checkerboard scheme matters only because it flags the fact that one of the reasons being applied to every person’s treatment under the scheme must be irrelevant. The fact of inconsistency underscores the fact of injustice.”). Theodore Benditt makes a similar argument about claims of formal justice in general, noting that the principle that like cases are to be treated alike “implies only that if two relevantly similar cases are treated differently, then one of them is in error and some party has been treated unfairly, though the principle doesn’t say which.” Benditt, *supra* note 7, at 90.

This criticism of Dworkin's view rests on integrity's alleged value independent of justice. While I do not take a stance on that issue (or integrity's importance in establishing political legitimacy) here, I emphasize that integrity's relationship to precedent allows space for strong reliance upon prior cases as an internal aspect of justice. His view neither wholly prescribes reliance on precedent nor makes such reliance a value internal to integrity.<sup>86</sup> A judge convinced by the reasoning of a previous case is simply learning from its content, not relying upon it strongly because it represents the work of prior judges.<sup>87</sup> Under Dworkin's approach, applying that precedent is helpful insofar as it promotes the integrity of the law, but applying precedent is not a requirement of integrity in all cases, nor is it a requirement of the allegedly distinct ideal of justice.

In developing my own theory, I do not mean to promote precedent simply on the basis of status—purely favoring the reasoning of a case because of its priority in time would circularly rely upon the policy preferences or perhaps more carefully refined philosophies of prior judges. Instead, I want to sketch a more direct link between the use of precedent and justice than Dworkin has given us without necessarily excluding his argument that integrity can act as a source of state legitimacy. Insofar as his theory leaves precedent external to the ideal of integrity, those persuaded by his view remain free to regard reliance on precedent as an aspect internal to justice, regardless of whether integrity is an important and distinct aim of the state.

## V. PRECEDENT, HUMILITY, AND JUSTICE

Precedent should fit within a conception of justice as a constituent part of another aspect of a just decision, humility. Only when taking a humble approach to the case at bar and relying on the opinions of the myriad judges that have passed before her can the present judge render a just decision, one which strikes the proper balance between social ideals and social cohesion. Precedent will be the primary guide in her exercise of discretion, given a special priority over other interpretive sources.

The early development of first amendment jurisprudence regarding

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<sup>86</sup> Dworkin argues that, in some cases, precedent and justice will pull in opposite directions, and in those cases justice should be favored. DWORKIN, *supra* note 71, at 138.

<sup>87</sup> As noted earlier, Dworkin allows that prior decisions may have stated the broader principle of law that guides decisions in a given legal area, but suggests only that they must be checked to confirm or deny this possibility. Peters, *supra* note 2, at 2074 (*quoting* DWORKIN, *supra* note 22, at 217-18). This may not constitute genuine reliance upon precedent, which as Frederick Schauer contends may be independent of the precedent's content. SCHAUER, *supra* note 3, at 62.

content-based speech regulations provides a useful example of the balance between the ideal and the pragmatic present in any just decision. The broad constitutional restraint on Congressional acts “abridging the freedom of speech” provided little guidance to the Supreme Court in early first amendment cases.<sup>88</sup> The modern conception of that free speech ideal evolved incrementally through reliance upon prior precedent as judges only applied limited extensions of the reasoning in any one case.<sup>89</sup> “The story of the emergence of the American constitutional law of free speech is a story of evolution and precedent.”<sup>90</sup>

Early cases arose in the context of particularly heightened social alarm in the World War I era; Congress responded with several statutes punishing agitation against the war or military service.<sup>91</sup> Initial efforts to limit the scope of those statutes, such as Learned Hand’s narrow understanding of speech that may “cause” insubordination,<sup>92</sup> were disfavored by the public and rejected by the Court. Instead, the Court followed the path charted by Oliver Wendell Holmes in the *Schenk* case, finding broad Congressional authority to regulate words that are “used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”<sup>93</sup>

While this standard was initially permissive of significant content-based regulation, it logically implies that Congressional authority is actually quite limited unless the regulated speech creates an immediate and significant threat. Holmes himself was clearly aware of the implication; in a dissent in *Abrams* published shortly after *Schenk*, Holmes expounded the clear and present danger test, arguing that “[i]t is *only* the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.”<sup>94</sup> Relying on the analytical principle of his prior opinion, Holmes’ dissent more thoroughly developed the logical implications of the clear and present danger test to limit Congressional regulation unless the risk of serious harm was likely and

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<sup>88</sup> U.S. CONST. amend. I.

<sup>89</sup> STRAUSS, *supra* note 17, at 62. Much of my discussion of free speech builds upon Strauss’s work.

<sup>90</sup> *Id.* at 53. “The central features of First Amendment law were hammered out in fits and starts, in a series of judicial decisions and extrajudicial developments, over the course of the twentieth century.” *Id.*

<sup>91</sup> GEOFFREY STONE ET AL., *THE FIRST AMENDMENT* 20 (2nd ed. 2003).

<sup>92</sup> “If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.” *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917).

<sup>93</sup> *Schenk v. United States*, 249 U.S. 47, 52 (1919).

<sup>94</sup> *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (emphasis added). At a minimum, this meant that “Congress certainly cannot forbid all effort to change the mind of the country.” *Id.*

immediate.<sup>95</sup> Although it was not immediately adopted by the Court as a whole, “this understanding of clear and present danger—with many variations and refinements over time—has become a core principle of First Amendment law.”<sup>96</sup>

Development of Supreme Court doctrine in the area took its next turn during the Cold War era. As the fear of communism washed over Congress, legislators again attempted to regulate dissident speech. In *Dennis* the Court once more found such regulations constitutional,<sup>97</sup> but this time significant social criticism of the decision indicated a broad shift in the community understanding of the free speech ideal that paralleled Holmes’ dissenting explications of “clear and present danger.”<sup>98</sup> This shift viewed the Court’s prior jurisprudence in the area as an overreaction to the destabilizing potential of dissenting speech.<sup>99</sup> The change in social understanding gave the Court the needed leeway to fully apply the logical extension of Holmes’ analytical principles and take a far more speech-protective stance in the 1960s. In *Brandenburg*, the Court struck as unconstitutional a 1919 Ohio statute regulating the advocacy of crime or violence as a means of political reform.<sup>100</sup> The Court relied on an interpretation of the free speech ideal akin to the imminent and likely harm understanding that Holmes (and Brandeis) had earlier advocated.<sup>101</sup> Accepting the full implication of Holmes’ clear and present danger test from prior cases, the Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy

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<sup>95</sup> STRAUSS, *supra* note 17, at 64.

<sup>96</sup> *Id.* Other members of the Court at first resisted this full application of the principle, which Holmes continued to preach, along with Justice Brandeis, in dissent. *See, e.g.,* *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920).

<sup>97</sup> In *Dennis* the Court interpreted the clear and present danger analysis as a balance between “the gravity of the ‘evil,’ discounted by its improbability” and “such invasion of free speech as is necessary to avoid the danger.” *Dennis v. United States*, 341 U.S. 494, 510 (1951) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (1950)).

<sup>98</sup> “In the years after *Dennis*, the clear-and-present-danger test, so dominant in the early 1940s, came under attack from many sides.” STRAUSS, *supra* note 17, at 71.

<sup>99</sup> “Beginning with the Russian Revolution and World War I and continuing into the 1920s, popular and government reaction to dissidents was overwrought and panic-stricken; by the 1930s, that panic had abated . . . [B]y the end of the 1930s, the free speech edifice (to use Burke’s term) no longer consisted of just the post-World War I decisions; there were now a number of cases upholding speakers’ claims, and there was a trend, however incompletely rationalized, toward protecting speech.” *Id.* at 67.

<sup>100</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>101</sup> STRAUSS, *supra* note 17, at 72 (“*Brandenburg* does not use the phrase ‘clear and present danger,’ but the Court’s emphasis on imminence and likelihood of harm was derived directly from the Holmes and Brandeis version of the clear-and-present-danger test.”).

of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>102</sup>

Certainly, no single conception of the ideal of free speech carries the day, and its value remains subject to frequent debate covering a wide variety of theories.<sup>103</sup> But the early evolution of first amendment jurisprudence regarding content-based regulation demonstrates that public debate over the ideal has followed a cautious judicial expansion of its limits. This has not been a story of any one judge applying wholesale a particularly vibrant new conception. Over time, judges instead slowly applied the full extension of a previously announced analytical principle to expand the meaning of the underlying free speech ideal, all the while hewing closely to the pace of shifting social understandings.

These cases demonstrate that reliance on precedent is needed to achieve two equally important functions of adjudication; the formation of a cohesive social structure and the advancement of societal ideals. Despite the constant tension between these primary functions, neither can be sacrificed in the name of the other. The balance between them is essential—arguments that decisions maintaining that balance work an injustice on a retail level fail to perceive that justice in adjudication consists at least partially in that very balance and cannot be described at such a micro level without regard to the broader macro-level definition of the principle. Decisions that adhere to this balance by considering precedent and ensuring that our ideals are not largely cast aside by a wary populace do not constitute individual injustices.

This claim should not be taken as an attempt to wholly define justice, a project far beyond this paper. I focus here only on the compromised nature of justice when considered in a particular sense applicable to adjudication. Whatever else justice might contain, one of its components is the needed balance of which judges must be mindful when rendering a decision, as many judges were during the early development of first amendment doctrine.<sup>104</sup> Justice may not be *only* this balance, but in the context of adjudication it is at a minimum *partly defined* by it.

When a judge decides a particular case by explicating the full logical extension of any social ideal without regard for social cohesion, she fails to acknowledge that a just adjudicatory outcome requires a carefully-attuned equilibrium between principle and practicality. Just adjudication accepts

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<sup>102</sup> *Brandenburg*, 395 U.S. at 447.

<sup>103</sup> For background on the various justificatory theories at play, see STONE ET AL., *supra* note 91, at 9-16.

<sup>104</sup> For a summation of the similar development of other aspects of first amendment doctrine, see STRAUSS, *supra* note 17, at 51-76.

something of a compromise between social reality and social ideals. A particular legal principle may have clear repercussions, but judges hoping to uphold or refine the ideal behind that principle may need to implement it incrementally. Given the judiciary's institutional role,<sup>105</sup> judges must be willing to humbly temper their views in favor of a more circumscribed implementation of a newly-defined right or recently-clarified principle, making justice in this context a guide to compromise amongst ideals rather than an ideal which itself dictates specific results. A just decision cannot abstract from the surrounding social and political environment in assigning burdens and benefits; it must to some degree account for the existing status quo even if it starts society down the path towards the fuller embodiment of a particular ideal.

This does not mean that judges must uphold or create a checkerboard-style weigh-station in the path to a more complete resolution of a particular controversy. As Dworkin would likely argue, such checkerboard outcomes might undermine the state's legitimacy and lead to its dissolution or at least degradation around the edges of its power. However, the competing functions of adjudication often require judges to temper their efforts to reach intuitively towards a more "perfect" outcome regardless of how far that departs from the status quo. While avowed inconsistency within any particular conception of a societal ideal should be avoided, somewhat limited extensions of that ideal may be desirable. Surely, incremental implementation of a refined ideal based on a nuanced analytical framework is more just than immediate and full implementation of its implications that leads citizens to question their obligation to submit to the coercive enforcement and judicial interpretation of the law.

Ideals, of course, are not to be discarded for the sake of political convenience. Judges cannot stand beholden to political pressures in rendering decisions without at least seeking to further refine any given line of precedent. But they can navigate competing concerns about the social limitations of a decision and the perhaps radical outcomes that follow from its reasoning. The task is demanding and complex, requiring ongoing development of ideals coupled with an understating of the extent to which those ideals can fully be put into practice in the modern context.

