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West Virginia Law Review

Fall, 2001

104 W. Va. L. Rev. 43

LENGTH: 44882 words**ARTICLE:** STARE DECISIS AS A CONSTITUTIONAL REQUIREMENT**NAME:** Thomas Healy ***BIO:**

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LEXISNEXIS SUMMARY:

... But are the courts required to follow this practice? Does the Constitution mandate a rule of stare decisis, or is it simply a judicial policy that can be altered or discarded when the need arises? ... Arnold, argues that stare decisis was such an established and integral feature of the common law that it was implicit in the founding generation's understanding of what it meant to exercise judicial power. ... Part I explores Judge Arnold's primary argument--that stare decisis is dictated by the founding generation's background assumptions about the authority of precedent and the nature of judicial power. ... Even if stare decisis is not dictated by the founding generation's background assumptions, did the Framers nonetheless intend for the courts to be bound by precedent as part of the separation of powers and checks and balances implicit in the Constitution's structure? The question here is not whether the founding generation thought the mere exercise of "judicial power" implied an obligation to follow precedent, but whether the Framers viewed stare decisis as a necessary check on the power of the courts. ... The basis for this conclusion is the content of the books themselves. ... Judge Arnold cites this statement as evidence that the Framers intended for stare decisis to operate as a constitutional check. ...

HIGHLIGHT: Is the rule of stare decisis a constitutional requirement, or is it merely a judicial policy that can be abandoned at the will of the courts? This question, which goes to the heart of the federal judicial power, has been largely overlooked for the past two centuries. However, a recent ruling that federal courts are constitutionally required to follow their prior decisions has given the question new significance. The ruling, issued by a panel of the United States Court of Appeals for the Eighth Circuit, argues that stare decisis was such an established and integral feature of the common law that the founding generation regarded it as an inherent and essential limit on judicial power. Therefore, when the Constitution vested the "judicial Power of the United States" in the federal courts, it necessarily limited them to a decision-making process in which precedent is presumptively binding.

This Article challenges that claim. By tracing the history of precedent in the common law, it demonstrates that stare decisis was not an established doctrine by 1789, nor was it viewed as necessary to check the potential abuse of judicial power. The Article also demonstrates that even if stare decisis is constitutionally required, the courts are not obligated to give prospective precedential effect to every one of their decisions. Stare decisis is not an end in itself, but a means to serve important values in a legal system. And those values can be equally well served by a system in which only some of today's decisions will be binding tomorrow.

TEXT:
[*44]

INTRODUCTION

When a court is faced with a legal question, one of the first points it considers is whether it has addressed a similar issue in the past. If so, the court will usually follow one of two paths: It will either adhere to the prior decision and apply it to the current dispute or distinguish the two cases and adopt a new rule. The court will rarely overrule the earlier decision, and then only if there are exceptional reasons for doing so.ⁿ¹ This practice of deciding cases by reference and adherence to the past is one of the defining characteristics of Anglo-American jurisprudence and distinguishes our system from the civil law, where judges reason from general principles, not from precedents.ⁿ² It is a practice so fixed in our legal institutions that most of us cannot envision the courts deciding cases in any other way. But are the courts required to follow this practice? Does the Constitution mandate a rule of stare decisis, or is it simply a judicial policy that can be altered or discarded when the need arises?

This question, which seems so obvious and fundamental, has largely gone unaddressed for the past 212 years. The Supreme Court has occasionally debated the workings of stare decisis, such as under what conditions a past decision [*45] can be overruled.ⁿ³ However, these debates have concerned the strength of the presumption that precedent is binding, not whether the presumption itself is a constitutional requirement.ⁿ⁴ The academic literature has been similarly silent. Although a few scholars have touched on the issue casually, no one has seriously examined whether stare decisis is dictated by the Constitution.ⁿ⁵

In the wake of a recent court decision, however, this question has become vitally important. In *Anastasoff v. United States*,ⁿ⁶ a panel of the United States Court of Appeals for the Eighth Circuit ruled that the court's practice of issuing unpublished opinions that cannot be cited as precedent violates Article III of the United States Constitution.ⁿ⁷ The decision, written by Judge Richard S.

Arnold, argues that stare decisis was such an established and integral feature of the common law that it was implicit in the founding generation's understanding of what it meant to exercise judicial power.ⁿ⁸ Therefore, Judge Arnold argues, when the Constitution vested "the judicial Power of the United States"ⁿ⁹ in the federal courts, it necessarily limited them to a decision-making process in which precedent is binding.ⁿ¹⁰ Judge Arnold does not claim that courts can never overrule past cases,ⁿ¹¹ but when they do, he asserts, they must justify their actions [*46] through reasons that are "convincingly clear."ⁿ¹² And because the Eighth Circuit's practice stripped unpublished opinions of even presumptive authority, the court had exceeded the judicial power delegated to it by Article III.ⁿ¹³

Judge Arnold's argument is quite original.ⁿ¹⁴ Although many lawyers have expressed concerns about the circuit courts' practice of issuing nonprecedential decisions,ⁿ¹⁵ no one has ever claimed that it is unconstitutional.ⁿ¹⁶ The argument also has profound theoretical and practical implications. For the past half-century, scholarship and litigation concerning Article III has focused primarily on jurisdictional issues, such as what types of disputes the judicial power extends to and what control Congress has over that question.ⁿ¹⁷ Judge Arnold's analysis shifts attention away from the issue of what the courts can hear and asserts that Article III is also relevant to the issue of how the courts must decide the cases they do hear. Although a few scholars have anticipated this move,ⁿ¹⁸ the Eighth Circuit panel is the first court to explicitly locate jurisprudential [*47] norms in Article III. And if other courts follow the panel's lead, a vast new area of federal courts litigation could open up.

The panel's conclusion could also disrupt the operation of the federal courts. Three-quarters of the opinions issued by the courts of appeals are unpublished,ⁿ¹⁹ and nearly all the circuits deny precedential effect to these opinions.ⁿ²⁰ This practice, which has been in place for roughly thirty years,ⁿ²¹ has enabled the courts to keep pace with a caseload that has increased by four-hundred percent over the same period.ⁿ²² By issuing non-precedential opinions, judges save time both in the writing process (because nonprecedential decisions are short and not intended for future reference) and in the researching process (because the body of case law is substantially reduced).ⁿ²³ If the practice was struck down nationwide, the smooth functioning of the appellate courts would be in serious jeopardy.

Moreover, because Judge Arnold's analysis is based on an interpretation of the judicial power vested by Article III, it would presumably apply to the federal district courts as well.ⁿ²⁴ Most of these courts currently have no rules governing the precedential status of their opinions, but it is generally understood that district court judges are not bound by their own decisions or those of other [*48] judges in their district.ⁿ²⁵ Thus, if the panel's opinion was taken to its logical conclusion, it would require an overhaul of district court practice.ⁿ²⁶

These potential consequences may be reason enough for other courts to reject Judge Arnold's analysis. Indeed, the Eighth Circuit itself has already stripped the opinion of legal effect.ⁿ²⁷ On en banc review, the court vacated the decision because subsequent actions of the parties had rendered the case moot.ⁿ²⁸ Judge Arnold also authored the en banc opinion

and explained that as a result of the court's action, the constitutionality of non-precedential opinions is once again an open question in the Eighth Circuit.ⁿ²⁹ He did not retreat from his analysis in the panel opinion, however, and given his adamant opposition to nonprecedential opinions, it seems likely that he would reach the same conclusion if faced with the question again.ⁿ³⁰ More importantly, his analysis has generated considerable debate in other circuits and is sure to be seized on by litigants and judges who share his views.ⁿ³¹ For these reasons, and because there is so little [*49] scholarship on point, this Article examines the merits of Judge Arnold's claim that stare decisis is constitutionally required and that the practice of issuing nonprecedential decisions violates this requirement.

Part I explores Judge Arnold's primary argument--that stare decisis is dictated by the founding generation's background assumptions about the authority of precedent and the nature of judicial power. According to Judge Arnold, the obligation to follow precedent was regarded in the late eighteenth century as "an immemorial custom, the way judging had always been carried out, part of the course of the law."ⁿ³² In addition, he claims, the "duty of the courts to follow their prior decisions was understood to derive from the nature of the judicial power itself"ⁿ³³ and was viewed as essential to curtail the discretion of the judiciary and "to separate it from a dangerous union with the legislative power."ⁿ³⁴ Judge Arnold concedes that opinions were seldom published in eighteenth-century America, but argues that this was no "impediment to the precedential authority of a judicial decision."ⁿ³⁵ "Judges and lawyers of the day," he asserts, "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum."ⁿ³⁶

Judge Arnold's reliance on the background assumptions of the founding generation is unobjectionable in itself. The Constitution is largely silent as to the "intrinsic nature and scope" of the judicial power,ⁿ³⁷ and one way to establish the limits of that power is by reference to the common law tradition.ⁿ³⁸ However, his [*50] claim about the substance of that tradition is overstated. By tracing the development of precedent from the middle ages to the early years of the Republic, Part I demonstrates that stare decisis is not an immemorial custom, but developed slowly over hundreds of years and was still unsettled even in eighteenth-century England. Moreover, the doctrine did not result from deeply held beliefs about the nature of judicial power, but emerged out of a practice of following the past for the sake of convenience and stability. Only later did judges develop a theory to justify that practice, and the theory they settled on - that past decisions were evidence of the law, but not the law itself - was rooted in a natural law perspective that is at odds with the concept of binding precedent. This theory also limited the practical significance of precedent. Because judges viewed decisions only as evidence of the law, they looked to a line of opinions for guidance rather than to a single case. Judges also felt free to ignore decisions not published in credible law reports because those decisions could not be considered reliable evidence of the law. Finally, American adherence to precedent in the seventeenth and eighteenth centuries was especially weak. Many colonial courts never recognized an obligation to follow past decisions, and in the decades after independence, state courts abandoned large numbers of English and domestic precedents. The early Supreme Court also paid little attention to case law.

This history casts considerable doubt on the claim that the founding generation viewed stare decisis as an inherent limit on the exercise of judicial power. Moreover, it demonstrates that even if courts were expected to follow precedents generally, they were not expected to give precedential effect to every one of their decisions. As Judge Arnold acknowledges, many decisions in the eighteenth century were not published. Contrary to his assertion, however, these decisions were not considered binding. A judge could rely on an unpublished decision to support his independent judgment, but he could also reject that decision as unreliable evidence of the law. In fact, the lack of reliable law reports was a major impediment to acceptance of the idea that precedent is binding. Thus, the founding generation would not have been surprised by a system in which only some decisions were given precedential effect; they were already familiar with just such a system.

In Part II, I examine a related argument that is suggested, though not stated explicitly, by Judge Arnold. Even if stare decisis is not dictated by the founding generation's background assumptions, did the Framers nonetheless intend for the courts to be bound by precedent as part of the separation of powers and checks and balances implicit in the Constitution's structure? The question [*51] here is not whether the founding generation thought the mere exercise of "judicial power" implied an obligation to follow precedent, but whether the Framers viewed stare decisis as a necessary check on the power of the courts.

Apart from an isolated statement by Hamilton, there is little evidence to support this theory and several reasons to reject it. First, the Framers expressed few concerns about the potential abuse of judicial power. Indeed, they thought the judiciary was a weak and feeble branch and worried that it would be overpowered by the other branches. Second, the Framers addressed whatever concerns they had about the courts by instituting several checks apart from stare decisis, including congressional control over jurisdiction. The Framers thought these checks were sufficient to restrain the judi-

ciary, especially in light of its limited power. Finally, stare decisis is not the kind of mechanism the Framers relied on to prevent overreaching. The Framers did not trust officials to limit their own authority, so they designed inter-branch checks that pitted the ambitions of each branch against the ambitions of the others. Stare decisis is an intrabranched check that relies on the self-restraint of the very officials it is meant to constrain. It was precisely such self-policing that the Framers regarded as inadequate to prevent abuses of power.

In Part III, I acknowledge that even if stare decisis is not dictated by the founding generation's assumptions or by the system of checks and balances, it might nonetheless be essential to the legitimacy of the courts. By following the doctrine consistently for the better part of two centuries, the courts may have created an expectation that they will continue to do so. And to the extent that their legitimacy now rides on this expectation, they may no longer be free to abandon the doctrine. Even if this is true, however, it does not necessarily follow that non-precedential decisions threaten the courts' legitimacy. Stare decisis is not an end in itself, but a means to promote certain values, such as certainty, equality, efficiency, and judicial integrity. Although a complete abandonment of stare decisis might undermine these values, the discrete practice of issuing nonprecedential opinions does not. Because a court must still follow past decisions even when it issues a nonprecedential opinion, problems arise only when the nonprecedential opinion differs in a meaningful way from the precedents upon which it is based (or when it is based on no precedents at all, as in cases of first impression). Therefore, as long as courts adopt a narrow rule for determining when nonprecedential opinions will be issued, along with mechanisms to ensure compliance with that rule, the underlying values of stare decisis will be preserved.

Before laying out these arguments in detail, I should make clear exactly what I mean when I refer to stare decisis or the doctrine of precedent, two terms I use interchangeably throughout this Article.ⁿ³⁹ I am not referring to a doctrine under which courts can never overrule past decisions. English courts have followed [*52] such an absolute form of stare decisis for roughly the past century (with some recent exceptions), but American courts have never taken such a rigid view.ⁿ⁴⁰ Instead, in this country stare decisis is generally understood to mean that precedent is presumptively binding. In other words, courts cannot depart from previous decisions simply because they disagree with them.ⁿ⁴¹ However, they can disregard precedent if they offer some special justification for doing so.ⁿ⁴²

One writer has argued that Judge Arnold did not have this formulation of stare decisis in mind when he wrote his opinion in *Anastasoff*. According to Professor Polly Price, Judge Arnold meant only that courts are required to begin their analysis with, and explain any departure from, past cases, not that they are bound by past decisions they disagree with.ⁿ⁴³ Furthermore, Professor Price argues, because the evidence shows that most eighteenth-century courts at least used past cases as a starting point even if they did not always adhere to them, Judge Arnold's historical claim is defensible.ⁿ⁴⁴

Some of Judge Arnold's language supports Professor Price's interpretation.

Near the end of the opinion, he writes that he "is not creating some rigid doctrine of eternal adherence to precedents"ⁿ⁴⁵ and that "if the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed."ⁿ⁴⁶ He also writes that when a court rejects a prior decision, it must make its reason "convincingly clear," yet does not state that a court must provide some reason other than its mere disagreement with the earlier decision.ⁿ⁴⁷ [*53]

The majority of the language in *Anastasoff*, however, undermines Professor Price's reading. Judge Arnold writes that rules of law declared by courts "must be applied in subsequent cases to similarly situated parties,"ⁿ⁴⁸ that it is the "judge's duty to follow precedent,"ⁿ⁴⁹ that "in determining the law in one case, judges bind those in subsequent cases,"ⁿ⁵⁰ and that "the Framers thought that, under the Constitution, judicial decisions would become binding precedents."ⁿ⁵¹ He also makes clear that he understands the difference between a requirement that courts begin their analysis with past decisions and a requirement that they adhere to those decisions, and that he believes Article III includes both.ⁿ⁵² For this reason, I will analyze his claim under the widely accepted definition of stare decisis articulated above.

I should also make clear that this Article does not address the important question of what circumstances justify the overruling of prior decisions.ⁿ⁵³ As already stated, the essence of stare decisis is that courts cannot disregard precedents simply because they disagree with them.ⁿ⁵⁴ For the doctrine to mean anything, decisions must be followed because they are precedent, not because they are correct. The latter is just a decision on the merits.ⁿ⁵⁵ Beyond this baseline principle, however, there is much disagreement about precisely what qualifies as special justification. Some Supreme Court justices have suggested that a decision can be overruled if it is "egregiously incorrect"ⁿ⁵⁶ or "inconsistent with the [*54] sense of justice or with the social welfare"ⁿ⁵⁷ or "insusceptible of principled application."ⁿ⁵⁸ The Court has also indicated that other factors may be relevant, such as whether a decision has proved unworkable, has previously been questioned, has induced significant reliance, or rests on outdated facts.ⁿ⁵⁹ At bottom, the answer a court gives to this problem

depends upon how much it values the competing interests of finality and accuracy. This, in turn, is dictated largely by its views about the possibility of objectively right answers.ⁿ⁶⁰ As two scholars have observed, "The less we believe in legal truth, the more we will value legal finality."ⁿ⁶¹

This Article does not attempt to resolve the problem. Instead, it considers whether the principle underlying this debate - that prior decisions cannot be overruled without special justification - is constitutionally mandated, and if so, whether the practice of issuing nonprecedential decisions violates that principle. Though largely unexplored, this inquiry is central to our understanding of the federal courts and the power they possess, and it provides important context for the debate over just how far the courts should go in adhering to precedent.

I. STARE DECISIS AND THE COMMON LAW TRADITION

The impulse to look to the past when shaping the present has always been powerful. Whether out of self-doubt, humility, or respect for prior generations, judges throughout history have often sought guidance from those who came before them. In ancient Greece, judges relied on past cases to settle commercial disputes, while early Egyptian judges prepared a rudimentary system of law reports to help guide their decisions.ⁿ⁶² Roman judges also displayed a tendency to follow the example of their predecessors, especially in procedural matters.ⁿ⁶³

A willingness to consult past decisions for their wisdom or insight, however, is far different from an obligation to follow precedent simply because it exists.ⁿ⁶⁴ And only common law judges have recognized an obligation to follow [*55] even those decisions they disagree with.ⁿ⁶⁵ Though courts in Greece, Egypt, or Rome may have consulted past decisions for guidance, they were never bound, even presumptively, by those decisions, and they did not view precedent as a restraint on their power.ⁿ⁶⁶ In fact, Justinian believed that the judicial practice of consulting past decisions threatened his power because it established the courts as the final arbiter of the law, a role he wanted for himself.ⁿ⁶⁷ "No judge or arbitrator," he declared, "is to deem himself bound by juristic opinions which he considers wrong: still less by the decisions of learned prefects or other judges. . . . Decisions should be based on laws, not on precedents."ⁿ⁶⁸

The history of stare decisis, then, begins in the common law.ⁿ⁶⁹ In this Part, I trace that history in an effort to establish the assumptions of the founding generation concerning the authority of decided cases and the nature of judicial power. The discussion unfolds in six sections. The first three sections explore the development and growth of case law in England from the middle ages to the early nineteenth century. Although this story has been told by a number of English historians, from whom the bulk of my material comes, I construct a narrative that pays special attention to the slow, organic evolution of stare decisis and the forces that propelled and hindered its progress. In the next two sections, I follow the story to America, beginning with the status of case law in the early colonies and continuing on to the Revolution and the decades immediately afterward. This territory is less well-traveled, and my account seeks to illustrate how the needs of the colonies created a distinctly American approach to precedent. The final section synthesizes the historical evidence, identifies important themes, draws conclusions, and addresses potential counter-arguments.

The history that follows is long and detailed, but with good reason. The rule that courts are bound by past decisions did not emerge all at once as a result of explicit premises about the authority of case law.ⁿ⁷⁰ It developed slowly, almost imperceptibly over several hundred years, assuming its modern form only in the late eighteenth and early nineteenth centuries.ⁿ⁷¹ Indeed, as this history [*56] makes clear, for most of its life the common law operated without a doctrine of stare decisis.ⁿ⁷²

A. Case Law in Medieval England

The earliest records of English law reveal little about the role of decided cases. Although court judgments were occasionally recorded during the Anglo-Saxon and Norman periods, they throw little light on the attitude toward judicial precedent.ⁿ⁷³ Early legal texts are also unhelpful. The first treatise on the common law, written in 1187, refers to only one case and offers no explanation of the way in which courts reached decisions.ⁿ⁷⁴ It was not until the mid-thirteenth century that a legal writer showed a discernible interest in the work of the courts.ⁿ⁷⁵ In a treatise written around 1256, a judge named Henry de Bracton attempted to explain the principles and procedures of English law.ⁿ⁷⁶ To illustrate his points, he included discussions of some five hundred cases decided by the Court of Common Pleas, the general trial court of the day.ⁿ⁷⁷ He also expressed a strong belief in the value of precedents, stating that "if any new and unusual matters arise, which have not before been seen in the realm, if like matters arise let them be decided by like since the decision is a good one for proceeding a [*57] *similibus ad similia*."ⁿ⁷⁸

Despite his regard for precedent, however, Bracton did not view past decisions as a binding source of authority. He carefully selected the cases in his treatise to reflect what he thought the law was, not simply to show what the courts had done.ⁿ⁷⁹ Indeed, most of the cases he cited were older and conflicted with more recent opinions he disliked.ⁿ⁸⁰ Bracton

conceded that these older cases were no longer followed, but he believed that his contemporaries had perverted the law and he wanted to restore the custom that had existed a generation before.ⁿ⁸¹ Thus, it is clear that Bracton did not cite cases because he thought they were authoritative sources of law, but rather because he respected the judges who had decided them and because they helped to illustrate his views.ⁿ⁸²

It is also clear that Bracton's use of cases was unique in thirteenth-century England.ⁿ⁸³ No other judge or lawyer collected court decisions for the simple reason that none of them had access to the Plea Rolls on which these judgments were recorded.ⁿ⁸⁴ Bracton was well placed, however, and he used his influence to obtain access to the only set of Plea Rolls in existence, from which he copied selected decisions.ⁿ⁸⁵ This was a difficult task. The rolls were immense and lacked any index to their contents; a lawyer interested in a given topic would have had to read straight through to locate a case on point.ⁿ⁸⁶ So even if other lawyers had been granted access to the rolls, the difficulty of sorting through them would have made any use of cases by the profession at large "manifestly impossible."ⁿ⁸⁷

Still, Bracton's treatise was a significant step in the development of *stare decisis* because he familiarized lawyers with the use of cases to support [*58] arguments about the law.ⁿ⁸⁸ It is also possible that his example inspired the creation of the Year Books, a digest of court cases that first appeared around 1283 and ran until the mid-sixteenth century.ⁿ⁸⁹ Much has been written about the Year Books and it is sometimes assumed that they mark the beginning of the English doctrine of precedent. Yet although the Year Books contributed to the influence of cases in the common law, their development and content make clear that they "were not intended to collect precedents whose authority should be binding in later cases"ⁿ⁹⁰ and were ill-suited to this purpose.

The precise origin of the Year Books is not known.ⁿ⁹¹ Some historians initially claimed that they were produced by official reporters paid by the king.ⁿ⁹² Modern scholars, however, believe the Year Books were begun by students or young lawyers who took notes of court proceedings and then distributed them to the bar.ⁿ⁹³ The basis for this conclusion is the content of the books themselves. Unlike modern law reports, which include only the opinion of the court, the Year Books included everything but the opinion. They recounted the arguments, the form of pleading, some commentary on the case, even remarks about the weather, all in the gossipy tone of a professional newspaper.ⁿ⁹⁴ However, they rarely reported the decision or the reasons behind it.ⁿ⁹⁵ "What the judgment was nobody knew and nobody cared."ⁿ⁹⁶ Such a record would have been valuable to students and young lawyers navigating the courts for the first time because the world of pleading was complex and tangled.ⁿ⁹⁷ But it would have had little value for someone who wanted to know the content of the law or the ways in which courts reached decisions. It is for this reason that students are credited with creation of the Year Books.ⁿ⁹⁸ It is for this same reason that scholars agree the Year Books were neither the result of an emerging belief in the binding force of precedent, nor were they the catalyst for such a doctrine.ⁿ⁹⁹ The Year Books [*59] "were never adduced as actual authorities in court,"ⁿ¹⁰⁰ and the absence of actual decisions made their use "as legal authority nearly impossible."ⁿ¹⁰¹

If the Year Books could not support a system of binding precedent, however, they do document the emerging role of cases in the courts. Even in the early Year Books, judges and lawyers occasionally discuss past decisions.ⁿ¹⁰² And though such discussions are relatively rare precedent is cited in roughly one of every twenty casesⁿ¹⁰³ - their presence demonstrates that reference to the past was at least considered a relevant legal argument.ⁿ¹⁰⁴ In a 1310 case, for example, Chief Justice Bereford referred to a case "in the time of the late King Edward"ⁿ¹⁰⁵ in which a woman was summoned to Parliament and then arraigned on numerous charges when she arrived. Noting that the King had refused to hear the case because the woman had not been warned of the charges, Bereford concluded with the words, "So say I here."ⁿ¹⁰⁶ In other cases, Bereford used such phrases as "I have seen a case of"ⁿ¹⁰⁷ or "Do you not remember the case of?"ⁿ¹⁰⁸