The difficulty of the task implies the need for adjudicative humility and reverence for past resolutions of similar problems, rather than a conception

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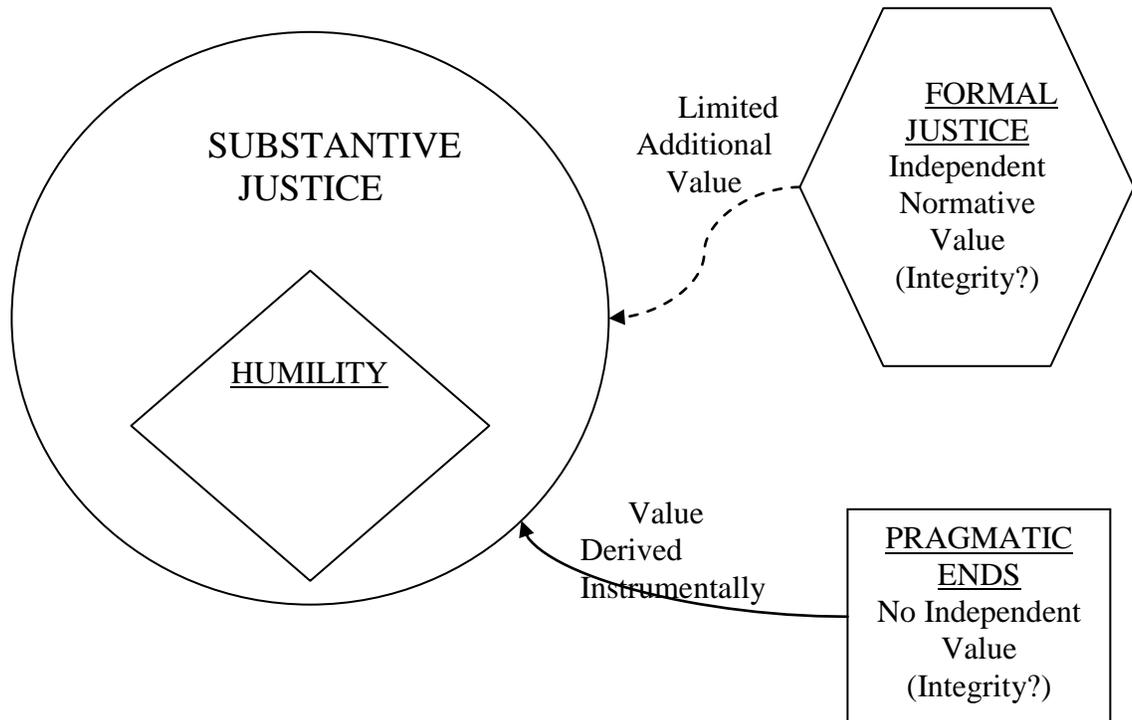
<sup>105</sup> It seems clear that judges are at least somewhat institutionally constrained given their place in society. "Judges must explain their rulings to the public and are usually subject to some review, whether by a higher court, legislature, or future constitutional convention. Courts are, therefore, constrained in their behavior: they cannot simply offer any interpretation they wish, but only those that will preserve their professional reputations and survive on appeal." SCOTT J. SHAPIRO, *LEGALITY* 326 (2011).

of judicial philosopher-kings somehow divining the right balance. A judge should not use adjudication's complexity as shield to deflect criticism or dismiss any argument she does not find immediately persuasive. Instead, complexity justifies humble consideration of arguments and approaches found in prior decisions. Failure to maintain such humility either by imposing a radical vision of our basic ideals—or, at the other extreme, refusing to refine those ideals in any way that threatens the status quo—may presage the downfall of the social order. Ultimately, we cannot ask judges to simply do what they think best without regard to their political environment, nor should we expect them to rule only in line with practical political considerations. Instead, judges must take an approach that both humbly acknowledges the faults in the existing schema of legal principles and proposes carefully delineated advancements of our legal structure after genuine, thorough consideration of prior precedents. Judicial humility is the linchpin, ensuring that each new generation of judges can pursue the long-term refinement of legal principles without unwarranted, destabilizing reinvention of the whole legal landscape.<sup>106</sup>

Thus conceived, humility is neither an independent normative value (similar to the value of treating like cases alike) nor a mere external instrument for the production of just results (similar to the ends posited in traditional pragmatic defenses of precedent). Humility ought to be understood in a way that makes its relationship with a just decision much more direct. It is in part constitutive of such a just decision, and therefore is an inherent aspect of the normative value of justice itself rather than something external.

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<sup>106</sup> Humility is thus an important method of ensuring that judges will temper their exercises of discretion to some degree. Others have suggested that judges ought to defer to their place in the legal system established by the country's framers and exercise less discretion if it is clear that those framers did not find judges particularly trustworthy. *Id.* at 345. While my account is not necessarily inconsistent with such considerations, it largely relies upon respect for the efforts of prior judges represented by the body of existing precedent to restrain discretion. As I argue later in the paper, even judges seeking to dramatically alter the legal landscape will be motivated to largely adhere to precedent to ensure that any alterations they propose are likewise upheld by future generations of judges. See *infra* Part IX; see also Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 67 (1994) (arguing that judges seeking to implement their policy preferences have an incentive to adhere to precedent in their opinions).



By bringing a humble attitude to her decisions, a judge can ensure just results. After all, “the integrity each judge must seek is the integrity of the law over time. That is a collective project, and a judge’s interpretation of the law at any point in time must recognize this.”<sup>107</sup>

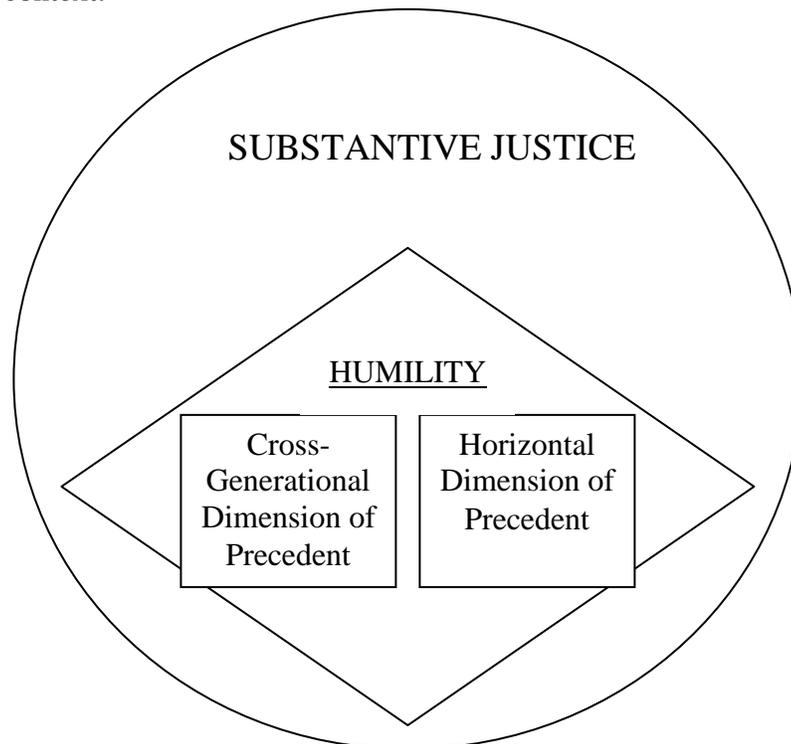
Humility is itself constituted by reliance on precedent. A judge must make a humble effort to incorporate the body of prior decisions if she is to render a just outcome in any given case, even utilizing those precedents at the thick level of analytical principle.<sup>108</sup> Precedent allows judges to utilize existing analytical structures to ensure a smooth transition to clearer understandings of society’s basic commitments. As Holmes did in the early first amendment context, judges can set out the tests that will dictate future extensions of a partially-specified ideal but stay enforcement until the populace can readjust, and importantly until citizens have the time to consider and accept the new specification as accurate. Reliance on precedent ensures that existing analytical frameworks derived from traditional understandings of our legal principles will be applied and only cautiously altered, allowing a judge to cross-generationally refine the law

<sup>107</sup> Gerald J. Postema, “Protestant” Interpretation and Social Practice, 6 LAW AND PHIL. 283, 312 (1987).

<sup>108</sup> See *infra* Part VI.

and to functionally resolve disputes in the present on a panel-based court.<sup>109</sup> Rather than frequently exercising her discretion to construct legal analysis from whole cloth, the appellate judge should take a humble approach with a broad respect for precedent to ensure just decisions.

In the remainder of the paper, I therefore argue that humility requires reliance on precedent in two ways, which I refer to as the horizontal and cross-generational dimensions of precedent. These uses of precedent are themselves internal aspects of humility, so that they are situated within it and, by extension, within the proper understanding of substantive justice in an adjudicatory context.



This is not to say that these two aspects of humility exhaust the field. In statutory cases, for instance, humility might entail some measure of deference to the legislature, especially if that legislature is empowered to overrule a judicial opinion statutorily. In a different context, Professor Michael McConnell highlights the absence of just this sort of humility in Dworkin's theory of adjudication.<sup>110</sup> The reader should not take me to

<sup>109</sup> David Strauss argues that Justices should approach constitutional cases, as a subspecies of the common law, with the dual attitudes of "humility and cautious empiricism." STRAUSS, *supra* note 17, at 40. I discuss this view in more detail in considering the cross-generational dimension of judicial humility. *See infra* Part VII.

<sup>110</sup> McConnell notes that, for Dworkin, "[i]t does not seem to matter, one way or the

argue that such deference cannot act as a meaningful constraint on judicial discretion; I simply eschew those issues as beyond the scope of the present project, which focuses specifically on the appropriate role of precedent cases in appellate court opinions.<sup>111</sup>

The following Parts dissect those particular dimensions of humility that are relevant for appellate adjudication. While the objection to precedent rejects it as a primary guide to a judge's exercise of discretion within discursive adjudication, I argue that precedent restricts judicial discussion with both contemporaries and predecessors to a needed common ground, allowing a judge to tentatively define legal principles and continually refine those guiding understandings at a socially palatable pace.

## VI. THE HORIZONTAL DIMENSION OF PRECEDENT

Consider two of the defining structural elements of the Supreme Court of the United States. First, although the Justices receive lifetime appointments, the body is sequential rather than unitary; the makeup of the Court changes over time.<sup>112</sup> No single adjudicator will persist in perpetuity to resolve cases in the most consistent manner possible. Instead, Justices are tasked with building upon the work of prior judges with whom they have had no personal interaction. The project is further strained by the second structural element, the Court's panel nature.<sup>113</sup> An individual Justice must try to reach agreement with a rotating set of colleagues, each of whom has been appointed, at least in part, because of her reputation for intellectual aptitude. Even tentative consensus on any issue amongst such a strongly-opinionated bench is unstable and often fleeting. In that environment, a Justice must act humbly and recognize the necessity of establishing a working relationship with her colleagues in order to properly resolve the extraordinarily divisive controversies on the docket.<sup>114</sup>

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other, that the legislature has passed a law. The legislative judgment, far from being entitled to a presumption of constitutionality, is formally irrelevant." Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1274 (1997). McConnell includes tradition and earlier cases as constraints to judicial discretion, but adds that the humble judge must also acknowledge and respect "the Framers of the Constitution . . . the representatives of the people [and] the decentralized contributors to longstanding practice." *Id.* at 1292.

<sup>111</sup> Indeed, if my own conception of humility's relationship to justice proves persuasive, the value of humility may include these other elements by implication as constitutive components of a just judicial opinion.

<sup>112</sup> For a discussion of different possible models of a court, see Kornhauser, *supra* note 11, at 67.

<sup>113</sup> See *id.*

<sup>114</sup> Gerald Postema expands eloquently on this idea to explain how judges must work

The structure of most appellate courts, of which the Supreme Court is emblematic, is an aspect of adjudication that Dworkin largely ignores, and one which he arguably does not support.<sup>115</sup> Dworkin contends that “[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.”<sup>116</sup> Dworkin thus seems to at least prefer the fiction of singular authorship on a court, a fiction he perpetuates when describing his singular model adjudicator, Hercules. To the extent that judges must temper their own views in the real world, Dworkin seems opposed to the practice:

“An actual [judge] must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other [judges] and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle . . . We use Hercules to abstract from these practical issues, as any sound analysis must, so that we can see the compromises actual justices think necessary as compromises with law.”<sup>117</sup>

Dworkin’s instincts on this issue, though understandable, are ultimately misguided. Panel judging, a reality in today’s appellate courts and a defining aspect of the Supreme Court of the United States, need not be dismissed as undesirable under Dworkin’s law-as-integrity framework. Working within a panel promotes humility and the corresponding craft of opinions. Panels require individual judges to acknowledge broader intellectual concerns generated by their peers, and to attempt to argue

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not only with one another, but also with other contemporary actors within the legal system. “For the judge carries on her interpretive activity simultaneously with many other judges, lawyers, other officials, and lay persons. Interpretive interaction extends both diachronically and synchronically. Judges undertake to decide what the law is by interpreting the practice of other judges, but that practice includes not only their decisions and actions, but also their interpretive activity. And her interpreting likewise will fall within the scope of their concern.” Postema, *supra* note 107, at 312.

<sup>115</sup> Dworkin is careful to note that his analysis in *Law’s Empire* avoids the issue of practical compromises judges must sometimes make, “stating the law in a somewhat different way than they think most accurate in order to attract the votes of other judges.” DWORKIN, *supra* note 22, at 12. Nonetheless, Dworkin’s attitude towards this sort of judicial horse-trading is evident in later passages. See *id.* at 380-81.

<sup>116</sup> *Id.* at 225.

<sup>117</sup> *Id.* at 380-81.

persuasively with one another while resolving difficult problems of interpretation.<sup>118</sup> They are forced to interact humbly with one another in reaching a consensus. Utilizing that very process, the humble judge can produce the most just decision possible.