The Year Books also reveal other points about the use of precedent. Judges and lawyers who referred to past cases rarely cited them by name, relying instead on descriptions of the facts and general assertions about the year and court in which the case was decided.ⁿ¹⁰⁹ This raised problems of credibility and accuracy.ⁿ¹¹⁰ Further complicating the picture, most lawyers and judges could not produce the records of past cases and were forced to recite the facts from memory or private notes.ⁿ¹¹¹ Judges, of course, could get away with unsupported claims about past decisions, and many of them referred to cases ten, fifteen, and twenty years old without documentation.ⁿ¹¹² On the other hand, if a lawyer cited [*60] a case and could not support his account of the decision, he was likely to be called on it.ⁿ¹¹³ In one early fourteenth century case, a lawyer named Miggeley was asked where he had seen a certain practice. "Sir, in Trinity term last past, and of that I vouch the record," replied the lawyer, to which the judge shot back, "If you find it, I will give you my hat."ⁿ¹¹⁴

When written pleadings replaced oral pleadings in the mid-fifteenth century, the content of the Year Books changed slightly. Under the old system, case reports focused on tactical and procedural issues.ⁿ¹¹⁵ Now, however, attention shifted to the substantive issues in a case, and the Year Book writers began to provide fuller accounts of cases, of-

ten discussing decisions at length.ⁿ¹¹⁶ This, in turn, made the Year Books a more fertile source of case law, and judges and lawyers began to cite precedents more frequently.ⁿ¹¹⁷ Judges also became increasingly conscious of the way their decisions would shape the law. In 1469, a judge named Yelverton acknowledged the future implications of a decision by stating, "For this case has never been seen before, and therefore our present judgement will be taken for a precedent hereafter."ⁿ¹¹⁸ Yelverton's statement is the first recorded use of the term precedent, and it was echoed over the next few decades by other judges.ⁿ¹¹⁹

Despite the increasing role of precedents, however, at no point during the Year Book period did judges think they were bound, even presumptively, by prior decisions.ⁿ¹²⁰ They looked to these cases because they respected the opinions of their predecessors, because it seemed prudent to maintain consistency, and because they wanted to "save trouble."ⁿ¹²¹ But they did not think their power as judges was restrained by precedent. When faced with a prior decision they disliked, most judges simply dismissed it without reasons or ignored it altogether.ⁿ¹²² "It was not incumbent upon them to say how the cases differed, or [*61] why the decision was wrong."ⁿ¹²³ In one case, Chief Justice Bereford responded to a claim that an earlier court had followed a certain procedure by declaring, "That was a mistake. We will not do so."ⁿ¹²⁴ When urged in another case to award a type of damages that had been allowed previously, he replied, "You will never see them so long as I am here."ⁿ¹²⁵ Even in later Year Books, judges often dismissed precedents outright. One judge in 1536, when told that his decision contradicted an earlier case, said simply, "Put this case out of your books for it is certainly not law."ⁿ¹²⁶

When judges did offer reasons for disregarding precedent, they usually invoked the nebulous principles of justice or reason. For instance, Bereford responded to an argument based on precedent by stating, "Judgments are founded not on examples, but on reason."ⁿ¹²⁷ Several years later, Justice Sharshulle acknowledged a previous decision on the point before the court, but insisted that "no precedent is of such force as justice or that which is right."ⁿ¹²⁸ When a lawyer responded that judges should follow the example of prior courts "for otherwise we do not know what the law is," one of Sharshulle's colleagues declared, "Law is the Will of the Justices."ⁿ¹²⁹ He was quickly corrected by another judge, who said, "No; Law is Justice, or that which is right."ⁿ¹³⁰

The resort to justice or "that which is right" sheds light on the prevailing belief about the nature of law in medieval England. Although judges and lawyers frequently claimed that the common law was the custom that had always existed in England, they believed this custom was ultimately grounded in reason.ⁿ¹³¹ As a result, if a previous decision was consistent with the judge's view of reason, it might be considered for its instructive value. But if it conflicted with reason - in other words, if the judge disagreed with it - it could have no value. This is why judges "were not for a moment 'bound' by previous decisions of which they did not approve; justice stood above all precedent."ⁿ¹³² It also explains why, when judges later began to build a doctrine of precedent, they would need a theory to justify it. [*62]

B. The Growing Role of Precedent and the Influence of Sir Edward Coke

In the middle of the sixteenth century, the Year Books abruptly ended and were replaced by a series of law reports named after their authors.ⁿ¹³³ These reports, which continued until the nineteenth century, varied widely in quality and format; often they were compiled for the use of the author and his friends and published only upon later request.ⁿ¹³⁴ But they continued the trend of the later Year Books in providing important information: the arguments of lawyers, the pleadings, and, usually, the decisions.ⁿ¹³⁵ They also document the gradual emergence over the next two centuries of the view that precedents are not only instructive guides that help maintain consistency, but are authoritative statements of the law that should be followed in most cases.

The first step in this direction came in the late sixteenth and early seventeenth centuries when some judges began to follow precedents on procedural matters even when they disagreed with them.ⁿ¹³⁶ In *Virley v. Gunstone*, for example, a pleading in the court below had been insufficient, but the appellate court did not reverse the judgment because similar pleadings had been allowed by other courts.ⁿ¹³⁷ Further progress was brought about by the influence of Sir Edward Coke, who served as Chief Justice of the Court of Common Pleas from 1606-1613 and Chief Justice of the King's Bench from 1613-16. ⁿ¹³⁸ Coke believed strongly that example and tradition should be followed, that the common law was ancient custom dating from time immemorial, and that the best way to learn that custom was to study the decisions of earlier courts.ⁿ¹³⁹ "Our book cases" he said, in an early expression of the declaratory theory of law, "are the best proof of what the law is."ⁿ¹⁴⁰ Consequently, Coke spent years poring over the Year Books and private reports, mastering the details of hundreds of cases.ⁿ¹⁴¹ When he had finished, he was the leading expert on the decisions of English courts.ⁿ¹⁴²

Coke helped secure a central role for precedent in two ways. First, he produced a thirteen-volume treatise known as "The Reports," which was the [*63] most thorough collection of cases that had ever appeared.ⁿ¹⁴³ His primary goal in writing *The Reports* was to explain the principles of English law through cases handed down over the years.ⁿ¹⁴⁴ His

secondary objective was to improve the quality of law reports. Coke thought inaccurate and unreliable reporting had undermined the usefulness of precedents.ⁿ¹⁴⁵ Often, he complained, various reporters described the same case so differently that "the true parts of the case have been disordered and disjointed, and most commonly the right reason and rule of the Judge utterly mistaken."ⁿ¹⁴⁶ Coke hoped to remedy the situation by providing a model law report.ⁿ¹⁴⁷ His model, it turned out, was less than ideal; Coke's report of a case was often a "rambling disquisition," "an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history."ⁿ¹⁴⁸ Yet due to the force of his personality and the sheer bulk of cases he cited, his reports had a tremendous influence.ⁿ¹⁴⁹ As a result, lawyers could no longer afford to ignore precedent, and citations to past decisions multiplied.ⁿ¹⁵⁰

The second way in which Coke solidified the role of precedent was by citing Year Book cases to challenge the King's authority. During his ten years on the bench, Coke repeatedly cited ancient precedents to limit the jurisdiction of the ecclesiastical courts and the Chancery, both of which were controlled by the King.ⁿ¹⁵¹ He also relied on precedents to deny the King power to make arrests or to alter the common law and to argue that acts of Parliament "against common right and reason" were void.ⁿ¹⁵² His battle with the King intensified in the Case of Prohibitions, which involved a dispute over the jurisdiction of ecclesiastical courts.ⁿ¹⁵³ Arguing on behalf of James I, the Archbishop of Canterbury [*64] claimed that judges were merely agents of the King and that what could be done by an agent could be done by the principal.ⁿ¹⁵⁴ When Coke responded that the King had no right to hear cases, James argued that "the Law was founded upon Reason, and that he and others had Reason as well as the Judges."ⁿ¹⁵⁵ Coke replied that what was needed to decide cases was not natural reason, which anyone could possess, but an "artificial Reason and Judgment of Law, which requires long Study and Experience before that a man can attain to the cognizance of it."ⁿ¹⁵⁶ That, he claimed, the King did not have.ⁿ¹⁵⁷

Coke's invocation of "artificial reason" had two implications. It asserted a special place for precedent in the decision-making process because the long study and experience he spoke of was essentially the learning of cases. It also claimed for the judiciary the sole power to determine what the law was because judges were the only officials with the requisite knowledge of prior cases. This was a bold move. Prior to this moment, the power to decide cases had been exercised not only by the judiciary, but also by the King and Parliament.ⁿ¹⁵⁸ Now, by putting precedent at the center of the common law, Coke claimed for the judiciary exclusive competence to decide cases. This was precisely what Justinian had feared more than a thousand years earlier when he forbade judges to build the law by following each other's decisions.ⁿ¹⁵⁹ It also illustrates that Coke's commitment to precedent did not limit judicial power, but the power of the King.ⁿ¹⁶⁰

Of course, if Coke and other judges had followed precedents strictly, their power would have been diminished also. However, "with the victory of the common-law courts, the judges were unwilling to restrict their freedom so far as to bind themselves absolutely to previous decisions."ⁿ¹⁶¹ Coke often distorted precedents to suit his own purposes and claimed that inconvenience alone [*65] was reason enough to depart from past decisions.ⁿ¹⁶² He also believed that precedents were frequently emphasized at the expense of principles.ⁿ¹⁶³ In the Year Book period, he wrote, lawyers cited general principles without reference to particular cases.ⁿ¹⁶⁴ In his day, he complained, lawyers cited precedents indiscriminately. "In so long arguments with such a farrago of authorities, it cannot be but there is much refuse, which ever doth weaken or lessen the weight of the argument."ⁿ¹⁶⁵

Judges not only feared that excessive reliance on precedent would obscure principles, but also that strict adherence to past decisions would undermine one of the common law's most important features - its flexibility. Especially in the seventeenth century, as European nations adopted codes based on Roman civil law, English lawyers regarded the adaptability of the common law as its great strength.ⁿ¹⁶⁶ In an eloquent essay, a lawyer named John Davies argued that the common law was superior to civil law because its customs grew up slowly to meet the people's needs and became binding only after long use and acceptance:

For the written Laws which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition of the people or whether they will breed any inconvenience or no. But a Custome doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did hereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue of a Law.ⁿ¹⁶⁷

Davies' argument provided a strong reason for following customs that [*66] withstood the test of time: their very survival attested to their suitability for the English people. But this argument necessarily implied that until a custom became fixed by long usage, judges were not bound to follow it. To the contrary, they were obligated to test the useful-

ness of unfixed customs and to discard those that were unjust or inconvenient.ⁿ¹⁶⁸ This is why, in Davies' opinion, the common law was superior to civil law. A rule announced in the civil law became fixed at once. In the common law, however, a rule only became fixed after its wisdom was proved by long experience.ⁿ¹⁶⁹

Coke expressed a similar view. In a famous passage from Calvin's Case, he declared that the law had been "fined and refined" by "long and continual experience" and "the trial of light and truth," and that as a result "no man ought to take it on himself to be wiser than the laws."ⁿ¹⁷⁰ Although this statement urged adherence to fixed customs, it also suggested that the law was constantly changing to meet the needs of the people.ⁿ¹⁷¹ Indeed, Coke believed that judges should constantly refine the law, "declaring its principles with even greater precision and renewing it by application to the matter at hand."ⁿ¹⁷² He also believed that each decision should be "based on the experience of those before and tested by the experience of those after."ⁿ¹⁷³ Under his view, therefore, attention to precedent was vital because it facilitated the continual accretion of knowledge. But a rigid approach to precedent would halt this process and fix the law in place, with no hope of further improvement.

C. Blackstonian Conservatism v. Mansfield's Reformism

Coke died in 1633, and for the next century and a half, "the whole theory and practice of precedent was in a highly fluctuating condition."ⁿ¹⁷⁴ On the one hand, judges paid greater attention to past decisions than before and often expressed an obligation to follow decisions they disliked. In a 1706 case, Justice [*67] Powell explained that as long as precedent pointed in one direction, "he had to judge so, but had it been out of the way, he might have been of another opinion."ⁿ¹⁷⁵ Reporters also placed greater emphasis on precedents, and some began to produce reports expressly for the purpose of being cited.ⁿ¹⁷⁶ On the other hand, many judges continued to assert the right to disregard precedents they thought incorrect. In the 1673 case of *Bole v. Horton*, Chief Justice Vaughan stated that "if a Court give judgement judicially, another Court is not bound to give like judgement, unless it think that judgement first given was according to law."ⁿ¹⁷⁷ Any court could make a mistake, Vaughan explained, "else errors in judgement would not be admitted, nor a reversal of them."ⁿ¹⁷⁸

Therefore, if a judge conceives a judgement given in another Court to be erroneous, he being sworn to judge according to law, that is, in his conscience, ought not to give the like judgement, for that were to wrong every man having a like cause, because another was wronged beforeⁿ¹⁷⁹

This mixed attitude toward precedent resulted largely from two factors.