Of course, outright horse-trading on matters of principal may not be a desirable judicial tactic. As Jeremy Waldron highlights, “[w]e already have institutions in our political life that are characterized by compromises, deals, log-rolling, and strategic thinking . . . Don’t we value the power of the judiciary (if we do) because it operates differently from a legislature?”<sup>119</sup> It seems fairly clear that adjudication should not require decisions based entirely upon a trade of one judge’s vote in the present case for another judge’s vote in a future one. But at the same time, a judge should be humble enough to approach cases with an open-mind and seek some common ground for the discussion amongst colleagues, a ground that precedent can provide. To again borrow Waldron’s language, “[t]he Supreme Court is a collegial institution and justices of different personalities and ideologies have to get along well enough to transact its business.”<sup>120</sup> And often, the principles and approaches to a given controversy are right at the heart of the logjam on such high appellate courts.<sup>121</sup> While outright vote-trading at the expense of any consistency in principle or well-conceived conception of social ideals is unseemly, when broadly similar issues arise repeatedly and at least a framework for resolution has been hammered out in previous decisions the various judges on an appellate court should humbly begin their analysis on that common footing. A judge should work within that framework and remain willing to take account of other judges’ views in ways that might ultimately change her own opinions on matters of principle.<sup>122</sup>

The role precedent must play in promoting this kind of agreeable panel adjudication becomes clear upon consideration of the first of Dworkin’s three stages of interpretation of a social practice, the preinterpretive stage.

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<sup>118</sup> “It is a bad idea to try to resolve a problem on your own, without referring to the collective wisdom of other people who have tried to solve the same problem.” STRAUSS, *supra* note 17, at 41.

<sup>119</sup> Jeremy Waldron, *Temperamental Justice*, N.Y. REV. BOOKS, May 10, 2007, <http://www.nybooks.com/articles/archives/2007/may/10/temperamental-justice/>.

<sup>120</sup> *Id.*

<sup>121</sup> Waldron later adds that, as a judge, “you have to be aware that your colleagues—reasonable men and women like you—have come up with different principles, different ways of approaching these assignments. They think your principles are as wrongheaded as you think theirs are; and you can’t both be right.” *Id.*

<sup>122</sup> As Justice Sandra Day O’Connor has frequently remarked, Supreme Court Justices must learn to “disagree agreeably” for the Court to remain functional. *See, e.g.*, Kate Shipley, *Sandra Day O’Connor at KU Law*, April 13, 2010, [KLFP.ORG](http://klfp.org/2010/04/sandra-day-oconnor-at-ku-law/), <http://klfp.org/2010/04/sandra-day-oconnor-at-ku-law/>.

At that stage, “the rules and standards taken to provide the tentative content of the practice are identified.”<sup>123</sup> A great deal of consensus is necessary: “the interpretive attitude cannot survive unless members of the same interpretive community share at least roughly the same assumptions about [the raw data of interpretation].”<sup>124</sup> But Dworkin provides scant argument for the likelihood of such broad agreement at the preinterpretive stage, especially on the Supreme Court. He simply points out that

“a very great deal of consensus is needed—perhaps an interpretive community is usefully defined as requiring consensus at this stage— if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.”<sup>125</sup>

While that abstraction may be a given regarding day-to-day matters, it is far from intuitive in matters of more controversial interpretation on a high appellate court. In those cases, the preinterpretive stage is vital both for defining the playing field and for determining the analytical starting point for the judges.<sup>126</sup> The Supreme Court’s fractured decision in *Employment Division v. Smith* well illustrates the role precedent can play.<sup>127</sup> While the majority held that the strict scrutiny balancing test set forth in *Sherbert v. Verner* did not apply to claims for a religious exemption from generally applicable criminal laws,<sup>128</sup> the concurrence and dissent argued stridently that strict scrutiny was the proper analytical framework dictated by precedent cases.<sup>129</sup> The resulting decision was a disjointed series of analyses jumping off from various points in prior doctrine and mostly debating at cross-purposes. More robust reliance on the precedents at hand might have allowed the Justices to analyze the issue on a common ground in reaching their ultimate conclusions.

The case also shows that ambiguities in past decisions can be valuable for present judicial authors; when approached humbly, such ambiguities force modern contemporaries to work together to find the meaning of prior cases before they set out to construct a resolution to a particularly puzzling

<sup>123</sup> DWORKIN, *supra* note 22, at 65-66.

<sup>124</sup> *Id.* at 67; *see also* Postema, *supra* note 107, at 297-98.

<sup>125</sup> DWORKIN, *supra* note 22, at 66.

<sup>126</sup> As Gerald Postema points out, Dworkin’s theory “presupposes that the object of the competing interpretations can be identified independently of any interpretation.” Postema, *supra* note 107, at 306.

<sup>127</sup> *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990).

<sup>128</sup> *Id.* at 877-890.

<sup>129</sup> *Id.* at 892-903 (O’Connor, J., concurring); *Id.* at 907-09 (Blackmun, J., dissenting).

issue, ensuring that judges avoid simply talking past each other. “Our past practice bears the shape of our common life, while at the same time forcing us to address together the question just what this shape is, and what it means for our collective and individual actions now and in the future.”<sup>130</sup> The rule or principle an earlier case establishes is often highly contentious itself.<sup>131</sup> But this disagreement is perfectly compatible with my argument. Insofar as judges agree on the applicable precedents and move from that point to a discussion of what those precedents require in both outcome-determinative and analytical ways, precedent has served its purpose. Such debate is a component of a reasoned legal discussion; all the judges will approach a particular issue with the understanding that certain foundations are not in play, but instead define the boundaries of discourse.

Precedent, then, plays dual roles for a court even at this preinterpretive stage: it can guide outcomes and can establish a legitimate basis for discussion of abstract principles.<sup>132</sup> The outcome-determinative level of precedent, where a past decision allows a certain type of plaintiff or defendant to consistently win cases, is the focus for those touting a thin, consequentialist form of *stare decisis*. This form of *stare decisis* looks only to conclusions, considering whether citizens in a given situation can expect to have the law on their side. But what drives those outcomes (perhaps behind the scenes in closely analogous but factually distinct cases) is an analytical-framework level of precedent that plays a role in a thicker version of *stare decisis*. This analytical framework concerns the intellectual labor of past opinions’ authors, rather than the outcome that by happenstance favors business interests, the impoverished, and so on. The thicker level of

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<sup>130</sup> Gerald Postema, *On the Moral Presence of Our Past*, 36 MCGILL L. J. 1153, 1162 (1991). “In my view, it is not the already determined character of the past that renders it fit for our allegiance, but, paradoxically, its very elusiveness. . . . In short, we are bound to *keep faith with our past* because that is a way of *keeping faith with each other*.” *Id.* (emphasis in original). For this reason, precedent might be thought to play a special role in the discourse amongst appellate judges. “For us, shared experience yields a common past with a common significance because it engenders, and is further enriched by, common perception and common discourse.” *Id.* (citing Aristotle, *Eudemian Ethics*, 1244b24-26 and *Nichomachean Ethics*, 1170b11-12).

<sup>131</sup> Dworkin usefully highlights this issue. See Dworkin, *supra* note 13, at 1089.

<sup>132</sup> Though discussing the issue of broader societal agreement rather than agreement amongst a judicial panel, Hume also pointed to the role that prior cases can play in resolving widespread dissensus. Hume argued in part that “the task of rules of justice (and law) is ‘to cut off all occasions for discord and contention’, i.e. to define a framework for co-ordination of social interactions regarding matters on which there still may be wide dissensus on the merits.” Gerald J. Postema, *Some Roots of our Notion of Precedent*, in PRECEDENT IN LAW 9, 27 (Laurence Goldstein ed., 1987) (emphasis in original) (citing DAVID HUME, A TREATISE OF HUMAN NATURE 502 (ed. L.A. Selby-Bigge, 2nd ed. rev. P. H. Nidditch Oxford 1978)).

*stare decisis* more fully implicates respect for precedent because it requires respect for the format of discussion and analysis in a particular line of decisions, even if the outcomes have been somewhat inconsistent leading up to the most recent case.<sup>133</sup> At this level of analytical structure, precedent plays a crucial role in the collegial resolution of disputes on a judicial panel, restraining the discussion judges have with one another in a way needed to achieve a just result.<sup>134</sup>

Strong reliance on precedent is therefore pivotal to establish a starting point for debate between an appellate court's members if ultimate consensus at a later, postinterpretive stage will ever be reached. By focusing not just on the outcomes of precedent cases, but utilizing the reasoning structure of a previous decision as an agreed starting point for analysis of ephemeral concepts, judges will be forced to establish common terms of debate. Precedent is the best means to resolve disputes in a body with an enumerated, rotating membership. Only if the judges humbly acknowledge the analyses detailed in prior decisions will they be able to frame their debates in the same terms, that is, within the analytical structure of those prior decisions.<sup>135</sup>

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<sup>133</sup> Dworkin seems to support only the thin version of *stare decisis*, suggesting that adherence to the outcome of close cases is more important than adopting the underlying reasoning supporting those judgments. Dworkin notes a distinction between "the actual decisions that the courts of [the] state reached in the past [and] the opinions that the judges who decided those cases wrote to support their decisions," and claims to be concerned primarily with "how the community [i.e. judges] actually uses its power to intervene in citizens' lives, not . . . the reasons that different officials have given for such intervention in the past." DWORKIN, *supra* note 71, at 16. He thereby suggests that the structure of analysis in an opinion is far less important to the future decisions of judges than the ultimate outcome reached. That at least opens the possibility for future decisions which "cohere" with prior ones in that they reach similar outcomes, but subtly reject the analysis and reasoning inherent in those prior decisions, a practice I address in Part X.

<sup>134</sup> Reliance on precedent may also allow judges on parallel appellate courts to rely on one another's particular expertise in a given legal field and resolve disputes more efficiently. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 103 (1989) ("Stare decisis may be viewed as a legal innovation that allows judges to expand the process of trading experience and expertise over time and across jurisdictions.").

<sup>135</sup> Admittedly, if a large part of precedent's value is its utility in resolving disputes amongst a panel of appellate judges, the question remains why we should support a panel-based system of appellate adjudication in the first place. Although I do not wish to develop an entire theory of judicial review here, I briefly reiterate the value humility has amongst our most powerful adjudicators and the role humility plays in ensuring just case-by-case outcomes. The panel nature of adjudication seems to require judges to exploit each others' thinking capacities in reasoning through a common analysis. They must emphasize carefully considered, incremental change in our legal landscape. That process itself is constitutive of, rather than a deviation from, a just decision.

One might argue that leaving these issues to be resolved by an elected body with broad

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Modern American lawyers are rightfully obsessed with the validity of the cases they will cite in an argument before the court. The emblem of this hyper-sensitivity is the small red flag visible on the corner of the page of a case viewed on the Westlaw database, which indicates negative treatment by a prior court. Practitioners on both sides of a controversy look for the little red flag because they seek a common analytical ground in their presentations to the court. Neither party wishes to completely disregard their opponents' arguments; each wishes to hold the debate on common terms, anticipating and defeating the opponents claims along the way. In those cases where the common starting ground is itself the main controversy of the case, again the little red flag presages the terms of the debate that will ensue. It demonstrates that there is a precedent of debatable value pertinent to the case, the validity of which each side will most likely want to confront in their arguments.

Much of this section invites judges on appellate courts to think similarly, which in turn will reinforce such humble, precedent-centered arguments from the attorneys appearing before them.<sup>136</sup> Proceeding logically from the same starting ground makes it possible for a panel of judges to write a just decision. It provides the avenue through which remarkably-talented and highly-opinionated adjudicators can constructively and cooperatively apply their skills, guiding their discretion in a present controversy. By using the analytical structure of prior cases as the common point of departure for their views, judges are able to produce just results in the multitude of complex cases before them.

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membership would be a preferable means of ensuring careful debate and compromise amongst well-qualified thinkers. But a reasonably small panel of adjudicators may be more adept to work on a case-by-case basis to consider how broad legislative policies have affected actual citizens. In the interest of determinacy, a panel-based court can resolve individual controversies and cautiously change the legal landscape without itself orienting towards a particular policy goal. *See* STRAUSS, *supra* note 17, at 40-42 (sounding this note of cautious empiricism). The panel-based court may itself be required to avoid complete stagnation in the face of difficult cases, and it in turn will consider some well-informed opposing opinions.

<sup>136</sup> As I argue in more detail later in the paper, there is a trickle-down effect that any prescribed method of adjudication will have upon the lawyers appearing before courts. *See infra* Part IX.

## VII. CROSS-GENERATIONAL REFINEMENT AND THE CHAIN NOVEL

Humanity is no stranger to ambitious undertakings the scale of which appear insurmountable in the abstract. A linear series of battlements extending across vast areas of northern China, the Great Wall is as much a testament to the capabilities of mankind as it is an architectural achievement. Constructed over several centuries and possibly even millennia, the Great Wall is a series of border defenses formed over various dynasties that responded to the particular threats facing the empire in power at the time of their construction.<sup>137</sup> The actual construction of these distinct walls spanned multiple reigns within those dynasties, suggesting that they “resulted after long evolutionary processes which involved initial construction at the most vulnerable locations, followed by gradual extensions and links.”<sup>138</sup> The walls were thus part of a broader project designed to solve perpetual security issues, which despite their mishmash of often rudimentary construction materials achieved the honorific “great” in retrospect once outsiders encountered the sheer scale of the construction.<sup>139</sup>

The development of Anglo-American law is a similarly vast project undertaken over several generations, with each responding to the unique issues and circumstances that dominate their day. The whole of this construction is what gives “law” a strongly positive connotation; the edifice was built by a series of skilled craftsmen working diligently together not only in the present time but across centuries, leaving the overall structure in a “better” or “stronger” arrangement for modern legal architects. This cross-generational aspect of law dictates the pride of place precedent receives in a theory of adjudication. Precedent acts as the existing configuration of the law as well as the building materials with which future legal minds will construct their own forms. While some might reject this metaphor as an aggrandizement of the legal process, it usefully highlights the important role precedent can and should play in society’s development over time.

Others have used similar metaphors to describe the work of appellate judges across time. Ronald Dworkin described judges as authors of a particular chapter in a chain-novel, taking the chapters written before them and attempting to make the novel the best they can through their own additions.<sup>140</sup> This adjudicatory structure is necessary given the limited life-span of any particular judge. No one legal author is prescient enough to predict and resolve all possible controversies in advance. This requires

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<sup>137</sup> DANIEL SCHWARTZ, *THE GREAT WALL OF CHINA* 8 (1990).

<sup>138</sup> WILLIAM LINDESAY, *THE GREAT WALL* 7 (2003).

<sup>139</sup> *Id.*

<sup>140</sup> DWORKIN, *supra* note 22, at 228-38.

certain acknowledgments on the part of a judge, which Gerald Postema summarizes brilliantly:

“[T]he success of that chapter, and so the significance of [a judge’s] contribution to the novel as a whole, depends on whether the themes she develops in her chapter are taken up in appropriate ways by subsequent writers in the chain. But, then, the success of the interpretation is dependent *inter alia* on the interpretive activities of other participants in that enterprise. So the chain novelist must view the project as a collective project, to which she will make a contribution, the meaning and success of which is a product of the interaction (in both interpreting and writing) of all the participants. A novelist in the chain cannot regard herself in abstraction from the collective project in order to construct her interpretation of the work without jeopardizing her contribution and the integrity of the work as a whole. She must construct an interpretation, cognizant of the interpretive activity of other contributors, both past and future.”<sup>141</sup>

It could be argued that this cross-generational process is a wholly undesirable condition for which institutional designers should account as much as possible, avoiding undue complexity and the influence of the dead hand of prior judges.<sup>142</sup> But that position is unpersuasive when one properly considers adjudication as a process of *refinement* rather than creation. On this understanding, the chain-novel features of adjudicative development are an advantage rather than a hindrance.<sup>143</sup> By seeking

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<sup>141</sup> Postema, *supra* note 107, at 311-12.

<sup>142</sup> For more details on the complexity of the chain-novelist’s project, *see* DWORKIN, *supra* note 22, at 231-32.

<sup>143</sup> Some have suggested that deriving moral principles such as justice similarly requires constant revision and refinement of earlier conceptions as part of an ongoing project. AMARYTA SEN, *THE IDEA OF JUSTICE* 86 (2009) (“To ask how things are going and whether they can be improved is a constant and inescapable part of the pursuit of justice.”). I agree that the law, too, should be an ongoing project that continually evolves our understanding of the very abstract principles that are its focus, either through the common law tradition or through constitutional analysis. But that project must build; each individual participant cannot possibly erect her own structure for the law from the ground up, or any advance in the law as time passes will become impossible.

contributions from earlier generations and trusting that future adjudicators will continue on the same deliberate and calculated path, judges can control for their limited life-spans and obtain more varied and intelligent contributions than any one author could hope to produce.<sup>144</sup> Rather than operating with absolute freedom, judges will be limited to making incremental changes within the analysis presented in prior cases, lest their own refinements be disregarded by subsequent authors.<sup>145</sup> Law is thus an exercise in the refinement of common legal ideals, and further refinement and analysis is always possible.<sup>146</sup> The process of adjudication, which includes humble adherence to precedent with only limited exceptions, is the very process of determining when justice allows a change in our previous conception of an appropriate outcome.<sup>147</sup> That a wide variety of strong opinions exists regarding any particular legal topic should not be overly discouraging: “a diversity of opinion in astronomy does not undermine the prospect of objective right answers . . . and nor should a diversity of opinion about justice undermine our view that there are right answers in that realm as well.”<sup>148</sup> Those opinions should be taken into account by the humble judge and built upon, allowing the process to continue *ad infinitum*.

A useful comparison of the refinement of legal ideas and the refinement of one’s senses can be made. Even though we cannot reach precisely agreed definitions for terms such as salty or sweet, almost everyone has the capacity to understand those terms. Just as we can cook a meal in an effort to match our tastes and produce more excellent, refined dishes, the law can continually refine our innate understanding of abstract ideals. Though an ultimate resolution may remain out of our reach, this is not an aimless

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<sup>144</sup> STRAUSS, *supra* note 17, at 37 (“[The law] can develop over time, not at a single moment; it can be the evolutionary product of many people, in many generations. There does not have to be one entity who commanded the law in a discrete act at a particular time.”); Sherwin, *supra* note 36, at 1189 (“[I]f the pattern of the decisions and the remarks of the judges who decided them suggest a common idea, that idea is worth attending to because it represents the collective reasoning of a number of judges over time.”).

<sup>145</sup> For a fuller discussion of this point, see Rasmusen, *supra* note 106.

<sup>146</sup> In many cases, “[t]he official’s failure to implement the law because it is unjust, or the citizen’s doing something other than what the law requires because that would be *more* just, is tantamount to abandoning the very idea of law—the very idea of the community taking a position on an issue on which its members disagree.” JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 37 (1999) (emphasis in original).

<sup>147</sup> Judges play a role as facilitators of the debate over our shared understanding of social ideals, and a vital one. Without their input along the fault-lines of widespread agreement, that debate would hardly get started.

<sup>148</sup> WALDRON, *supra* note 146, at 10 (citation omitted). “What it might undermine, though—indeed, what it should undermine—is our confidence that the right answer can be discerned (from among all the views that are put forward) in any way that is politically dispositive.” *Id.* This may be one reason to favor judicial resolution.

project. As each generation offers a more thorough account of the ideals that ought to guide our interactions, society continues to flourish. To abandon the project simply because clear answers are not forthcoming is analogous to abandoning a race because the fastest time possible is not yet known. The race is run in an effort to break the previous record, and the new record itself is not designed to stand in perpetuity but to mark a stage of development in the athletic quest for which future participants can strive.

In many if not most areas of law, the legal chain-novelist is handed a mostly completed text; the ideals and principles in a given area have already received at least somewhat vague treatment. The task of the judge adding to that body of work is to refine those principles which no longer appear adequate, rather than to complete an unfinished story or begin a new one from scratch. In undertaking this refining project, a humble approach towards the law placing significant reliance upon precedent is required. The judge must recognize the nature of her project and assess cases in light of already existing and well-considered legal principles, seeking only to tweak analyses stated in prior decisions. Even if a judge had an infinite life span, her understanding of the abstract legal principles in play might change over time. By passing the task of legal decision-making from one era to the next, each new generation can apply its own intellectual strengths to the same fields in an effort to sharpen those aspects of the law the previous generation may not have realized were wanting.<sup>149</sup> In this way, society perpetually progresses rather than remaining stuck in the static opinions of a single legal author.<sup>150</sup>

A judge aware of her own mortality may be tempted to make changes for the better as quickly as possible and complete broader adjustments in our legal traditions rapidly. But a judge that truly wishes to contribute to the overall project of advancing our society through the law would acknowledge that she can best extend her influence by working as part of a team across generations, thereby tempering her own myopic views. Constancy in a particular constitutional tradition is desirable and changes in that tradition should be approached with trepidation; judges ought to

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<sup>149</sup> As David Strauss notes about the common-law generally, “[t]he content of the law is determined by the evolutionary process that produced it. Present-day interpreters may contribute to the evolution—but only by continuing the evolution, not by ignoring what exists and starting anew.” STRAUSS, *supra* note 17, at 38.

<sup>150</sup> Dworkin seems to suggest that lawyers are often misled into thinking that the law works towards a purer form; for a law-as-integrity theorist, any pure form of law would in fact simply be what the law is now, not at some future time. DWORKIN, *supra* note 22, at 400. However, Dworkin does seem to temper that point by acknowledging that some doctrine of precedent remains an important part of the law, although seemingly simply because that tradition is contained within the law and violating it would itself violate any conception of integrity. *Id.* at 401.

carefully consider proposed alterations to the legal structure they inherit. Referring to common law adjudication generally, David Strauss usefully illustrates the point:

“The first attitude at the foundation of the common law is humility about the power of individual human reason. It is a bad idea to try to resolve a problem on your own, without referring to the collective wisdom of other people who have tried to solve the same problem. That is why it makes sense to follow precedent, especially if the precedents are clear and have been established for a long time. ‘We are afraid to put men to live and trade each on his own stock of reason,’ Burke said, ‘because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations.’ The accumulated precedents are ‘the general bank and capital.’ It is an act of intellectual hubris to think that you know better than that accumulated wisdom.”<sup>151</sup>

The point should not be taken too far or it may again devolve into the claim that prior decisions ought to be respected solely on the basis of their status as prior; after all “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>152</sup> But respect for prior opinions is not required simply because they are prior in time. Instead, the judge’s humility reminds her that she can only hope to improve that body of law through cautious advancement and even more cautious efforts to cut back on its growth. The humble judge acknowledges “the insight that the result of the experimentation of many generations may embody more experience than any one man possesses”<sup>153</sup> before forthrightly suggesting that a break from the tradition embodied in precedent is required. And to preserve that tradition of cross-generational experimentation and legal refinement, the present-day judge must herself remain faithful to precedent, increasing the odds that her own limited alterations to the shape of the law will in turn be preserved by future

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<sup>151</sup> STRAUSS, *supra* note 17, at 41 (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 251 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790)).

<sup>152</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>153</sup> FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 62 (1960).

generations of humble adjudicators.<sup>154</sup>

Opponents of a robust theory of precedent might argue that cross-generational judicial humility mistakenly places faith in human reason to refine the law over time, rather than compound its mistakes or introduce new impurities.<sup>155</sup> But if our faith in human reason is limited, it would be far more misguided to allow a contemporary actor to describe the end-state of the law that henceforth will justly guide all conduct. The law does and should change, but at a tempered pace, and judges should remain circumscribed and deliberate by relying heavily upon precedent.<sup>156</sup> The humble judge begins with the presumption that precedent is a valid advancement given its position in the larger- and longer-term project of refining abstract legal concepts.<sup>157</sup> Rather than discarding prior judges' combined analytical prowess, present judges access and rely upon that prowess to advance interpretation. Hercules, Dworkin's model adjudicator, is above all humble, and his encyclopedic knowledge of the prior established areas of law growing from the specific to the general in concentric circles is a reflection of that humility, not of his preference for integrity simply for integrity's sake.<sup>158</sup>

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<sup>154</sup> Although he uses particularly broad language to describe judicial discretion, Eric Rasmusen usefully illustrates the incentives of present-day judges. "Even if [a judge] feels he can successfully make policy today against the will of the legislature and the decisions of past judges, he knows that the judges who succeed him can change that policy. Thus, he shows restraint in most areas of law in the hopes that where he does innovate, the innovation will be permanent." Rasmusen, *supra* note 106, at 67. I turn to this issue in more depth later. See *infra* Part IX.

<sup>155</sup> E.g. Frederick Schauer, *The Failure of the Common Law*, ARIZ. ST. L.J. 766, 766-69 (2004) ("To believe that the common law works itself pure is to believe that subsequent cases correct the errors of earlier ones far more than they add errors to previously sound doctrines, and the new cases present opportunities for refinement rather than occasions for mistake. . . . In the hands of the wrong people, the law may be as likely to work itself impure as pure, or so at least many people believe, and thus once again the faith that produced the common law in the first place is a faith that seems no longer to exist.").