First, judges during this period still believed in natural law, which was at odds with the idea of binding precedent. As long as judges accepted the existence of universal and unchangeable principles, they could never be bound by precedents that conflicted with those principles.ⁿ¹⁸⁰ Moreover, the belief in natural law raised a troubling question: if the law was separate and apart from judicial decisions, what authority could precedents ever have? The answer agreed upon was that although decided cases were not actually the law, they were good evidence of the law because they resulted from a long tradition of common law judging. Coke had subscribed to this declaratory theory of law when he wrote that "our booke cases are the best proof of what the law is."ⁿ¹⁸¹ Matthew Hale endorsed the view in 1713, stating that although cases "do not make a law properly so-called . . . yet they have a great weight and authority in expounding, declaring and publishing [*68] what the law of this kingdom is."ⁿ¹⁸² Blackstone also put his stamp on it in 1765: "Judicial decisions," he wrote, "are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."ⁿ¹⁸³

The declaratory theory was a tidy compromise between the dictates of natural law and the growing pressure to follow precedent. Because judges regarded decisions as evidence of the law, they could justify their adherence to precedent by pointing to the weight of the authorities on a given issue. At the same time, they could evaluate past decisions as they would any other evidence.ⁿ¹⁸⁴ Thus, they frequently claimed that a decision was bad evidence of the law because it was unjust, inconvenient, or absurd.ⁿ¹⁸⁵ They also gave little weight to a single decision, or even two decisions, looking instead to "the current of authorities" or to a "strong and uniform . . . train of decisions."ⁿ¹⁸⁶

The second factor that contributed to the fluctuating state of precedent was the poor quality of reports for most of the seventeenth and eighteenth centuries. Because judges issued their decisions orally, the bar depended upon reporters for an accurate account of the court's judgment and reasoning.ⁿ¹⁸⁷ Yet the reporters were notoriously unreliable and made numerous mistakes.ⁿ¹⁸⁸ Chief Justice Holt complained in 1704 that "these scrambling reports . . . will make us to appear to posterity for a parcel of blockheads."ⁿ¹⁸⁹ Reporters also omitted many cases that seemed unimportant or wrongly decided.ⁿ¹⁹⁰ In their view, "a [*69] case was precedential and worth reporting only when it significantly inter-

preted existing law. Cases turning only on their facts or involving only slight variations of existing law were not reported."ⁿ¹⁹¹

Judges did not object to the omission of cases; to the contrary, they worried that an excess of precedents would threaten the stability of the law, and they requested even thinner reports.ⁿ¹⁹² However, the inaccuracies of the reports substantially undermined the evidentiary value of many decisions. As one writer has explained, "The first and most important problem of evidence is its credibility, and the eighteenth-century judge . . . had to decide whether the witness (i.e. the reporter, or the particular report) was both competent and credible."ⁿ¹⁹³ This explains why judges often refused to follow precedents they could not verify in a reliable report and usually looked to a line of decisions rather than to a single case.ⁿ¹⁹⁴ It also explains why a theory of binding precedent could not take hold until the quality of reporting improved significantly.ⁿ¹⁹⁵

That began to occur in the mid-eighteenth century when a lawyer named James Burrows produced his first volume of reports.ⁿ¹⁹⁶ Burrows' reports were the most useful and accurate yet to appear, and they encouraged an increased adherence to precedent.ⁿ¹⁹⁷ Though a judge could still declare in 1760 that "erroneous points of practice . . . may be altered at pleasure when found to be absurd or inconvenient,"ⁿ¹⁹⁸ most judges agreed that precedent should be followed in cases involving property or contracts, where certainty was essential. In *Morecock v. Dickins*,ⁿ¹⁹⁹ a 1768 case, Lord Camden deferred to the authority of precedent, declaring that "much property has been settled, and conveyances have [*70] proceeded upon the ground of that determination . . . and therefore I cannot take upon me to alter it."ⁿ²⁰⁰

Yet conflicting views about the force of precedent persisted and were reflected in the two most prominent judges of the day, Blackstone and Lord Mansfield.ⁿ²⁰¹ Blackstone, an avowed conservative, was a leading proponent of *stare decisis* in the second half of the eighteenth century.ⁿ²⁰² In his *Commentaries on the Laws of England*, published in 1765, he argued that adherence to precedent not only promoted certainty and stability in the law, but also flowed from the judge's duty to find the law rather than make it.

For it is an established rule to abide by former precedents where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.ⁿ²⁰³

Blackstone qualified his statement by asserting that judges were not bound by precedents that were "flatly absurd or unjust," or "evidently contrary to reason."ⁿ²⁰⁴ Such decisions, he explained, were not good evidence of the law because "what is not reason is not law."ⁿ²⁰⁵ However, he was one of the first writers to speak of the rule of precedent as one of general obligation, and he left far less room for discretion than his predecessors.ⁿ²⁰⁶

Mansfield, by contrast, was a reformer who often strayed outside the restraints [*71] of precedents.ⁿ²⁰⁷ During his thirty years as Chief Justice of the King's Bench, he rewrote large sections of the commercial law and appealed to "law's rational principles . . . even on occasion at the expense of established precedents."ⁿ²⁰⁸ "The law would be a strange science if it rested solely upon cases, and if after so large an increase of Commerce, Arts and Circumstances accruing, we must go to the time of Richard I to find a case and see what is Law," he wrote in a 1774 case.ⁿ²⁰⁹ "Precedent, though it be Evidence of law, is not Law itself, much less the whole of the Law."ⁿ²¹⁰

Mansfield "never entirely ignored precedents."ⁿ²¹¹ He occasionally followed rules he did not agree with because "the authorities are too strong," or "the cases cannot be got over."ⁿ²¹² But he did so because he believed the law should be stable, not because he thought he lacked the power to do otherwise. "Certainty," he wrote, "is one great object of all legal determinations."ⁿ²¹³ Thus, if an established rule provided certainty, Mansfield would accept it.ⁿ²¹⁴ If, however, the rule created confusion or if another rule would work better, Mansfield was quick to innovate.ⁿ²¹⁵

The conflict between "Blackstonian conservatism and Mansfield's reformism"ⁿ²¹⁶ reached its climax in *Perrin v. Blake*. The case centered on a property rule laid down by Coke (known as the Rule in *Shelley's Case*) that prevented an individual from placing certain limits on his heirs unless he used a specific formula, even if his will otherwise clearly expressed his intent.ⁿ²¹⁷ Ruling for the King's Bench, Mansfield declined to follow the rule, arguing that it defied reason to subvert the intention of a clearly written will.ⁿ²¹⁸ He and his colleagues [*72] also attacked the pedigree of the rule, describing it as a feudal anachronism that "must not be extended one jot."ⁿ²¹⁹ On appeal to the Exchequer Chamber, however, Mansfield's decision was reversed by Blackstone. Though he acknowledged that the rule was outdated, Blackstone argued that the courts were powerless to change it.ⁿ²²⁰

There is hardly an ancient rule of real property but what has in it more or less of a feudal tincture. . . . But whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy, that no court of justice in this kingdom has either the power or (I trust) the inclination to disturb them" ⁿ²²¹

The decision in *Perrin v. Blake* can be seen as a "straightforward triumph of precedents over the reforming enterprises of" Mansfield. ⁿ²²² Though Mansfield continued to press his innovations until he left the bench in 1788, in the years following his retirement the English doctrine of precedent hardened. ⁿ²²³ By the beginning of the nineteenth century, courts began to regard a line of decisions as absolutely binding, though they could still depart from a single decision, or even two decisions, for sufficient reasons. ⁿ²²⁴ Gradually that exception also disappeared and by the latter half of the nineteenth century, courts asserted an obligation to follow all prior cases, no matter how incorrect. ⁿ²²⁵ Even the House of Lords, which had never regarded its own precedents as binding, declared in 1861 that it was absolutely bound by its past decisions. ⁿ²²⁶

These changes, however, were still many years off in the late eighteenth century and they were made possible by two developments: the gradual replacement of the declaratory theory with a positivist view of law and the emergence of a reliable system of law reports. ⁿ²²⁷ Until these things occurred, "the doctrine of stare decisis was a principle of adhering to decisions, not a set of rules. It did not identify any class of case as strictly binding, irrespective of circumstance."

[*73] ⁿ²²⁸ Moreover, eighteenth-century English judges were not obligated to blindly accept precedents, but could argue for reason in the law, even at the expense of certainty and predictability. ⁿ²²⁹ "It was left to the nineteenth century finally to establish the rule that judges are absolutely bound by decisions." ⁿ²³⁰

D. Precedent in Colonial America: A New Land and New Values

If the English adherence to precedent was qualified in the seventeenth and eighteenth centuries, the American commitment was even more attenuated. The defining characteristic of law in colonial America was its mutability. Struggling to survive on a strange continent, the colonists had little use for strict, formal rules applied by an exacting judiciary. They needed a legal system that could be molded to meet the challenges of a developing society. ⁿ²³¹ As a result, from their earliest years they demonstrated a marked preference for adaptability over certainty, for latitude over restraint.

One of the first questions they faced was what law would govern. The colonists brought with them no set of rules and little knowledge of the common law. ⁿ²³² They also had few of the resources - books, law schools, trained judges - needed for the development of a case law system. So instead the colonists improvised, adopting simple codes to govern their lives. ⁿ²³³ These codes covered crimes, torts, and contracts and often departed significantly from common law rules. ⁿ²³⁴ They also left many matters to the discretion of popularly elected magistrates or appointed judges. ⁿ²³⁵ In Massachusetts, magistrates were instructed to decide all cases according to the established laws of the colonies, but when the law is silent, to decide "as near the law of God as they can." ⁿ²³⁶ In Maryland, judges were authorized to fill in the gaps of the law by resorting to "equity and good conscience 'not neglecting (so far as the judge shall be informed thereof [*74] and shall find no inconvenience in the application of this province) the rules by which right and justice useth and ought to be determined in England.'" ⁿ²³⁷

Some colonists objected to the broad discretion of judges and argued for the adoption of "a settled rule of adjudication from which the magistrates cannot swerve." ⁿ²³⁸ But two factors stood in their way. First, most settlers believed that the law of God or of nature was supreme and that statutes and precedents were binding only if consistent with this law. ⁿ²³⁹ To impose strict rules on judges was therefore pointless because they were bound to follow those rules only if they reflected divine or natural law. As one Massachusetts official told his constituents, "the covenant between you and us is that we shall judge you and your causes by the rules of God's law and our own." ⁿ²⁴⁰

Second, colonial courts were highly informal and unrefined. Due to a strong dislike for lawyers in nearly every colony, most of the judges had little or no legal training. ⁿ²⁴¹ In addition, court records were rare, and the few that existed provided little information, usually noting only the verdict, not the facts or reasoning. ⁿ²⁴² The result was that even had judges been inclined to follow strict rules and precedents, they lacked the resources and legal skills to do so. ⁿ²⁴³ Instead, they had to rely on their own judgment and "the pretense that the word of God is sufficient to rule us." ⁿ²⁴⁴

Over time, the administration of law in the colonies evolved. The number of lawyers increased, the training of the legal profession improved, and the courts began to follow more refined methods of legal reasoning. ⁿ²⁴⁵ Lawyers also [*75] began to push for the adoption of common law rules and practices. Their hope was that as a case law system developed, the courts would gain even greater influence. ⁿ²⁴⁶ Some colonies had already taken steps to embrace the com-

mon law. Maryland, which alone among the colonies did not establish a code, had declared in 1642 that it would be governed by the common law, in so far as it was applicable to the needs of the colony.ⁿ²⁴⁷ Now, at the beginning of the eighteenth century, other colonies followed suit.ⁿ²⁴⁸ And, by the time of the revolution, most had either formally or informally adopted the common law.ⁿ²⁴⁹

This "transfer" of English law to the colonies was not absolute, however. Lawyers supported the move because it made their technical expertise more valuable, whereas the public hoped to benefit from English liberties such as habeas corpus.ⁿ²⁵⁰ Both groups, however, agreed that not all common law rules and practices were suited for the colonies.ⁿ²⁵¹ Therefore, as Maryland had done in 1642, most colonies reserved the right to depart from common law rules when necessary.ⁿ²⁵² In South Carolina, for example, the common law was to be followed "except where it may be found inconsistent with the customs and laws of the province"ⁿ²⁵³ and in North Carolina, the common law governed "so far as shall be compatible with our way of living and trade."ⁿ²⁵⁴