<sup>156</sup> My account of precedent thus fits within the range of accounts that can be described as common-law constitutionalism, of which Strauss's is a particularly enlightening example. See generally STRAUSS, *supra* note 17.

<sup>157</sup> This idea is fundamental in the common law tradition as captured by Blackstone: "The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration." WILLIAM BLACKSTONE, 1 COMMENTARIES \*70. However, it is worth noting that Blackstone also supported the thesis that precedent could be overruled or ignored in many situations, "[f]or if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." *Id.* (emphasis in original).

<sup>158</sup> To his credit, Dworkin highlights the way in which our principles of political morality will change over time as we attempt to construct a better state. "Politics, for us, is

Further consideration of so-called checkerboard law illustrates the role precedent should play in appellate adjudication. Whether integrity has normative value in itself or as a component of the pursuit of justice, checkerboard solutions are a particularly poor means of participating in discourse designed to refine the abstract ideals that dot the legal landscape. Checkerboard solutions suggest that society can partially cater to a particularly strongly-held opinion, even if misguided, and move on to the next (hopefully less divisive) controversy. But neither citizens nor judges should be so defeatist. Honest discussion with a reasonably determinate outcome is a better route because it is a means of refining our ideals.<sup>159</sup> Even if the revisions offered later prove undesirable and in need of revision themselves, the effort of choosing and applying a common solution is far more desirable than making an avowedly arbitrary compromise.<sup>160</sup>

Many of our legal (and especially constitutional) precepts are necessarily vague and admit of no singular, clear definition. They may therefore be “essentially contested concepts” that benefit from continued efforts at discussion and refinement.<sup>161</sup> Though the participants in the discussion are not likely to experience sudden epiphanies revealing that their opponents’ positions are accurate in principle, “[r]ealistically the hope one invests in one’s participation in such a dispute is that the contestation—and the sense of the underlying ideal at subsequent stages—will be the better for one’s intervention.”<sup>162</sup> In this sense, the essentially contestable aspects of law (and especially our constitutional tradition) benefit from cross-generational discussion and development. While it may not be possible to confidently state the precise meaning of a particular ideal, it remains a worthwhile endeavor to discuss competing views on the issue and ultimately implement one conception even if we must later reverse course.

The law is like a great project of humanity that admits of modest improvement only through slow, considered restructuring and renovation. Rather than redesigning the law wholesale, judges should work to build

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evolutionary rather than axiomatic; we recognize, in working toward a perfectly just state, that we already belong to a different one.” DWORKIN, *supra* note 22, at 164. At least in the abstract, then, Dworkin might be willing to accept a conception of adjudication that is itself designed to refine the law over time.

<sup>159</sup> Importantly, appellate decisions allow the state to implement these solutions on a small scale at first, favoring a method of experimentation that does not threaten stability nearly as much as sweeping legislative programs.

<sup>160</sup> David Strauss touches on this point in discussing the attitude of “cautious empiricism” in a common law judge. STRAUSS, *supra* note 17, at 40-42.

<sup>161</sup> This idea is attributed to W. B. Gallic in an article dealing with ideas in linguistic philosophy. See W. B. Gallic, “Essentially Contested Concepts,” *Proceedings of the Aristotelian Society*, 56 (1955-1956) 167, cited in Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 *LAW & PHIL.* 137, 148 n.27 (2002).

<sup>162</sup> Waldron, *supra* note 161, at 153.

upon and refine the existing legal structure that is the product of prior generations' carefully considered work, continuing to adapt that structure in response to modern social controversies. Precedent is the bedrock of that project, the Great Wall of prior legal dynasties upon which present legal decisions should be based to ensure that just outcomes are consistently achieved.

### VIII. CONSTITUTIONAL CASES

Before turning to the repercussions of my view, I want to emphasize why a supplementary argument for precedent beyond the traditional accounts discussed earlier is especially important in constitutional cases. Many will contend that any unjust result is contrary to the essence of constitutional rights, which should act as inviolable trumps a citizen can invoke against a government intrusion without subjecting to a balance with justice on a society-wide, systemic level.<sup>163</sup> Further, constitutional theorists note that the text of the United States Constitution itself contains no reference to *stare decisis*, and therefore a prior decision that violates the constitution cannot be legal.<sup>164</sup> If a theory admits that reliance on precedent will work at least occasional injustices, it seems necessary to grant that it is unsustainable in constitutional cases.

The standing counter to this claim is that *stare decisis* remains a principle of constitutional magnitude, "but one that is rooted as much in unwritten norms of constitutional practice as in the written Constitution itself."<sup>165</sup> This position seems to hold sway amongst Supreme Court Justices, at least when it has been discussed in recent confirmation hearings.<sup>166</sup> Certainly, modes of argument beyond pure constitutional

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<sup>163</sup> See Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153-67 (Jeremy Waldron ed., 1984).

<sup>164</sup> See Paulsen, *Marbury*, *supra* note 38, at 2731-32; Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005).

<sup>165</sup> Fallon, *supra* note 48, at 572. Fallon argues that "[w]ithin constitutional practice, *stare decisis* has acquired a lawful status that is partly independent of the language and original understanding of the written Constitution," one which remains viable insofar as it is "reconcilable" with the text. *Id.* at 588.

<sup>166</sup> "[I]n their confirmation hearings both then-Judge Roberts and then-Judge Alito gave assurances about adherence to *stare decisis*. Judge Roberts told Senator Specter that '[j]udges have to have the humility to recognize that they operate within a system of precedent;' Judge Alito, for his part, called *stare decisis* 'a fundamental part of our legal system,' citing its virtues." Friedman, *supra* note 1, at 30 (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 55 (2005), 2005 WL 2204109 (statement of Judge John G. Roberts, Jr.); *Confirmation Hearing on the Nomination of*

textualism seem appropriate, including the tradition of respect for precedent due in part to its history of widespread acceptance.<sup>167</sup> In addition, some textual grounding for *stare decisis* has been suggested: “Article III’s grant of ‘the judicial Power’ authorizes the Supreme Court to elaborate and rely on a principle of *stare decisis* and, more generally, to treat precedent as a constituent element of constitutional adjudication.”<sup>168</sup> This position does not challenge the claim that *stare decisis* in constitutional cases will sometimes produce unjust results, instead countering that *stare decisis* was understood by the framers to be inherent in the judicial power exercised by federal courts.<sup>169</sup>

Defenders of *stare decisis* in constitutional cases may be able to reject the claims of critics even more directly by arguing that reliance on constitutional precedents in fact produces more just results. As I have attempted to illustrate, a just decision necessarily has an author who approaches her work with the humility needed to respect precedent horizontally and cross-generationally. Textual and historical claims aside, precedent has priority of place in a theory of constitutional adjudication simply because it can be a source of, rather than an obstacle to, just decisions, guiding the Justices’ exercises of discretion as they continue to refine abstract constitutional principles in keeping with shifting constitutional understandings in society at large.<sup>170</sup>

In the interests of justice, it may be all the more important for constitutional interpreters to robustly rely on precedent given the unique complications presented by that type of interpretation. The founding document of the United States is inherently ambiguous, perhaps simply due to the difficulty of pinning down abstract ideals of legal rights concretely or the perceived undesirability of doing so.<sup>171</sup> The text does not merely

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Samuel A. Alito, Jr. *To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 318 (2006), 2006 WL 75414 (statement of Judge Samuel A. Alito, Jr.).

<sup>167</sup> Henry Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 794 (2010).

<sup>168</sup> Fallon, *supra* note 48, at 577 (citing *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir. 2000), vacated as moot on reh’g *en banc*, 235 F.3d 1054 (8th Cir. 2000); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994)).

<sup>169</sup> *See id.* at 578-82.

<sup>170</sup> Although I make an argument more directly on the grounds of justice, I do not mean to suggest that Fallon’s understanding of “the judicial Power” is misguided. Rather, I simply argue that a more direct defense of *stare decisis* is possible and may be more convincing to its would-be detractors.

<sup>171</sup> “[A]lthough we may agree on and be deeply committed to certain abstract values or principles, we cannot anticipate all the fact situations in which they may be implicated, nor can we fully map out a comprehensive view of the concrete consequences implicated by those values. . . . In such situations, it is wise not to attempt a comprehensive theory

allow Justices to give varying interpretations, but seems to require them to provide further refinements as new factual scenarios arise.<sup>172</sup> This is not to say that the words of the Constitution have no meaning. But frequently the discussion in constitutional cases quickly moves from the text to consideration of guiding decisions in the area under consideration.<sup>173</sup> Empirical analysis reveals that arguments from precedent “vastly outnumber all other kinds of arguments in attorney’s written briefs, the [Supreme] Court’s written opinions, and the justices’ arguments in conference discussions.”<sup>174</sup> By leaving open a variety of interpretations, the constitution permits judicial exposition of the deeper meaning of the spare words in the document itself to cover the most (and most effective) ground possible towards a better society. The text is only the start of the interpretation of the ideals it contains, and precedent continues to grow from it into a significantly larger (and perhaps more meaningful) body than the spare words of the document.<sup>175</sup>

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issuing a precise network of rules at the outset, but rather to let the implications of the abstract principles be revealed incrementally through confronting fact situations on a case-by-case basis.” W.J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* 207 (2007) (quoting Denise Reaume, *Of Pigeonholes and Principles: A Reconsideration of Discrimination Law*, 40 *OSGOODE HALL L.J.* 113, 117 (2002)).

<sup>172</sup> Theorists of both a positivist and a non-positivist ilk have argued that the U.S. Constitution inherently requires those interpreting and applying it to consider at least some moral principles in this refining process. See DWORKIN, *supra* note 71, at 187-98 (discussing JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001)).

<sup>173</sup> STRAUSS, *supra* note 17, at 33. One might contend, then, that the constitution did not significantly dilute the sturdiness of the common-law tradition. It may have represented a step away from that tradition, but only a cautious step.

<sup>174</sup> Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 *AM. POL. SCI. REV.* 755, 764 (2002) (citing Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 *AM. J. POL. SCI.* 1018 (1996); Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 *SANTA CLARA L. REV.* 567 (1991)).

<sup>175</sup> It can certainly be argued that the constitution is the product of the general distrust our founders had for future interpreters, and therefore judges should defer to its text rather than exercise broad interpretive discretion. SHAPIRO, *supra* note 105, at 346-49. On this account, the legitimacy of the legal system is at stake if judges feel qualified to evaluate their own abilities as constitutional expositors, rather than filling the constrained role outlined by the founders and “ratified by an overwhelming majority of adults in the political community after a full and fair debate.” *Id.* at 349. Even if my own prescriptions dilute what judicial respect for constitutional text remains, they are certainly not an effort to promote unrestrained judicial discretion; rather, they acknowledge the constraining role that prior precedent plays as judges issue new constitutional rulings in light of prior judicial opinions just as they hope future judges will rely on their own doctrinal advancements. While my approach to judicial humility (and therefore restraint) is different, I sympathize with the desire for further restraint than that contained in a fully Dworkinian method of

The constitution's very indeterminacy requires reliance upon precedent to avoid the problem of Justices simply talking past one another as they engage in their interpretive project. Precedent plays an important settlement role in the necessarily large subset of constitutional cases without clear answers. While opponents of precedent might suggest that Justices should ignore obviously unconstitutional decisions, that instruction fails to meaningfully identify which prior cases should be so discarded, a question that cannot be answered outside of a decisionmaking process that delves deeply into both the outcomes and analytical structures of prior cases. We should avoid overturning past judgments in part because "given the intense debate in society over various social and political principles, including the principles that courts apply in reaching their decisions, some court decisions are in certain respects like making a commitment in arbitrary cases."<sup>176</sup> Especially in constitutional cases, Justices must take the existing settlements that precedent represents as the basis for their discourse to further refine the controversial principles at stake.<sup>177</sup> This allows the Justices to meaningfully debate the extension of the basic agreement represented by the constitutional text. Precedent constrains the field of debate amongst Justices to an analytical background about which all can agree, and from which further refinement of constitutional ideals is actually possible. While some Justices might wish that certain earlier opinions were never issued, their existence should not be ignored.<sup>178</sup>

While I take the United States' case as a paradigm, the same argument applies even to more specifically enumerated constitutions adopted elsewhere. Admittedly, recent efforts at constitutional construction contain far more specific government mandates and descriptions of rights.<sup>179</sup> Frederick Schauer argues that while the generalities of the U.S. Constitution seem to require a process of slow, incremental refinement of the understanding of those ideals along a common law-like path, the modern

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interpretation.