One result of this qualified adoption of the common law was a willingness by colonial legislatures to innovate.ⁿ²⁵⁵ Another result was that some judges, [*76] left free to choose among common law principles, never acquired a devotion to precedents and analogical reasoning.ⁿ²⁵⁶ In New Hampshire, one writer observes, "no man acknowledging a regular development of the law by precedents and finding an authoritative guidance in the adjudications of the common law judges, held judicial power . . . during the entire eighteenth century."ⁿ²⁵⁷ Samuel Livermore, the colony's Chief Justice in the 1780s, "paid little attention to precedent," and when reminded once of his previous decision in a similar case declared that "every tub must stand on its own bottom."ⁿ²⁵⁸ John Dudley, an associate justice in the 1790s, took an equally dim view of precedents, describing Coke and Blackstone as "books that I never read and never will."ⁿ²⁵⁹

Other judges, although not disdaining precedent, focused on principles rather than cases. James Otis, a Massachusetts lawyer and judge, argued in a 1761 case that it is "better to observe the known Principles of Law than any one Precedent."ⁿ²⁶⁰ The Provincial Court of Maryland agreed, stating in a 1772 case that a judge should begin with general principles and apply them to the case at hand.ⁿ²⁶¹ When the Maryland court did cite a particular case, it often did so out of respect for the author, not out of an obligation to follow precedent.ⁿ²⁶² Indeed, the court seemed influenced as much by extra-judicial authority as by actual cases. In the 1772 case of *Nicholson v. Sligh*,ⁿ²⁶³ the court sought the opinions of distinguished lawyers in the community, and in the 1771 case of *Belt v. Belt*,ⁿ²⁶⁴ it disregarded the decision in a previous case and instead followed the teachings of Mansfield.ⁿ²⁶⁵

There is also some evidence that judges assumed the power to issue decisions that could not be cited in the future. In a 1764 Pennsylvania case, a clergyman [*77] had been charged with performing a marriage in which the woman already had another husband.ⁿ²⁶⁶ The clergyman moved to delay the trial so that he could obtain an affidavit from a witness, but the government opposed his request. On appeal, the Supreme Court of Pennsylvania granted the delay, pointing out that the defendant's livelihood was at stake. But the court explicitly precluded citation of the case, declaring that its opinion was "not to be a Precedent."ⁿ²⁶⁷

Some judges, of course, did stress the importance of following rules and precedents. Thomas Hutchinson, Chief Justice of Massachusetts, wrote in 1767 that "laws should be established, else Judges and Juries must go according to their Reason, that is, their Will."ⁿ²⁶⁸ Two years earlier, the Massachusetts Supreme Court declared that when a "Usage had been uninterrupted . . . the Construction of the Law is thereby established" and the court "therefore would make no Innovation."ⁿ²⁶⁹ At least one historian has read such statements as evidence that precedents were strictly followed by colonial judges.ⁿ²⁷⁰ Little additional proof is offered to support this conclusion, however, and it seems untenable in light of the examples above and the exceptional degree of discretion enjoyed by colonial courts. Moreover, any adherence to precedent would have been necessarily selective: few reliable reports of American cases were produced before the late eighteenth and early nineteenth centuries, and access to English reports was limited.ⁿ²⁷¹ And although some lawyers and judges may have cited cases from memory, there is no evidence that anyone regarded these cases as binding.ⁿ²⁷² As in England, the only cases that were viewed as authoritative [*78] were those appearing in reliable law reports.ⁿ²⁷³ Thus, the more supportable conclusion is that despite some fidelity to past cases, colonial courts did not feel bound by precedents and were more likely to search for principles in the law than for a decision on all fours with the case at hand.ⁿ²⁷⁴

E. The Post-Revolutionary Attitude Toward Precedent

The attitude of colonial courts toward precedent may be open to dispute, but there is little disagreement about the view that prevailed after the revolution. Although the majority of states adopted the common law as a rule of decision,ⁿ²⁷⁵ in the decades following the war the courts embarked on one of the most creative periods in American judicial history, shaping the law to meet the needs of the new nation and abandoning large numbers of precedents, both English and domestic. Judges during this period adopted an instrumental view of the law. They regularly considered the eco-

conomic and social consequences of legal rules and did not hesitate to alter those they saw as impractical, illogical, or unjust.ⁿ²⁷⁶ Many of their actions "would have been regarded earlier as entirely within the powers of the legislature."ⁿ²⁷⁷ Indeed, by 1820, "the process of common-law decisionmaking had taken on many of the qualities of legislation."ⁿ²⁷⁸

Early signs of this approach appeared in two 1786 cases. In *Wilford v. Grant*,ⁿ²⁷⁹ the Superior Court of Connecticut reviewed the convictions of two minors who had failed to appear at their trial because they were legally incapable of arranging for their defense.ⁿ²⁸⁰ The court concluded that the minors should have been represented by guardians and that their convictions should thus be reversed. The minors, however, had been convicted along with four adult codefendants who were not entitled to a new trial, and common law precedents [*79] prohibited a partial reversal in such cases. The question before the court, therefore, was whether to follow precedent or its own sense of justice. The court's answer was unequivocal:

The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn: The rules, however, which have not been made our own by adoption, we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice; which for the reasons above suggested, we do in this case, and reverse the judgement as to the minors only.ⁿ²⁸¹

The Pennsylvania Supreme Court also articulated a liberal view of precedent in the 1786 case of *Kerlin's Lessee v. Bull*.ⁿ²⁸² "A court is not bound to give a like judgment which had been given by a former court, unless they are of opinion that the first judgment was according to law," the court wrote, echoing Chief Justice Vaughan's statements from a century earlier.ⁿ²⁸³ "For any court may err, and if a judge conceives that a judgment given by a former court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law."ⁿ²⁸⁴

Over the next several decades, courts offered numerous reasons for departing from common law precedents. Often, they asserted that a rule established in past cases was illogical, unreasonable, or inconsistent with public policy.ⁿ²⁸⁵ In *Silva v. Low*,ⁿ²⁸⁶ for instance, the New York Supreme Court departed from an English rule it considered unjust and irrational,ⁿ²⁸⁷ and in *Starr v. Starr*,ⁿ²⁸⁸ the Connecticut Supreme Court refused to follow precedent it viewed as incompatible with state law.ⁿ²⁸⁹

The most frequent justification, however, was that common law rules [*80] were inapplicable to American circumstances.ⁿ²⁹⁰ In the 1791 case of *Downman v. Downman's Executors*,ⁿ²⁹¹ the Supreme Court of Virginia Court expressed its willingness to depart from English precedents requiring certain kinds of appeals to be filed immediately upon entry of a judgment.ⁿ²⁹² The court noted that in a large country like the United States, attorneys and their clients lived far apart and could not communicate quickly about litigation. As a result, it concluded, "justice seems to require a relaxation of" the common law rule.ⁿ²⁹³ The Supreme Court of Judicature of New York also took into account American circumstances in the 1806 case of *Jackson, ex dem. Benton v. Laughhead*.ⁿ²⁹⁴ The question was whether a mortgagor who had fallen behind on his payments was entitled to notice before being ejected. Lord Mansfield had held in a 1778 case that such a mortgagor was not entitled to notice, but the New York court ruled otherwise.ⁿ²⁹⁵ The requirement of notice, it argued, would create "no hardship on the mortgagee, while a contrary practice may be much abused, in a country where so many thousand estates are held in this way."ⁿ²⁹⁶

The *Benton* decision reflects the particular reluctance of courts to follow English decisions handed down after 1776. Most of the state provisions adopting the common law were limited expressly to English opinions issued prior to the revolution.ⁿ²⁹⁷ That qualification alone gave courts significant discretion; if an issue had not been settled by the English courts before that time, American judges had virtually legislative power to select the applicable rule.

But the courts not only disregarded post-1776 decisions; they also frequently departed from long-standing English precedents. In *Douglas v. Satterlee*,ⁿ²⁹⁸ an 1814 New York case, the plaintiff attempted to collect on a promissory note made by a man who had since died. The administrators of the man's estate responded that they would not have sufficient funds to pay off the note after settling previously submitted claims. Under an English rule followed since 1701, the administrators' response would have been taken as an admission that [*81] they did have sufficient funds because they had not yet paid off the other claims.ⁿ²⁹⁹ But Chief Justice Kent discarded the rule and found for the defendants. "If the conclusion was just, the rule would be applicable,"ⁿ³⁰⁰ Kent ruled. But because the administrators made clear that the estate's money was already accounted for, "it would be illogical and unjust," to interpret their response as an admission that they had sufficient funds to pay the note.ⁿ³⁰¹ The New York court also departed from a long-standing rule in *Palmer v. Mulligan*,ⁿ³⁰² an 1805 case in which a downstream mill owner sued an upstream mill owner for obstructing the flow of water. Under the common law, a downstream plaintiff could always recover damages for obstruction of the natural flow.ⁿ³⁰³ However, the New York court relied on a functional analysis, asking which outcome would most benefit the

public. Its answer was that under the common law rule, the public "would be deprived of the benefit which always attends competition and rivalry."ⁿ³⁰⁴ Therefore, it ruled for the defendant.ⁿ³⁰⁵

Courts also overturned a number of domestic precedents. In the 1804 case of *Duncanson v. MLure*,ⁿ³⁰⁶ the Pennsylvania Supreme Court was asked to rule upon the validity of a transaction between a British trader and an American citizen concerning the sale of a ship. In a decision five years earlier, the court had ruled that the transaction was valid.ⁿ³⁰⁷ But when the issue arose again in a related case, the court overruled the decision. "The charge delivered in the earlier case . . . was erroneous and untenable," the court said, because the transaction conflicted with the laws and policies of the United States.ⁿ³⁰⁸ The Supreme Court of Judicature of New York also overruled domestic precedent in *Cunningham v. Morrell*.ⁿ³⁰⁹ The case involved a construction contract that provided [*82] for the builder to be paid in installments as work progressed. After completing part of the work and receiving one installment, the builder demanded the entire payment. Two prior New York cases held that the builder in such a situation could receive full payment even though the work was incomplete.ⁿ³¹⁰ Chief Justice Kent, however, thought that outcome would subvert the understanding of the parties.ⁿ³¹¹ Instead of following precedent, he invoked "the good sense and justice of the case" to rule that the builder could not receive full payment until the project was finished.ⁿ³¹²

Kent's approach in *Cunningham* was typical of his attitude toward precedent. Although he believed, like Blackstone, that decided cases were "the highest evidence" of the law, he did not speak of the obligation to follow precedent as a question of judicial power.ⁿ³¹³ Instead, he considered *stare decisis* to be a functional doctrine, writing that it would "be extremely inconvenient to the public if precedents were not duly followed If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property."ⁿ³¹⁴

Kent also believed that not every case should be included in the law reports that served as the source of precedents. "The evils resulting from an indigestible heap of laws and legal authorities are great and manifest," he wrote, echoing a common concern of the day.ⁿ³¹⁵ "They destroy the certainty of the law, and promote litigation, delay, and subtily The spirit of the present age, and the cause of truth and justice, require more simplicity in the system and that the text authorities should be reduced within manageable limits."ⁿ³¹⁶

Finally, Kent made clear that judges were not bound by a previous decision if it could "be shown that the law was misunderstood or misapplied."ⁿ³¹⁷ And to dispel any doubt that judges were bound by erroneous precedents, he [*83] offered the following extensive qualification:

I wish not to be understood to press too strongly the doctrine of *stare decisis* when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of the property to be affected by a change in it.ⁿ³¹⁸

Other influential judges expressed similar views. James Wilson, the preeminent legal scholar of his day and the second most influential member at the Constitutional Convention, wrote that precedents were strong evidence of the common law because they were decided by wise judges whose opinions should be respected.ⁿ³¹⁹ Like Kent, however, Wilson did not suggest that following prior decisions was a function of judicial power. Instead, he wrote that "every prudent and cautious judge will appreciate them."ⁿ³²⁰ In addition, he warned that because the authority of the law rests on common consent, not on decided cases, judges should not follow precedents automatically.ⁿ³²¹ English precedents, especially, "must be rejected or adopted very cautiously," he wrote. "We must have in this country an American common law drawing its doctrines from American wants and needs."ⁿ³²²

Even the conservative judge Nathaniel Chipman agreed that past cases should be discarded if inapplicable to present circumstances. Many precedents, he wrote in 1792, "were made at a time, when the state of society, and of property were very different, from what they are at present."ⁿ³²³ Therefore, judges [*84] should not "entertain[] a blind veneration for ancient rules, maxims, and precedents" but should "distinguish between those, which are founded on the principles of human nature in society, which are permanent and universal, and those which are dictated by the circumstances, policy, manners, morals, and religion of the age."ⁿ³²⁴

The post-colonial attitude toward precedent can be seen most clearly through the eyes of state judges like Kent and Chipman because state courts were the main forum for litigating common law issues. The U.S. Supreme Court primarily

heard cases involving federal statutes and the Constitution.ⁿ³²⁵ Even so, several factors suggest that the early Supreme Court was equally ambivalent about the authority of decided cases.

First, when the court was established in 1789, it made no provision for the reporting of its opinions, most of which were issued orally.ⁿ³²⁶ Not until a Philadelphia lawyer named Dallas took on the task upon his own initiative in 1791 was there a system in place for circulating the opinions of the nation's highest court.ⁿ³²⁷ Even then, the opinions were not readily available. Dallas occasionally took five or six years to finish a term's decisions.ⁿ³²⁸ He also made numerous errors and omitted many cases he did not think important.ⁿ³²⁹ Dallas finally quit in 1800 when the Court moved to Washington, but his successor, a Boston lawyer named William Cranch, was not much better.ⁿ³³⁰ It was only in the 1830's, when the Court began to file written opinions, that the reports improved.ⁿ³³¹ Thus, for the first few decades of the Supreme Court's history, the substance of its decisions was unknown to large segments of the bar.ⁿ³³² Although not proof of the justices' attitude toward precedent, the lack of reliable reporters at least demonstrates that adherence to decided cases would have been difficult in the Court's early years.ⁿ³³³

Second, until 1800, when Marshall was appointed Chief Justice, the Court issued its decisions *seriatim*, meaning that each justice gave his own opinion. [*85]ⁿ³³⁴ This made it difficult for lawyers to rely on even those precedents they were familiar with, because although the decision was usually clear, the underlying reasons varied depending upon which opinion one read.ⁿ³³⁵

Third, the content of the Court's opinions showed little concern for precedent. Many early justices wrote page after page without citing authority.ⁿ³³⁶ For them, the "law had to be chiseled out of basic principle; the traditions of the past were merely evidence of principle and rebuttable."ⁿ³³⁷ Marshall, in particular, wasted little ink citing cases even when they supported his conclusion, relying instead on the force of his own arguments.ⁿ³³⁸ As one scholar has observed, Marshall had a "marked disdain for reliance on precedent"ⁿ³³⁹ so that "precedent, while not wholly foreign to his opinions, was seldom prominent there."ⁿ³⁴⁰

The Court did rely on past decisions in some cases. In *Ex Parte Bollman*,ⁿ³⁴¹ the Court faced the question of whether it had jurisdiction to issue a writ of habeas corpus. Although the Court had issued habeas writs in two previous cases, the jurisdictional question had never been raised. Nonetheless, Marshall relied in part on the earlier cases to conclude that "the question is long since [*86] decided."ⁿ³⁴² In *Ogden v. Saunders*,ⁿ³⁴³ an 1827 case dealing with the constitutionality of state bankruptcy laws, Justice Washington even followed a precedent he disagreed with:

To the decision of this Court, made in the case of *Sturges v. Crowninshield*, and to the reasoning of the learned Judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the State legislatures to pass bankruptcy laws.ⁿ³⁴⁴

Other important writers also emphasized the importance of following precedent. William Cranch, the second reporter of the Court's opinions, wrote in the preface to his reports that adherence to precedent was necessary to limit the discretion of judges.ⁿ³⁴⁵ "Every case decided," he wrote, "is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public."ⁿ³⁴⁶ Alexander Hamilton wrote in *Federalist No. 78* that in order "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."ⁿ³⁴⁷ James Madison also wrote about the role of precedent on two occasions. In a 1789 letter to Samuel Johnson, he explained that "the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."ⁿ³⁴⁸ Forty-two years later, he wrote to another friend that "judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, are regarded as of binding influence, or rather, of authoritative force in settling the meaning of a law."ⁿ³⁴⁹

These statements, however, do not outweigh the evidence presented above. Indeed, the second letter from Madison supports the proposition that the [*87] founding generation had not adopted the rule of *stare decisis*. Madison does not claim that an individual decision is binding on subsequent judges. Instead, like English judges stretching back to Coke, he writes that only when a decision is "deliberately sanctioned by reviews and repetitions" does it have "binding influence."ⁿ³⁵⁰ Although left unstated, the implication is that until a decision has been reviewed and repeated, judges are free to evaluate its merits.

This same idea was expressed in even stronger terms by Justice Johnson in the 1807 case of *Ex Parte Bollman*. Dissenting from Justice Marshall's majority opinion, Justice Johnson argued that incorrectly decided cases could never bind the Court:

Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own decisions, or those of any other tribunal. . . . Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice.ⁿ³⁵¹

The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law.ⁿ³⁵² In 1833, Justice Story maintained that adherence to precedent was a central feature of American jurisprudence.ⁿ³⁵³ "A more alarming doctrine could not be promulgated by any American court," he wrote, "than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."ⁿ³⁵⁴ State courts also began to recognize the binding effect of precedent.ⁿ³⁵⁵ "By 1851 . . . Maryland was prepared to accept a prior decision even though it was distasteful," and "by 1853 . . . Pennsylvania was in the camp of the ardent [*88] followers of stare decisis."ⁿ³⁵⁶ American courts never adopted the nineteenth century English rule that precedents are absolutely binding in all circumstances. They instead reserved the right to overrule decisions that were absurd or egregiously incorrect.ⁿ³⁵⁷ However, during the "formative period of the doctrine . . . from 1800 to 1850," they accepted that prior decisions were presumptively binding and that mere disagreement alone is not sufficient to justify departure from the past.ⁿ³⁵⁸

F. The Historical Evidence Summarized

This long and complex history demonstrates that the role of precedent has passed through many stages that are not marked by clear and definite boundaries. As a result, it is difficult to determine with precision what a given generation assumed about the authority of decided cases. Nonetheless, certain themes have emerged that cast considerable doubt on the claim that the founding generation viewed stare decisis as an inherent limit on judicial power.

First, the obligation to follow precedent is not an immemorial custom, nor was it likely regarded as one in the late eighteenth century. For hundreds of years, precedent played only a minor role in the decision-making process of English courts. Although judges sometimes looked to prior decisions for guidance, they did not feel bound to follow those decisions or even to explain their departure from them. It was not until the latter half of the eighteenth century that judges recognized a general obligation to follow decisions they disagreed with, and even then they were divided on the matter. As late as 1760, an English judge could state that "erroneous points of practice . . . may be altered at pleasure when found to be absurd or inconvenient,"ⁿ³⁵⁹ and Mansfield rewrote entire areas of established doctrine, asserting that the law is founded not in cases, but "in equity, reason, and good sense."ⁿ³⁶⁰ In America, many colonial courts never recognized an obligation to follow precedent. And during the decades after independence, state courts discarded English and American precedents wholesale, while the Supreme Court paid little attention to decided cases, choosing instead to reason from principle. The founding generation may not have been familiar with the entire history of precedent, but it was familiar with the work of eighteenth century courts. And it would have been difficult to assume from that evidence that stare decisis was an established doctrine, let alone immemorial.

Second, the practice of adhering to prior decisions did not emerge from [*89] explicit theories about the nature of judicial power. Judges began to follow precedent for the sake of convenience and stability, not because they felt powerless to do otherwise. Even in the late eighteenth century, adherence to precedent was justified chiefly in instrumental terms. Although Blackstone argued that the obligation to follow precedent flowed from the judge's duty to find law rather than make it, judges such as Mansfield, Camden, and Kent viewed the practice primarily as a way to promote certainty, and Wilson spoke of it in terms of prudence and caution.ⁿ³⁶¹ Therefore, even if the founding generation assumed that courts would adhere to precedent, it did not necessarily regard that adherence as a question of judicial power. Like many judges of the time, the founding generation could have assumed that courts were empowered to ignore precedent, but that they chose not to for instrumental reasons. Indeed, given the frequent departure from precedent in late eighteenth-century America, this is the more plausible conclusion.

Third, the history of stare decisis "is intimately bound up with the history of law reporting."ⁿ³⁶² Until judges had a reliable record of prior cases, they were not willing to bind themselves to decisions with which they disagreed. Mansfield, for one, often "'blamed the reporter' when he did not like an inconvenient decision."ⁿ³⁶³ English reports significantly improved in the mideighteenth century, and consequently judges displayed increased adherence to precedent. But thorough and accurate law reports were virtually nonexistent in colonial America. Not until the very end of the eighteenth century and the beginning of the nineteenth century did reliable reports begin to appear, and then only in the older states.ⁿ³⁶⁴ This explains why the American commitment to precedent strengthened in the first half of the nineteenth century, and it suggests that stare decisis was not an established doctrine in this country by 1789.ⁿ³⁶⁵

Of course, this conclusion is not indisputable. There is some evidence that American lawyers prior to and shortly after the framing of the Constitution recognized an obligation to follow precedents they disagreed with. William Cranch believed that courts could not depart from past cases without "strong reasons"ⁿ³⁶⁶ and Alexander Hamilton thought it was "indispensable that they should be bound down by strict rules and precedents."ⁿ³⁶⁷ In addition, although post-revolutionary courts showed little deference to precedents, many of the [*90] cases they refused to follow were handed down by English courts after the Declaration of Independence. Many others were older English decisions that were inapplicable to American circumstances. One could argue that these two categories of cases were no more entitled to deference than the decisions of French or Italian courts and that American departure from them is therefore beside the point.ⁿ³⁶⁸ As long as American courts did not readily overrule domestic precedents, it might be possible to reconcile their approach to precedent with modern views of stare decisis.

However, American courts did freely overrule domestic precedentsⁿ³⁶⁹ and the leading judges of the day fully encouraged this practice. As late as 1826, Kent wrote that "hasty and crude decisions" should "be examined without fear, and revised without reluctance," rather than have the "beauty and harmony of the system destroyed by the perpetuity of error."ⁿ³⁷⁰ He also acknowledged that the "revision of a decision very often resolves itself into a mere question of expediency."ⁿ³⁷¹ These are not the statements of a judge who considered courts bound by decisions with which they disagreed. And taken together with similar statements by other judges and the Supreme Court's lack of attention to precedent, they make it difficult to conclude that the founding generation had adopted the principle of stare decisis.

Even if it had, however, the historical evidence strongly indicates that courts were not expected to give precedential effect to every decision they issued. Under the declaratory theory, which was embraced throughout the eighteenth century, courts paid little attention to individual cases and looked instead to the "current of authorities" or a "strong and uniform train of decisions."ⁿ³⁷² As a result, a single decision had little importance and could only exert precedential force when combined with other similar decisions. This differs substantially from modern practice, in which even one decision is viewed as authoritative, and it suggests that the founding generation would not have been troubled by the omission of individual decisions from the body of case law.

In fact, many decisions were omitted during the eighteenth century. Reporters had complete control over which decisions to report and often discarded those they disagreed with or thought unimportant. And because judges only recognized an obligation to follow decisions that appeared in reliable reports, omitted cases were essentially lost forever. Judges did not object to this situation, however, as one would expect if they viewed themselves bound by every decision [*91] they issued. Instead, they encouraged reporters to ignore decisions that turned only on the facts or involved only slight variations of existing law.ⁿ³⁷³ Coke "warned the judges, when there were not more than thirty books on the common law, against reporting all cases"ⁿ³⁷⁴ and Kent believed that "an indigestible heap of laws and legal authorities" would "destroy the certainty of the law, and promote litigation, delay, and subtilty."ⁿ³⁷⁵ Given this evidence, it seems doubtful that the practice of issuing non-precedential opinions conflicts with the background assumptions of the founding generation. In 1789, such decisions were already an accepted fact.

There is one final point I should make. One defender of Anastasoff argues that although critics might "quibble" with the historical record presented by Judge Arnold, his claim fares well under a preponderance of the evidence standard.ⁿ³⁷⁶ I hope I have shown that one might do more than quibble with Judge Arnold's historical record and that his claim does not survive even a preponderance of the evidence test. I would also argue that judges and scholars should be required to meet a higher burden than this when making novel assertions about the content of constitutional terms on the basis of original understanding. Especially when an established and valuable practice is being questioned, we should demand greater certainty that the proposed interpretation reflects the meaning of the Constitution as the founding generation understood it.