<sup>176</sup> Benditt, *supra* note 7, at 92. While Benditt notes that "[t]he greater the agreement on principles, the less like an arbitrary commitment a judicial decision is," I think it especially important in the most controversial cases to commit "to continue to live with a disputed principle or its application even when suspicions arise that it may be wrong." *Id.*

<sup>177</sup> "Following precedent can thus be seen as a hedge against our . . . lack of certainty about the correctness of certain of the social and political principles we adopt." *Id.*

<sup>178</sup> There is a hint of this idea in Dworkin's discussion on the distinction between concept and conception, according to which a broad agreement about a concept may later be seen as part of that concept's very meaning and therefore act "as a kind of plateau on which further thought and argument are built." DWORKIN, *supra* note 22, at 70. H.L.A. Hart presents a similar argument that legal meaning can be conceived of as a core of determinacy with a surrounding area in which discretion may properly be exercised by the judge. See HART, *supra* note 13, at 144-45.

<sup>179</sup> Schauer, *supra* note 155, at 766-69.

trend towards additional constitutional precision, as well as the efforts of the Supreme Court itself to elaborate more precise constitutional tests, demonstrates the receding influence of the common law approach and its attendant rules of precedent.<sup>180</sup> But this view overestimates the degree to which the process of judicial refinement of abstract constitutional ideals (as well as the effort by constitutional drafters to create mandates that are more specific) demonstrates modern law's final, code-like status. Constitutions "can and should be seen to represent a mixture of only very modest precommitment and confidence, combined with a considerable measure of humility."<sup>181</sup> Judicial (or legislative) refinement of legal concepts is a perpetual process, not one which is designed to achieve any end-state stripping legal decisionmakers of all discretion.

The modern trend towards constitutional specificity simply represents the effort of younger nations to incorporate the legal developments of the past without repeating the often painful history of refining legal concepts from more abstract beginnings. A constitution should be taken as a humble declaration of rights deserving of especially strident protection for the time being, not a more hubristic claim to have settled the question for all time.<sup>182</sup> Modern constitutional drafters have merely attempted to define the legal foundations of their societies in ways that build upon many of the landmark decisions in Anglo-American legal history; they have not suggested that the work of judges in refining the law for future generations is somehow complete, nor have they bound future generations to an originalist interpretation of the constitution simply because it is more verbose and expansive. For instance, the drafters of the Indian constitution specifically avoided the phrase "due process of law" in favor of seemingly more precise formulations in order to sidestep the controversy over substantive due process claims; however, many of the same principles have arguably become a part of modern Indian constitutional jurisprudence.<sup>183</sup> The line in the sand defining the rights of citizens and responsibilities of government that a modern constitution represents can be more detailed simply because it builds upon the successes and mistakes of adjudication in other constitutional societies. Such added detail means refinement of abstract ideals begins from a later stage of development in younger countries, but the process of constitutional adjudication remains the same unending,

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<sup>180</sup> *Id.* at 772-73.

<sup>181</sup> WALUCHOW, *supra* note 171, at 213.

<sup>182</sup> *Id.* at 246.

<sup>183</sup> Abhinav Chandrachud, *Of Constitutional "Due Process,"* THE HINDU, May 24, 2010, <http://www.thehindu.com/opinion/op-ed/article436586.ece?service=mobile>. The same may also be true of the Canadian constitutional tradition. See David M. Siegel, *Canadian Fundamental Justice and U.S. Due Process: Two Models for a Guarantee of Basic Adjudicative Fairness*, 37 GEO. WASH. INT'L L. REV. 1 (2005).

careful progression towards a fuller understanding of those ideals, a progression in which precedent will play a crucial role.<sup>184</sup>

That the constitution must necessarily be augmented by judicial interpretation does not imply that judges should rigidly follow former interpretations of its principles to the letter. But Justices must humbly work through those constitutional precedents even when suggesting new interpretations. That very humility allows Justices to balance current social cohesion and the advancement of broader constitutional ideals, guiding their discretion towards just results. Humility is a necessary aspect of justice within the Supreme Court's constitutional jurisprudence, not an expedient that should be tossed asunder when the "correctness" of a prior decision is in dispute.

### IX. THE VALUE OF OPINIONS

Having sketched my own position in favor of strong reliance on precedent, I now turn to some of its apparent implications, beginning with the output of the judicial process in appellate courts. Some have instructed

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<sup>184</sup> By extension, an admittedly radical (and unrealistic) argument for more ready codification of U.S. constitutional precedents in the text could be made. As more and more cases arise, more decisions are needed, and the law must adapt to changing conditions with ever more speed. Thus, the temptation for arbitrary, rapid-fire opinions issued without sufficient consideration of precedent is great. As precedent becomes overbearingly difficult to comprehend or clarify, judicial agreement upon which decisions are canonical is likewise more taxing. It might be desirable to add specificity to the constitution's text by codifying some precedent, thereby ensuring that those decisions will be a starting point for judicial discussion and assuring litigants of the permanence of certain once-controversial precepts of law. Constitutional amendment could be utilized to establish with finality that certain precedents are now part of the line-in-the-sand that the constitution itself represents.

The Article V amendment process may be too strict for alterations that simply affirm and codify the Supreme Court's repeated view on a particular issue. A simplified process would both allow Justices to remain faithful to precedent in most cases, avoiding inconsistency or any waning in the influence of precedent, and give citizens a mechanism to express their approval (or lack thereof) of Supreme Court debate surrounding abstract constitutional principles. Such an amendment could not be substantive; it could only state simply that "this amendment codifies the Supreme Court's decision in Case X." The limitation to the scope of these amendments would distinguish them from other types of amendments to trigger the easier amendment procedure, and also avoid the problem of requiring interpretation by the courts to derive a clear meaning for the amendment. *See* WALDRON, *supra* note 146, at 10 (on the role of courts in defining the terms of a new legislative enactment). Where a new law is so circumscribed that it merely affirms a Supreme Court decision, the meaning of the law cannot admit of any other interpretation than simply that Justices must take account of a precedent in their decisional matrix. By limiting the field of debatable principles, such amendments would encourage Justices to work through well-established analytical frameworks rather than face a web of overwhelmingly complex and conflicting approaches.

judges to “ ‘consider what you think justice requires and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.’ ”<sup>185</sup> Indeed, there is little *prima facie* cause for a judge to reduce her reasoning to a published opinion when such reasoning will give observers grounds to disagree and suggest relitigation. It is an understandable temptation for a judge to intentionally dilute her language when rendering a decision as a hedge against potential criticism and the instability that may result.<sup>186</sup> And to the extent a judge is committed to the reasons she gives for a particular decision in future cases, she may seek to avoid giving reasons simply to avoid committing herself to wrong outcomes in subsequent cases.<sup>187</sup> But even if the judge’s opinions will likely be exposed as wrongheaded by future critics, the judge must express them publicly and candidly in order to most easily advance the shared, cross-generational endeavor that is the law.

First, opinions are necessary if courts are to remain politically viable. A candidly-written, well-reasoned decision has obvious benefits for the parties to the controversy, who are far more likely to respect such a resolution. A judge can quickly deplete the judiciary’s political capital if her opinions appear largely arbitrary, and nothing appears more arbitrary than a decision lacking appropriate supporting reasons. By expressing her justifications for a given decision, the judge makes significant strides towards placating the losing party by explaining the deficits in that party’s position, in the process signaling “that [the parties’] participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments.”<sup>188</sup> Only by giving reasons for a decision can the court argue that the conclusion reached was one supported by some reasoned ground, not simply a judicial coin-flip.<sup>189</sup> And the craft of that explanation is likely improved by the practice of publishing the reasons for one’s decision; as

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<sup>185</sup> SEN, *supra* note 143, at 4 (*quoting* 2 JOHN CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES IN ENGLAND: FROM THE NORMAN CONQUEST TILL THE DEATH OF LORD MANSFIELD* 572 (John Murray ed., 1949-57) (1849)).

<sup>186</sup> Fear of a public backlash may play a larger role than commonly thought in the ultimate decisions of high appellate courts. *See* Friedman, *supra* note 1, at 33; WALUCHOW, *supra* note 170, at 201.

<sup>187</sup> “If reasons are what cause the right outcome in this case to generate wrong outcomes in others, then weakening the reason-giving requirement can produce the right outcome now without negative side effects.” Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 656 (1995). Schauer later acknowledges some advantages to the judicial practice of providing reasons for a decision, “the most obvious being the very commitment that is at times a disadvantage.” *Id.* at 657.

<sup>188</sup> Lon Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 388 (1978).

<sup>189</sup> *Id.* at 367 (“We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.”).

Richard Posner has remarked, “[a]ppellate judges in nonroutine cases are expected to express as best they can the reasons for their decisions in signed, public, citable documents (the published decisions of these courts), and this practice creates accountability and fosters a certain thoughtfulness and self-discipline.”<sup>190</sup>

There is also an important role for opinions to play in promoting the stability provided by the rule of law.<sup>191</sup> Published opinions publicly display the state of the law, giving guidance to rational actors and allowing them to self-apply legal norms in future cases.<sup>192</sup> They promote planned actions that presuppose a stable set of legal strictures, actions that lead to economic and social growth. Published opinions also generalize legal standards and rules beyond the particular facts of a case, again supporting citizens’ planning.<sup>193</sup> In constitutional cases, detailed written opinions lay open for debate the propriety of the Supreme Courts’ views within particular fields of constitutional doctrine; the Court is not subject to accusations of arbitrariness or impropriety unless the written material produced as an accompaniment for the decision reveals the basis for its opinion.<sup>194</sup> Even if

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<sup>190</sup> RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 257 (1999); see also Schauer, *supra* note 187, at 657-58 (“Under some circumstances, the very time required to give reasons may reduce excess haste and thus produce better decisions. A reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.”).

<sup>191</sup> “Published opinions promote publicity, predictability and steadiness of the body of law, while avoiding secret action or favor, by creating pressure to conduct careful analysis of the facts and issues before the court, to justify with law and reason the decision that is made.” Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 *GEORGETOWN J. INT. L.* 353, 369 (2006).

<sup>192</sup> For more on the importance of the self-application of legal norms, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 119-121 (Foundation Press 1994).

<sup>193</sup> Schauer, *supra* note 187, at 635 (“The act of *giving* a reason, therefore, is an exercise in generalization. The lawyer or judge who gives a reason steps behind and beyond the case at hand to something more encompassing.”). Schauer later argues that simply in virtue of giving a reason for a decision, a judge commits herself to other outcomes falling within the scope of that reason. *Id.* However, he seems ultimately puzzled by that result, and by the legal system’s apparent supposition “that it is sometimes desirable for legal decisionmakers to be committed to, and therefore constrained by, a range of results larger than the case at hand.” *Id.* at 653. I argue that there is a purpose to committing a judge to her reasons, at least until an argument persuades her otherwise—doing so allows the judge to humbly participate in a collegial and cross-generational refinement of the law, and constrains the discretion of those whose ambition is to make the largest mark possible on that body of law.

<sup>194</sup> This is what led Frank Douglas Wagner, longtime reporter of decisions for the Court, to remark that “public access to the Court’s decisions, no matter what the medium or source, is one of the bearings that keep democracy’s wheels turning true.” Naseem Stecker, *Reflections of a Modern Scribe*, *MICH. B.J.*, Feb. 2005, at 41, cited in Kahn, *supra*

a large majority of the population will not engage in careful study of an appellate court's views, making those views generally available serves an important promulgation function, highlighting the current state of doctrine for those who wish to discover it.<sup>195</sup> The simple fact that those opinions are published and publicly available also assuages the community's fears; much as published opinions reassure the parties that their arguments have been heard, they can reassure a wary public that judges are not taking decisions without a significant and stabilizing ground in past practice.

Putting political viability to one side, written decisions are also of the utmost importance to the humble judge in advancing, through human reason, the overall project of the law across generations. If decisions are limited to bare bones outcomes, they are of very little value;<sup>196</sup> without written building blocks already in existence, constructing a consistent jurisprudence and advancing our understanding of abstract ideals is nigh impossible. If a pattern of outcome-only adjudication became prevalent, the justification for relying on precedent as part of a broader project of legal refinement would itself be significantly weakened. There would be no growth for the law to pursue, and no reason to believe that prior decisions are important to study other than their brute existence.

Opinions expressing the reasons for a decision allow judges to adhere to what I earlier called a thick version of *stare decisis*, relying not just on outcomes but also on the analytical structure of prior cases. The process of legal refinement requires more than somehow divining a rule or standard out of a series of prior outcomes; judges must delve deeply into the analysis presented by those prior cases,<sup>197</sup> and must leave behind for future judges a lattice or matrix of reasoning upon which they can build. The analytical structure in precedents allows a humble judge to work more easily in tandem with her colleagues, rather than each trying to devise the structure and scope of their reasoning independently. While the text of a statute may provide some common beginning for discussion amongst judicial colleagues, the more fully-developed reasoning of prior courts will not only

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note 191, at 393 n.136.