II. STARE DECISIS AS A STRUCTURAL CHECK

The historical evidence examined in Part I significantly undermines the claim that stare decisis is constitutionally required and that the practice of issuing non-precedential decisions violates that requirement. But even if stare decisis is not dictated by the founding generation's assumptions about the nature of judicial power, one might argue that the Framers nonetheless intended for the courts to be bound by precedent as part of the separation of powers and checks and balances implicit in the Constitution's structure. Though the Framers generally modeled the courts after the common law, they were not opposed to innovation.ⁿ³⁷⁷ The complete segregation of the courts from the legislature was itself a departure from an English tradition in which the House of Lords both wrote the laws and served as the supreme appellate court.ⁿ³⁷⁸ The Framers also declined [*92] to follow the English division between law and equity, choosing instead to extend the jurisdiction of federal courts to both areas.ⁿ³⁷⁹ It is possible, then, that regardless of how precedent was

viewed by English and colonial courts, the Framers might have intended for the courts of the United States to follow a different practice. In fact, one might argue that it was precisely because of other deviations from the common law that strict adherence to precedent would have been regarded as necessary. Federal courts were given far greater power and independence than English courts. Not only do they have the power of judicial review, but their decisions cannot be reversed by the legislature.ⁿ³⁸⁰ In light of these enlargements of the judicial power, it is certainly reasonable to ask whether the Framers contemplated a new mechanism to check that power.

One response to the question is that if the Framers did intend for the doctrine of precedent to limit judicial power, that intention was not reflected in the work of the early Supreme Court. As demonstrated above, the Supreme Court paid little attention to the force of precedent in its first several decades. The Court made no arrangement for its decisions to be reported, an undertaking that was essential to the practice of *stare decisis*, especially in an era when opinions were issued orally and *seriatim*; without reports, even the justices would have had trouble keeping track of past decisions and the reasoning behind them.ⁿ³⁸¹ When a lawyer did begin reporting the Court's decisions upon his own initiative, the Court showed little concern for the way in which his inaccuracies and omissions undermined the usefulness of his reports.ⁿ³⁸² Finally, even when they were aware of prior cases, the justices spent little time discussing them. Marshall put more stock in his own arguments than in past cases, and he and other justices often displayed an indifferent attitude toward precedent.ⁿ³⁸³

This pattern of conduct is strong evidence that the Framers did not intend for *stare decisis* to operate as a check on judicial power. Five of the first ten justices appointed to the Court had attended the Constitutional Convention and one of them, James Wilson, played a major role in writing Article III.ⁿ³⁸⁴ Most other early justices had participated in the ratification debates, either writing [*93] essays or attending the ratifying conventions of their respective states.ⁿ³⁸⁵ If the doctrine of precedent was intended to function as a constitutional check, these justices would have known. Yet their early attitude toward decided cases does not reveal any awareness of a constitutional obligation to follow precedent.

Of course, relying on the attitude of the early Supreme Court to determine the Framers' intent is potentially hazardous. The Court had (and still has) a deep self-interest in the extent of its power and likely would have been reluctant to explain how that power was limited. In addition, despite its early inattention to precedent, by the mid-nineteenth century the Court had adopted a more rigorous approach to decided cases that is arguably consistent with the claim that *stare decisis* is constitutionally required.ⁿ³⁸⁶ It is unclear why the later Supreme Court would have been more attuned to the Framers' intentions or more willing to assert the limits of its own power. But the danger of relying exclusively on early Supreme Court practice is sufficient to justify a more thorough response to the claim that the Framers intended *stare decisis* to serve as a check on judicial power.

In this Part, I offer three additional arguments to rebut this claim. First, the Framers expressed few concerns about the potential abuse of judicial power. They viewed the judiciary as the least dangerous branch of government and felt little need to impose extensive checks on its power. To the contrary, they worried that the courts would be overwhelmed by the other branches. Second, the Framers addressed whatever concerns they had about the potential abuse of judicial power by instituting several checks apart from *stare decisis*, most notably congressional control over jurisdiction. The Framers thought these checks were sufficient to restrain the judiciary, especially in light of its limited power. Finally, *stare decisis* is not the sort of mechanism the Framers relied on to prevent overreaching. Because the Framers did not trust government officials to control their own appetite for power, they utilized inter-branch checks that pitted the ambition of each branch against the ambitions of the others. *Stare decisis* is an intra-branch check that depends upon the self-restraint of the very branch it is meant to constrain. It was precisely such self-policing that the Framers rejected as inadequate to prevent abuses of power.

A. The Least Dangerous Branch

One of the glaring defects of the Articles of Confederation was its lack of a national judiciary.ⁿ³⁸⁷ The Articles authorized Congress to appoint tribunals with limited jurisdiction over admiralty cases and interstate disputes, but these [*94] courts served an advisory role and had little power.ⁿ³⁸⁸ There was no central court to ensure the supremacy and uniformity of national laws.ⁿ³⁸⁹ Only state courts had jurisdiction to interpret those laws, and they were notoriously biased toward state interests.ⁿ³⁹⁰

The Framers recognized this problem. Hamilton argued in Federalist No. 22 that "the circumstance that crowns the defects of the confederation . . . is the want of a judiciary power. . . . Laws are a dead letter without courts to expound and define their true meaning and operation."ⁿ³⁹¹ Madison expressed related complaints in a letter to Thomas Jefferson, arguing that the lack of restraints on state governments was a "serious evil."ⁿ³⁹² To address these concerns, the Constitution vested the judicial power of the United States in "one supreme Court, and in such inferior courts as the Congress

may from time to time ordain and establish."ⁿ³⁹³ It then extended that power to a broad range of matters, including all cases arising under federal law, treaties, and the Constitution.ⁿ³⁹⁴

The Framers also thought it was vital to ensure the strength and independence of the federal judiciary. Indeed, the delegates to the Constitutional Convention exhibited more agreement on this point "than on all other aspects of the judiciary article."ⁿ³⁹⁵ They believed that the judiciary was in danger of being "overpowered, awed, or influenced by its coordinate branches"ⁿ³⁹⁶ and that the only way to prevent this was by insulating it from political pressure.ⁿ³⁹⁷ Therefore, they provided that federal judges "shall hold their Offices during good behavior,"ⁿ³⁹⁸ a phrase modeled on an English statute that effectively guaranteed life tenure.ⁿ³⁹⁹ They also provided that the salary of federal judges could not be [*95] diminished during their time in office.ⁿ⁴⁰⁰

The Framers expressed little concern that judges would abuse this independence. Writing in Federalist No. 78, Hamilton maintained that the judicial branch was the "least dangerous to the political rights of the Constitution"ⁿ⁴⁰¹ and "beyond comparison the weakest of the three departments of power."ⁿ⁴⁰² The executive branch "dispenses the honors" and holds the "sword of the community,"ⁿ⁴⁰³ he stated, while the legislative branch controls the purse and makes "the rules by which the duties and rights of every citizen are to be regulated."ⁿ⁴⁰⁴ The judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment"ⁿ⁴⁰⁵

The Framers also thought that because the judiciary had been largely insulated from politics, it would be the least susceptible to partisan passions. Madison claimed that judges, due to the method of their appointment and their life tenure, "are too far removed from the people to share much in their prepossessions."ⁿ⁴⁰⁶ According to Hamilton, the judiciary's independence would be "the citadel of the public justice and the public security."ⁿ⁴⁰⁷

The Framers did acknowledge the potential danger of a combination of judicial and legislative power.ⁿ⁴⁰⁸ However, this was because they worried that the legislature would usurp the power of the courts, not the other way around. In Federalist No. 48, Madison warned that legislative power must be checked because that "department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."ⁿ⁴⁰⁹ To illustrate his point, he noted that in Virginia, an unchecked legislature had "in many instances, decided rights which should have been left to judiciary controversy"ⁿ⁴¹⁰ and in Pennsylvania [*96] "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination."ⁿ⁴¹¹

The Anti-Federalists, it is true, raised numerous concerns about the independence of the judiciary. They argued against life tenure and urged that the legislature be given power to overrule judicial decisions.ⁿ⁴¹² According to Brutus, the Constitution would make

judges independent in the full sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.ⁿ⁴¹³

The Anti-Federalist fear, however, related primarily to concerns of federalism, not separation of powers. In his main essay on the judiciary, Brutus complained that the federal courts would use their discretion not to limit Congressional power, but to expand that power at the expense of the states.ⁿ⁴¹⁴ In cases pitting the federal government against the states, he claimed, judges would favor the former in the hopes of increasing their influence and salaries.ⁿ⁴¹⁵ In the process, he argued, they would silently and imperceptibly subvert the legislative, executive, and judicial powers of the states.ⁿ⁴¹⁶

In addition, some Anti-Federalist rhetoric indicates that they thought adherence to precedent would exacerbate this problem rather than remedy it. In connection with his earlier complaint, Brutus predicted that the courts would seize upon expansive precedents, first to enlarge their own power and then to enlarge the power of the national legislature.ⁿ⁴¹⁷ Brutus did not suggest that the courts would be bound by these precedents, only that they would use them to justify their actions.ⁿ⁴¹⁸ Another opponent of the Constitution argued that strict judicial rules could ultimately result in judicial tyranny.ⁿ⁴¹⁹ Over time, he argued, [*97] "the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution, and by laws, from time to time."ⁿ⁴²⁰ This echoed the refrain of English judges who feared that strict adherence to precedent would lead to inflexible and unreasonable rules,ⁿ⁴²¹ and it suggests that at least some AntiFederalists would have opposed a constitutional requirement of stare decisis.

B. "All the Usual and Most Effectual Precautions"

Despite the general lack of concern that the judiciary would overreach its authority - especially vis a vis the other branches of the federal government - the Framers did not leave the judiciary entirely unchecked. The Constitution includes a number of mechanisms, both direct and indirect, that the Framers thought were sufficient to prevent any abuses of power.

First, the political branches were given control over the appointment and removal process. Judges must be nominated by the president and confirmed by a majority of the Senate, a double hurdle that ensures they enjoy widespread support and confidence.ⁿ⁴²² The Senate's involvement in this process was especially important to the Framers because it allowed the states to block the appointment of judges hostile to state interests.ⁿ⁴²³ History has proven the potency of this check. Of the 148 nominations to the Supreme Court, twenty-nine have been rejected and many others have been influenced by the threat of rejection.ⁿ⁴²⁴ Still, because the Framers recognized that judges might become overzealous once in office, they also gave Congress the power to impeach judges for "Treason, Bribery or other high Crimes and Misdemeanors."ⁿ⁴²⁵ This power has rarely been used,ⁿ⁴²⁶ and some Anti-Federalists complained that it provided little security [*98] because the process of impeachment and conviction would be too difficult.ⁿ⁴²⁷ But the Framers put great faith in this measure. Hamilton claimed that the power to impeach judges "is alone a complete security" against the threat of judicial overreaching.ⁿ⁴²⁸ "There never can be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with [the power of impeachment]" ⁿ⁴²⁹ That few judges have actually been impeached does not necessarily undermine his claim; it could demonstrate that the threat of impeachment has effectively deterred judicial excess.

The second way the Framers restrained the judiciary was by withholding the power to enforce its own judgments. Although this is a negative, not a positive, restraint, it operates in much the same way. In order for the judiciary to effectuate its decisions, it must win the cooperation of the executive branch, in the same way that Congress must solicit the aid of the president to enforce the laws it makes.ⁿ⁴³⁰ As Hamilton wrote in Federalist No. 78, the judiciary is so weak it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."ⁿ⁴³¹

Finally, the Framers gave Congress control over the establishment of lower federal courts and the jurisdiction of both those courts and the Supreme Court.ⁿ⁴³² Although Article III invites the creation of lower federal courts,ⁿ⁴³³ Congress ultimately has discretion over the size and shape of the federal judiciary.ⁿ⁴³⁴ In addition, although the Supreme Court's original jurisdiction is Constitutionally guaranteed, its appellate jurisdiction is subject to the exceptions and regulations made by Congress.ⁿ⁴³⁵ Congress also has latitude over the jurisdiction of the lower federal courts it chooses to create.ⁿ⁴³⁶ The extent of that latitude has [*99] been hotly debated.ⁿ⁴³⁷ Some scholars have argued that Congress may not entirely eliminate the jurisdiction of federal courts over special categories of cases, such as those involving federal questions, admiralty, and ambassadors.ⁿ⁴³⁸ In a recent article, Professors Liebman and Ryan offer a convincing rebuttal to this view, arguing that although Article III includes a presumption that federal courts will have appellate jurisdiction in these cases, the choice is up to Congress.ⁿ⁴³⁹ Under either scenario, however, Congress exercises significant control over the makeup and influence of the federal judiciary.