<sup>195</sup> The importance of such promulgation has been preached by a long line of Rule of Law scholars, notably including Lon Fuller. See LON FULLER, *THE MORALITY OF LAW* 49-51 (1964). As Fuller argued, “[e]ven if only one man in a hundred takes the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the laws generally available.” *Id.* at 51.

<sup>196</sup> Regarding English decisions, Rupert Cross and J. W. Harris suggest that “the authority of a decision for which no reasons are given is very weak, because it is so hard to tell which facts were regarded as material and which were thought to be immaterial.” RUPERT CROSS & J. W. HARRIS, *PRECEDENT IN ENGLISH LAW* 47 (4th ed. 1991).

<sup>197</sup> Sherwin makes a similar contention about the attention a judge must pay to the details of prior cases when reasoning by analogy. Sherwin, *supra* note 36, at 1195-96.

alert present courts to the most important issues, but will give form to the court's internal debates before an ultimate conclusion is reached.

Published opinions relying on precedent can also act as a useful constraint on judicial discretion. Even judges seeking to make broad changes in the legal landscape have incentives to craft humble opinions that clearly defer to the work of their predecessors. Written decisions that take such a humble approach necessarily imply that a present-day judge will remain deferential towards prior precedent. While this may constrain the discretion exercised by the present-day judge, it also suggests an ongoing constraint applicable to future judges inclined to disregard any legal refinements the present-day judge has developed. A judge seeking to maximize her influence will ensure that her opinions remain faithful to precedent with only occasional, well-reasoned exceptions, finding it “‘advantageous to follow rules announced by [her] predecessors, so that successors will follow [her] rules in turn.’”<sup>198</sup> Following precedent may then be a self-reinforcing constraint on judicial discretion,<sup>199</sup> one which will be enhanced if future judges are particularly disinterested in prior analyses that fail to take a humble, precedent-centered approach.<sup>200</sup>

Any theory of adjudication also necessarily affects the methods employed by lawyers acting on behalf of litigants. Publicly expressed judicial humility, demonstrated by published decisions relying heavily on prior precedent, will encourage similar humility in legal advocacy by showing that judges will generally avoid deviations from the views they have expressed in prior opinions.<sup>201</sup> Lawyers will become aware of the unlikelihood of drastic doctrinal changes by judges committed previously to a particular line of reasoning. This is not to say that litigants ought to be discouraged from arguing for expansions of existing rights or logical extensions of long-held principles. But counsel arguing on behalf of those litigants should temper their passions and present arguments in the context of a legal structure that develops and grows based upon the past. That mode

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<sup>198</sup> Rasmusen, *supra* note 106, at 67 (quoting Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817 (1982)). “Judges need no professional conscience to impel them to obey existing law even when they think it bad policy, but instead can be made to obey it to maximize their own influence, in the hope that the new law they create interstitially will be obeyed by future judges. In theory, then, it is possible even for purely self-interested judges to discipline each other.” *Id.* at 81.

<sup>199</sup> “If all the treatises, law professors, and law reviews . . . predict that future judges will obey precedent if present judges do, the predictions may become self-fulfilling.” *Id.* at 80.

<sup>200</sup> *Id.* at 82 (“Future judges must impose sanctions on judges who break precedent and misinterpret statutes by not following their precedents.”).

<sup>201</sup> I emphasized this relationship earlier in discussing the lawyer's devotion to the “little red flag.” *See supra* Part VI.

of argument is encouraged by the publication of humble, carefully-reasoned opinions. Publishing such opinions does not disavow all change, but does discourage lawyers from arguing repeatedly for the repudiation of existing analytical approaches or overly dramatic shifts in doctrine that would only decrease the reliability of the law and, in turn, the stability of the social structure.

The thick form of *stare decisis* is especially important in constitutional jurisprudence. Given the small number of cases the Supreme Court of the United States hears on an annual basis,<sup>202</sup> the likelihood of its addressing two cases that are factually similar in all relevant respects is indeed quite low.<sup>203</sup> But that does not mean precedent ought to be disregarded. The Court can draw a useful analytical approach from prior cases. Strong factual identity is not required for the use of such analytical structure; rough correspondence between the constitutional clauses and ideas upon which the cases turn will suffice. By focusing on broader areas of constitutional law and looking less for tight factual analogy, a field of common analysis opens upon which Justices can commonly base their discussion of any particular case. For instance, the analysis applicable to expressive material that may constitute commercial speech, as the Supreme Court described in *Central Hudson* and has reinforced in a series of subsequent decisions,<sup>204</sup> provides an important guide for the discussion of similar cases in the future, allowing judges debating particular factual scenarios to at least argue within the same analytical framework.<sup>205</sup> If, on the other hand, a judge reaches a decision

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<sup>202</sup> In 2009, the Court issued 86 merit opinions. SCOTUSblog Final Stats OT09, <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Charts-070710-2.pdf> (last visited May 5, 2011).

<sup>203</sup> Justice Scalia has highlighted the regrettable frequency with which appellate judges are forced to resort to “totality of the circumstances” tests given the wide factual variation between the relatively few cases they decide. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-82 (1989).

<sup>204</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.*, 447 U.S. 557, 562-66 (1980) (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it must at least concern lawful activity and must not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-556 (2001) (noting the Court’s repeated application of *Central Hudson*’s basic analysis).

<sup>205</sup> The Second Circuit Court of Appeals recently conducted such a debate on the same analytical terms outlined in *Central Hudson*, although the majority and dissent disagreed on the ultimate outcome. *See IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2010). On review of that decision, the Supreme Court likewise conducted its debate within the same basic analytical framework. *See Sorrell v. IMS Health Inc.*, 564 U.S. \_\_\_ (2011).

without clearly applying (or forthrightly discarding) the analytical framework laid out in prior opinions, significant confusion can be introduced into the field which could have been avoided by following a thicker version of *stare decisis*.<sup>206</sup> Subsequent analyses that fail to grow upon or work within an existing precedent make the project of meaningful judicial debate amongst colleagues both present and future significantly more laborious. Such a practice leaves judges far too much leeway to disregard each other and formulate a new and rapid shift within a particular area of discourse, stalling the broader legal project in which each of them at least claims to participate.<sup>207</sup>

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<sup>206</sup> For example, consider the recent history of cases concerning race-conscious school admissions. In *Grutter v. Bollinger*, 539 U.S. 306, 334-42, (2003), Justice O'Connor outlined a five-factored test to determine if the University of Michigan Law School's race-conscious admissions program was narrowly tailored to the School's claimed compelling interest, diversity in higher education. O'Connor's analysis considered whether the admissions program individually considered applications along many factors, avoided quotas, considered workable race-neutral alternatives, avoided undue harm to students of any race, and had some logical endpoint or sunset provision. *Id.* at 334, 336, 339, 342. Yet when the court considered race-conscious school placement programs less than a decade later in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), Justice Kennedy's controlling opinion significantly deviated from O'Connor's clear test without any discussion or explanation. Instead, Kennedy noted his confusion with the implementation and decision-making of the plans at bar and seemed to require that program administrators be able to detail the implementation and supervision of such programs, then returned to more familiar factors such as the need to consider race-neutral alternatives and allow individualized review. *Id.* at 785-90. However, Kennedy's analysis did not include consideration of quotas, harm to students of any race, and logical endpoints or sunset provisions for the program. Thus, the alternative Kennedy left in place of *Grutter* significantly muddied the waters regarding race-conscious school admissions programs, presenting a hurdle to both future discussions of the issue amongst the members of the Court and meaningful refinement of the legal principles at play by future judges. Though not clearly an intentional effort to deceive observers about the direction of the law in the area (an issue I turn to in the following Part), such a decision can significantly damage the Court's reputation and authority.

Similar examples are myriad in the Court's constitutional jurisprudence, and are not merely a modern phenomenon. *See, e.g.,* *Hudgens v. N.L.R.B.*, 424 U.S. 507, 514-20 (1976) (noting that the analysis of *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), which held that the exercise of first amendment rights could not be denied absolutely on a shopping center's property near a store entrance, was irreconcilable with the analysis in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), which limited the applicability of the first amendment to handbilling activity in another shopping center).

<sup>207</sup> Appellate courts that issue less candid and more convoluted opinions also disserve the broader public and lower courts, rather than providing much-needed guidance. Courts that "treat[] precedents less than candidly . . . necessarily send mixed messages. Yet those messages must be interpreted and followed by the lower courts and government officials." Friedman, *supra* note 1, at 41.

Thus, the humble judge expresses her opinions and analysis in clear and candid published decisions without intellectual dilution or deception. This promotes a thicker version of *stare decisis* amongst all members of the bar as part of the project of cross-generational legal refinement. The judge utilizes prior opinions not just for guidance as to outcomes, but also for their analytical structure, seeking a common ground upon which she and her contemporaries might discuss more precise understandings of the concepts at the core of difficult cases. This leaves following generations with the strongest adjudicative roadmap possible and allows those generations to build upon and refine the existing edifice of law.

#### X. INTERPRETIVE CHANGE AND THE PROBLEM OF “SUBTRACTION BY ADDITION”

The competing desires for constancy and flexibility in the law have long been the subject of debate.<sup>208</sup> One foundational observation can be made: to develop a cohesive society, the law must be able to adjust some over time. Even a robust theory of precedent does not suggest that the work of prior judges must be followed by rote in all instances: “past decisions are thought to provide . . . reason for similar decisions in the present, *conditional* upon its not being the case (or its not being shown to the decision maker’s satisfaction) that the past decision is in error.”<sup>209</sup> Yet change must be sparing enough that unhappy litigants are not heartened to consistently press identical challenges in an effort to reverse the direction of a particular line of jurisprudence. The success of such strategies might tempt activists to spend far more resources on perpetual litigation on the belief that with enough time and effort any decision can and will be overruled.<sup>210</sup> That belief is self-reinforcing, and may tempt future judges (who necessarily rise to the bench only after practicing within the bar that harbors such a belief) to disregard humility in favor of ill-considered shifts in the legal landscape. Again, humility in the arguments presented by counsel before the court will reflect the content of the decisions the court has rendered in the past, and a judge’s humility in prior decisions is likely to trickle down to lawyers and influence the style of advocacy practiced before her. The danger of arbitrariness is ever-present; robust reliance on precedent can be frustrating to those litigants who find their cases resolved

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<sup>208</sup> PLATO, *supra* note 34, at \*295-300; ARISTOTLE, THE POLITICS 37 (Jowett trans., Forgotten Books ed. 2007) (350 BCE) (Suggesting that rulers should seek to change the law only to the point where “the citizen will not gain so much by making the change as he will lose by the habit of disobedience.”).

<sup>209</sup> Postema, *supra* note 130, at 1162 (emphasis in original).

<sup>210</sup> Gentithes, *supra* note 7, at 812-13, 819.

largely by a previously announced decision. But the law must advance societal ideals while at the same time maintaining a cohesive structure. Change in the law must remain possible, but it should be tempered by a strong reliance on and acceptance of precedent both as a political expedient and as the most careful and logical means for refining the law and adapting it to new situations.

While needed legal change may come from many sources, including the legislature or administrative agencies, the judiciary as an institution may be especially competent to make some limited alterations to the law in particular cases. As new and unique situations that previous legislators never considered become prevalent, it is vital that general legislation apply to challenging new scenarios. Within their historically miniscule time on the bench, judges have the opportunity to re-examine doctrine that no longer meshes with modern thought.<sup>211</sup>

As I recommended previously, a judge should adopt a thick version of *stare decisis* and apply the analytical structure utilized in a prior written opinion to resolve the particular legal issue at bar, even if she ultimately concludes that a change in that structure is due. But the fact that prior opinions are written does not guarantee their value; those opinions will have the most utility if intellectually candid. The judge must avoid the temptation to dilute her views for the sake of quelling controversy when the final decision is released. The legal project gains most from genuinely expressed viewpoints rather than diluted, specious arguments made only to protect the judge and court from criticism.<sup>212</sup>

The process of slow legal refinement described above is not necessarily an invitation for judges to add further “refinements” to an existing analysis, through additional tests or prongs, with an eye towards essentially reversing the position of a previous decision—an unfortunate process I call

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<sup>211</sup> Even philosophers whose work represents substantial leaps would hesitate to suggest that they have the final word on any given subject. The necessary implication that any legal thinker will have his work discussed, dissected, and in all likelihood discarded at some point in the future may seem frightening to the ego of those who wish to make a lasting contribution. However, there is value in the honest recognition of the likelihood, and the humility that this realization breeds in one’s outlook ultimately produces a more thorough and carefully considered viewpoint.

<sup>212</sup> “A judgment is also no better than an unreasoned decision when it refers to conflicting cases and does no more than state that some will be followed or, where this is possible, overruled, without any indication why such a course is being adopted.” CROSS & HARRIS, *supra* note 196, at 207. Although this claim is widely accepted, some have argued against judicial candor given its potential threats to judicial legitimacy. See Friedman, *supra* note 1, at 40 n.234 (citing Scott C. Idelman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388-94 (1995); Micah Schwartzmann, *Judicial Sincerity*, 94 VA. L. REV. 987, 988-89 (2008); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 739-50 (1987)).

“subtraction by addition.” In essence this process may allow a judge to revive the status quo prior to the more recent decision even though an extra layer of analytical complexity has been added. This may be a form of what Barry Friedman refers to as “stealth overruling,” whereby a judge uses “sleight of hand or fiat [to] simply chop the precedent to a stub.”<sup>213</sup> The subtraction by addition method may be particularly troubling when adopted by an intellectually dishonest judge purportedly refining a prior decision by adding to its analysis, while in reality disserving the rationale underlying it.

Consider two decisions, prior decision *Alpha* and subsequent decision *Beta*. Decision *Beta* purports to respect the analytical structure of *Alpha*, but adds more factors or further tests to *Alpha*’s framework in a “clarification.” These further considerations may effectively undermine the rationale of *Alpha*. Thus, although the judge has not overruled any aspect of *Alpha*, she has discretely expunged it without announcing the change. A judge can eventually overrule *Alpha* by taking part in a two-step process of adding complexity, then suggesting that *Alpha* be wholly disregarded in that line of precedent. The process is part of “a sophisticated dance in which the [judges] take a determined lead and choose their steps carefully”<sup>214</sup>

Subtraction by addition may be more problematic than it first appears. If undertaken in good faith, it does require a judge to discuss the propriety of certain aspects of the existing analytical structure, ensuring that she takes into consideration all the necessary principles of the broader area of law concerned and perhaps leading her to convince her colleagues that some considerations were missing from the previous analysis. That process seems to fit within the idea common-law reasoning, an important element in the incremental refinement of the law that partially defines the appellate judge’s project (although that common law process often entails distinguishing a prior precedent factually, rather than suggesting that the prior decision was analytically misguided).<sup>215</sup> Yet the potential pitfalls are

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<sup>213</sup> Friedman, *supra* note 1, at 12. Friedman more fully defines the worrisome process of stealth overruling, of which the “subtraction by addition” problem may only be one form, as follows: “‘overruling’ is (a) the failure to extend a precedent to its logical conclusion, drawing distinctions that are unfaithful to the prior precedent’s rationale; or (b) reduction of a precedent to essentially nothing, without justifying its de facto overturning. And stealth occurs when the Justices who do this know better, such that their decisions are in fact ‘dissembling.’” *Id.* at 15-16.

<sup>214</sup> *Id.* at 32. Friedman argues that the Court’s recent spate of campaign finance decisions exemplifies the process of stealth overruling, of which subtraction by addition is one form. “This is not minimalism, properly understood. . . . It is, in its own right, aggressive decision making.” *Id.*

<sup>215</sup> “‘In other words the distinguishing of precedents is often a gradual and reluctant way of overruling cases.’” Benditt, *supra* note 7, at 98 (quoting William O. Douglas, *Stare Decisis*, 1949 Cardozo Lecture, reprinted in ALAN F. WESTIN, *THE SUPREME COURT: VIEWS FROM INSIDE* 122, 133 (1961)).

significant, especially where a judge's motivations are less pure.<sup>216</sup> The canny judge can claim that overturning *Alpha* is appropriate because "subsequent legal developments"—namely the very decision, *Beta*, which the canny judge authored to excoriate *Alpha*—suggest so.<sup>217</sup> The judge can therefore effect a calculated but unacknowledged overrule of *Alpha* because "this factor by definition will almost always be met."<sup>218</sup> Such behavior will likely have a trickle-down effect on advocates before the bench, encouraging them to make repeated and costly efforts to scale back a particular rule of law with an eye towards its eventual reversal.

Rather than slowly chipping away at a decision through subtraction by addition, a judge ought to make candid and clear arguments for any break from prior cases. When declaring a precedent mistaken, a judge must show that her justification for doing so "is nevertheless a stronger justification than any alternative that does not recognize any mistakes, or that recognizes a different set of mistakes."<sup>219</sup> Thus, the argument should be up-front, directly supplying the reasons why a prior decision was misguided and ought to be cast aside as "a piece of legal flotsam or jetsam."<sup>220</sup> Clear, explicit, and direct overruling of a prior decision is thus preferable to the more opaque "subtraction by addition" method.<sup>221</sup>

Consider the contrasting paths taken by the Supreme Court of the United States in two of its recent decisions touching on congressional campaign finance reform efforts. In *Federal Election Commission v.*

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<sup>216</sup> This may be especially true in constitutional cases. See Gentithes, *supra* note 7, at 812-14.

<sup>217</sup> In the U.S. Supreme Court, this factor is contained within precedent addressing *stare decisis* and the appropriate time for overruling a precedent. Friedman, *supra* note 1, at 26.

<sup>218</sup> *Id.*

<sup>219</sup> Dworkin, *supra* note 13, at 1100.

<sup>220</sup> *Id.* Although it is not an issue I consider here, Dworkin makes an interesting suggestion as to how one might perceive when a decision is ripe to be labeled a mistake. "If Hercules discovers that some previous decision, whether a statute or a judicial decision, is now widely regretted within the pertinent branch of the profession, that fact in itself distinguishes that decision as vulnerable." *Id.* Elsewhere, I have argued against such "widely disregarded" tests for the overturning of previous decisions. Gentithes, *supra* note 7, at 814-15.

<sup>221</sup> The subtraction by addition method may encapsulate an outdated common-law view premised upon a much smaller population presenting far more infrequent challenges to established legal doctrine, a view which thereby elevates the law as established through judicial decisions above the realm of mere political power play. WALDRON, *supra* note 146, at 24 (discussing the "appealing anonymity of [judge-made] law" and its "distance from or independence of politics."). As Schauer argues, complex modern society requires more than the mere settlement of disputes as they arise; there is also an important "guidance function of law." Schauer, *supra* note 155, at 781.

*Wisconsin Right to Life, Inc.*,<sup>222</sup> the concurring and dissenting opinions (as well as many commentators)<sup>223</sup> decried the majority decision as an underhanded excoriation of the decision only three years earlier in *McConnell v. Federal Election Commission*.<sup>224</sup> Yet the case engendered little public notice or outcry,<sup>225</sup> even after the Court essentially overruled *McConnell* and struck key elements of landmark campaign finance reform legislation.<sup>226</sup> Three years later, the Court took a different tack in the much-publicized case of *Citizens United v. Federal Election Commission*,<sup>227</sup> expressly overruling the limitations on corporate campaign donations set out two decades earlier.<sup>228</sup> Although *Citizens United* was widely criticized for its potential to “jeopardize the Court as an institution,”<sup>229</sup> the clarity of that debate and criticism in part demonstrates the value of such a direct, candid overruling. Like it or not, the decision in *Citizens United* argued clearly and forcefully for a particular proposition of constitutional law, rather than confusing the area so severely as to render discussion amongst judicial colleagues and application by future judges nearly impossible.<sup>230</sup> While *WRTL* left constitutional doctrine mired in incoherence, *Citizens United* gave current and future judges a meaningful starting ground for debate, disagreement, or even future changes to the rationale underlying that strand of jurisprudence.

While subtraction by addition is less desirable than candid overruling, I emphasize that the least desirable method for shifts in legal doctrine is a decision wholly lacking an honest effort to work within the analytical structure of a prior decision or obtain consensus on the existence of its flaws. Even slowly undermining precedent remains preferable to simply

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<sup>222</sup> 551 U.S. 449 (2007).

<sup>223</sup> See, e.g., Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064 (2008); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533 (2008).

<sup>224</sup> 540 U.S. 93 (2003).

<sup>225</sup> Friedman, *supra* note 1, at 38 (noting the dearth of coverage on the decision in most major newspapers).

<sup>226</sup> *Id.* at 11-12.

<sup>227</sup> 130 S. Ct. 876 (2010).

<sup>228</sup> *Citizens United*, 130 S. Ct. at 913 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

<sup>229</sup> Friedman, *supra* note 1, at 39.

<sup>230</sup> “In deciding by stealth rather than explicitly, the Justices necessarily pay a price in the clarity of the message they convey.” *Id.* at 5. Friedman emphasizes the social costs of such stealth overruling, which is necessarily done to avoid public attention with the attendant uproar and loss in judicial esteem. *Id.* at 42. This will often encourage defiance and disobedience of judicial edicts. *Id.* at 50-53 (describing the widespread disregard for the *Miranda* decision).

ignoring the existing analysis of a given legal issue and presenting a new approach more to a particular judge's liking. Judges in that undesirable scenario simply talk past each other. Such muddled discourse starting with flatly contradictory analytical approaches is anathema to the ongoing legal refinement that the humble judge seeks to promote. Judges should instead prove their point on the same playing field as their intellectual opponents, or suggest why that playing field itself ought to be fundamentally altered.

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The relationship between the age of a precedent and the authority it carries is also an important consideration in any potential overruling. It would seem that long-standing precedents should be more entrenched than recently issued opinions, especially if one takes the view that judges engage in a continuous refinement of abstract legal principles. Under that conception, prior advancements in our understanding of legal ideals represent foundations upon which all current commentary and refinement should be based; undermining those basic principles of law necessitates a complete reevaluation of an entire strand of jurisprudence, a project not to be undertaken lightly.

But while the age of a prior decision may grant it some favor, it is only one factor in its weightiness; perhaps of equal importance is the sum of precedent behind that decision, building upon previous decisions over generations. Especially when that precedent has been recapitulated in a recent opinion, both the long-standing tradition and the modern take upon it must be respected as much as possible. Reconsideration and approval of a long-standing precedent gives it an even stronger claim to continued respect from current and future Justices:

“When a precedent has been repeatedly reexamined and reaffirmed, over many years by a Court whose composition has changed, that should give us greater confidence that the precedent is correct. An old precedent that has never been reexamined, but has simply slipped into the background, has less of a claim on our allegiance than one that has been critically reexamined and reaffirmed; the later precedent is more likely to reflect the kind of accumulated practical wisdom that the common law approach values.”<sup>231</sup>

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<sup>231</sup> STRAUSS, *supra* note 17, at 96.

The fact that a particular analysis within a precedent has been repeatedly reviewed and approved lends it special weight above and beyond its age.<sup>232</sup> Even more than simple longevity, the repeated reaffirmation of an analysis strongly counsels against overruling in favor of a new approach more in line with a present-day Justice's viewpoint.<sup>233</sup>

## XI. CONCLUDING REMARKS

Judges on appellate courts are faced with the challenge of offering decisions that continue to refine our understanding of society's basic commitments without so radically altering the social landscape as to engender widespread disapproval or disregard for the courts or the ideals they purport to serve. In this Article, I have argued that a just decision is one that strikes the proper balance between those often competing aims of adjudication, and in turn one that takes a humble approach heavily reliant on the analysis contained in precedent cases. Mine is not the first view to oppose the detractors of such dutiful respect for prior decisions, but it draws a uniquely strong, direct connection between precedent and justice. It therefore supplements theories grounded in the pragmatic ends served by reliance on precedent or in the independent normative virtues such reliance will typically uphold. In my view, a just decision necessarily has a humble author who respects precedent for the role it plays in the cross-generational refinement of the law and the horizontal debate amongst modern-day judges. The humble approach taken by a just decision's author also implies her desire for clear, well-reasoned opinions that take a conservative tack to modifications of prior doctrine. Justice and precedent can thus be seen as working in lockstep rather than at loggerheads, ensuring pride of place for prior cases in any theory of adjudication.

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<sup>232</sup> "New precedents, at least to the extent that they reflect a reaffirmation and evolution of the old, count for more than old precedents that have not been reconsidered." David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 892 (1996).

<sup>233</sup> The discussion in this Part suggests that the opportunities to repeatedly litigate a settled controversy, especially in constitutional jurisprudence, should be limited. One (somewhat radical) option is to limit the opportunities for a direct challenge to a precedent, either in time or number—that is, either no challenges for X years or only X challenges can ever be made to a given precedent, such as *Roe* or *Heller*. The time-frame limitation could be based on a specific number of years or tied to external events like changes to the bench or party in power. Reconsideration of precedent at clear, distinct intervals far enough apart that citizens perceive the law as intelligible and constant is highly desirable.

In the United States, the Supreme Court could practice such limitations to the exercise of its *certiorari* jurisdiction, deterring any approach nearing perpetual relitigation. Indeed, some theorists have hinted that added limitations on the sorts of cases that a high court considers would be worthwhile. See DWORKIN, *supra* note 71, at 243 (discussing Rawls).