The Framers thought these limits on the courts were sufficient and rejected proposals for additional checks, including congressional review of judicial decisions. In Federalist No. 81, Hamilton argued that congressional oversight was unnecessary because "the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom."ⁿ⁴⁴⁰ Although the courts may sometimes misconstrue the will of Congress, Hamilton argued, these instances "can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system."ⁿ⁴⁴¹

Madison also thought the power of the judiciary had been sufficiently circumscribed. Responding to Anti-Federalist fears that the courts would favor the federal government in cases against the states, he wrote, "The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."ⁿ⁴⁴² What were those precautions? Madison elaborated in an 1823 letter to Thomas Jefferson concerning Supreme Court review of state court decisions. "The impartiality of the judiciary," he argued, was guaranteed by "the concurrence of the Senate, chosen by the State Legislatures, in appointing the Judges, and the oaths and official tenures of these, with the surveillance of public opinion."ⁿ⁴⁴³ Thus, Madison thought the discretion of the courts would be kept in check even without a constitutional requirement of stare decisis.

The only indication that the Framers thought stare decisis was necessary [*100] to restrain the courts is a statement by Hamilton in Federalist No. 78. Responding to complaints that life tenure would give judges too much power, Hamilton first argued that tenure would provide judges with the independence they needed to resist political pressure.ⁿ⁴⁴⁴ He then offered a secondary justification:

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.ⁿ⁴⁴⁵

Judge Arnold cites this statement as evidence that the Framers intended for stare decisis to operate as a constitutional check.ⁿ⁴⁴⁶ Yet although Hamilton's statement provides some support for this view, there are several reasons why it might be discounted. First, as several scholars have pointed out, Hamilton's "side-bar on precedent" was "hardly conceived as a comprehensive exposition of the doctrine of stare decisis."ⁿ⁴⁴⁷ He was responding to criticisms of life tenure, and he mentioned the role of precedent only to illustrate that judges would need many years to become familiar with the materials of their craft.ⁿ⁴⁴⁸ Had he wished to announce the Framers' intention that stare decisis would serve as a constitutional check, it seems likely he would have chosen a more direct way to make the point.

Second, Hamilton's statement is inconsistent with other arguments he made in Federalist No. 78 concerning the power of judicial review. Responding to claims that this power would elevate the courts above the legislature and lead to judicial supremacy, Hamilton argued that judicial review would instead lead to constitutional supremacy: "Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."ⁿ⁴⁴⁹ This argument was necessary to allay anti-federalist fears about judicial review, but it is arguably undermined by his statements about binding precedent. For "a strict regime of precedent suggests that constitutional meaning is a product of the interpretative [*101] power of the courts," a suggestion that would have deepened, not lessened, the fears of judicial supremacy.ⁿ⁴⁵⁰ Consequently, one scholar has argued that Hamilton's "statement about precedent should be treated as a mistake."ⁿ⁴⁵¹

Finally, Hamilton made no attempt to connect his discussion of precedent with either the text or the structure of the Constitution. He simply declared that because judges would be bound down by strict rules and precedents, they would need life tenure. This suggests that he was not announcing a constitutional requirement, but was only expressing his own expectations. In other words, "Hamilton is not explaining what the Constitution means about the judicial power, but describing what he expects judges will do - study and consider precedents"ⁿ⁴⁵² This expectation might be relevant to the background assumptions of the founding generation (although it is outweighed by the bulk of the evidence examined in Part I), but it does not establish that the Framers intended for stare decisis to operate as a constitutional check on judicial power.ⁿ⁴⁵³

C. The Wrong Kind of Check

Not only does the evidence fail to establish a clear intent by the Framers to impose a constitutional requirement of stare decisis, but such a requirement cannot be inferred from the system of checks and balances they designed because stare decisis is not the type of mechanism the Framers relied on to prevent overreaching. Stare decisis is an internal check that depends for its effectiveness on the self-restraint of the very officials it is intended to check. Yet the Framers explicitly declined to rely on such self-policing and instead created a system in which each branch was given the means and the motive to frustrate the excesses of the other branches.

The workings of this system were spelled out by Madison in a series of Federalist Papers discussing the structural benefits of the Constitution. He began by responding to complaints that the Constitution did not conform to the principle of separation of powers because the duties of the three branches often overlapped.ⁿ⁴⁵⁴ These complaints, Madison argued, were based on a misunderstanding of Montesquieu's statement that liberty cannot exist where the legislative, [*102] executive, and judicial powers are not separated.ⁿ⁴⁵⁵ By this statement, he claimed, Montesquieu "did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other."ⁿ⁴⁵⁶ He meant only "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."ⁿ⁴⁵⁷

Madison then considered ways to ensure that no single branch would usurp the whole power of another branch. One possibility was to "mark, with precision, the boundaries of these departments in the constitution of the government, and to trust these parchment barriers against the encroaching spirit of power."ⁿ⁴⁵⁸ Most state constitutions relied on this approach, Madison noted. "But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government."ⁿ⁴⁵⁹ In particular, he maintained, the judiciary and the executive needed protection from the legislature, "which is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."ⁿ⁴⁶⁰

Another possibility was to provide that whenever two of the three branches were dissatisfied with the third, they could call a convention for altering, or correcting breaches of, the Constitution.ⁿ⁴⁶¹ This suggestion had been made by Thomas Jefferson in his Notes on the State of Virginia, and Madison agreed that it had some merit.ⁿ⁴⁶² Because no branch had "an exclusive or superior right of settling the boundaries" of power, he argued, it made sense that disputes should be resolved by the "people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance."ⁿ⁴⁶³ Madison, however, ultimately rejected this solution. He argued that frequent appeals to the people would shake their faith in the Constitution.ⁿ⁴⁶⁴ He also maintained that such appeals would be futile. Most conventions, he believed, would be called by the executive and the judiciary to restrain the legislature. But because legislators would outnumber judges and the president and have more influence with the people, they would win most public battles over [*103] the distribution of power.ⁿ⁴⁶⁵

Having rejected the "mere demarcation on parchment of the constitutional limits of the several departments,"ⁿ⁴⁶⁶ as well as recurring conventions to clarify those limits, Madison turned to the only approach he thought likely to prevent the concentration of power. The interior structure of government, he argued, must be arranged so "that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."ⁿ⁴⁶⁷ How could this be done? Not by relying on the self-restraint of each branch. For "if men were angels, no government would be necessary," and "if angels were to govern men, neither external nor internal controls on government would be necessary."ⁿ⁴⁶⁸ Instead, Madison argued, the Constitution must rely on the ambitions of each department to check the ambitions of the others.ⁿ⁴⁶⁹ It must ensure that each branch, by pursuing its own desire for power, would thereby frustrate the efforts of the other two branches to augment their power.

The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.ⁿ⁴⁷⁰

Madison's theory is reflected in numerous aspects of the Constitution.

Congress is given broad authority to lay taxes, regulate foreign and interstate commerce, and make laws concerning a variety of subjects,ⁿ⁴⁷¹ but these powers are checked by the president's right to veto legislationⁿ⁴⁷² and his obligation to [*104] "take Care that the Laws be faithfully executed."ⁿ⁴⁷³ The president, in turn, is given the power to make treaties and appoint ambassadors, judges, and officers, but these powers are checked by the requirement that he obtain the advice and consent of two-thirds of the Senate.ⁿ⁴⁷⁴ In addition, although the president has the power to veto bills, the full Congress can override his veto with a two-thirds vote.ⁿ⁴⁷⁵ The two houses of Congress can also join forces to impeach and convict the president for treason, bribery or other high crimes and misdemeanors.ⁿ⁴⁷⁶ And should the president and Congress conspire to violate the Constitution, the courts can exercise the power of judicial review to strike such actions down.ⁿ⁴⁷⁷

The structural checks on the judiciary also conform to this approach. The president and Senate have initial control over the appointment of judges and can use that authority to appoint individuals with a reputation for self-restraint.ⁿ⁴⁷⁸ Once in office, judges have the power to hear and resolve cases and controversies over which they have jurisdiction. But if they overstep their authority, the executive and legislative branches have "the necessary constitutional means and personal motives" to reign them in.ⁿ⁴⁷⁹ The president can refuse or delay enforcement of judicial orders,ⁿ⁴⁸⁰ and Congress can impeach renegade judgesⁿ⁴⁸¹ or exercise its control over the size and jurisdiction of the judiciary.ⁿ⁴⁸² Thus, any effort by the judiciary to aggrandize its power will be met by "opposite and rival interests," and "the private interest of every individual may be a sentinel over the public rights."ⁿ⁴⁸³

Stare decisis does not operate like these inter-branch checks. It is not [*105] something the other branches do to prevent the judiciary from overreaching, but is instead an intra-branch doctrine of self-restraint. As a result, it is no more effective as a check on judicial overreaching than is a "mere demarcation" of the boundaries of judicial power.ⁿ⁴⁸⁴ And the Framers expressly declined to rely on such "parchment barriers against the encroaching spirit of power."ⁿ⁴⁸⁵

One might argue that stare decisis is an effective check on judicial power because a failure to adhere to precedent could lead the other branches to exercise their leverage over the courts. This is certainly possible. If Congress regards adherence to precedent as critical to judicial decision-making, it can penalize an inattention to precedent by restricting the courts' jurisdiction. Under this scenario, however, stare decisis does not function as a check on judicial power. The check is congressional control over jurisdiction. Stare decisis is simply a policy by which the courts can forestall the imposition of that check.ⁿ⁴⁸⁶ To offer an analogy, the Senate would likely reject the president's cabinet nominees if they

were unqualified. But this does not mean that the president's internal obligation to choose qualified cabinet members functions as a check on his power. The check is the Senate's power to reject the president's nominees. The policy of choosing qualified nominees is simply a way for the president to avoid the imposition of that check.

Of course, the mere fact that stare decisis is not the kind of check the Framers relied on does not mean they would have rejected it outright. As Madison stated in his letter to Jefferson, he thought the judges' oath to uphold the Constitution would contribute to their impartiality.ⁿ⁴⁸⁷ The oath, like stare decisis, is not something the other branches do to the courts, but is instead a selfpolicing mechanism. And it would be absurd to suggest that the oath is only binding to the extent that the other branches punish judges for violating it. But, the oath, unlike stare decisis, is explicitly required by the text of the Constitution.ⁿ⁴⁸⁸ And though Madison argued that such "parchment barriers" were inadequate [*106] to prevent overreaching, the Framers nonetheless expressed a clear intent that the oath be honored. Stare decisis is not mentioned in the text, and there is little direct or indirect evidence that the Framers intended for it to serve as a check. Thus, in order to assert that it is constitutionally required, we must establish not only that it does not conflict with other checking mechanisms; numerous provisions that were never considered by the Framers could meet this test. Instead, we must establish that the Framers regarded stare decisis as necessary to the system of checks and balances. Yet as Madison's discussion makes clear, the Framers could not have regarded stare decisis as necessary to that system because it was precisely the kind of check they viewed as inadequate to guard against "the encroaching spirit of power."ⁿ⁴⁸⁹

III. NON-PRECEDENTIAL DECISIONS AND THE VALUES OF STARE DECISIS

To conclude that stare decisis is not dictated by the background assumptions of the founding generation or by the Framers' intent does not resolve the matter entirely. Regardless of what the Constitution required in 1789, it is possible that our expectations about the exercise of judicial power have changed sufficiently over time so that what was once simply a prudential concern has now assumed constitutional significance. The conduct of the courts alone may have altered the equation. By consistently following stare decisis for nearly a century and a half, the courts may have staked their legitimacy upon adherence to precedent. If so, could they really abandon the practice now? The Constitution may or may not require a specific procedure for deciding cases, but surely it requires a legitimate judiciary.ⁿ⁴⁹⁰ And if stare decisis has become indispensable to judicial legitimacy, then for all intents and purposes it has become a constitutional requirement as well.

The question remains, of course, whether stare decisis is in fact essential to judicial legitimacy. Some scholars and judges clearly believe that it is. More than a half-century ago, Justice Roberts wrote that "respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."ⁿ⁴⁹¹ More recently, the plurality in *Planned Parenthood v. Casey* wrote that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."ⁿ⁴⁹² Some, on the other hand, question whether stare decisis can even be defended. One professor [*107] has argued that adherence to erroneous decisions, at least in the constitutional arena, violates the courts' duty "to say what the law is."ⁿ⁴⁹³ Others have suggested that a system ostensibly committed to justice cannot justify a decision-making process that necessarily produces unjust results.ⁿ⁴⁹⁴

Part of the problem in answering the question is that legitimacy is subjective: it depends upon the perception of those who are empowered to confer acceptance - in a democracy, the people. Yet without abandoning the practice of stare decisis altogether, it is difficult to know whether the public would accept a judiciary that did not decide cases based on precedent. Even an opinion poll might not provide a conclusive answer because legitimacy is also a functional concept. One can speculate about what practices would or would not be legitimate, but the only real test is to put them into play and see what happens.ⁿ⁴⁹⁵

A definitive answer to the problem of legitimacy is beyond the scope of this article, and is probably unnecessary in any case. The courts are unlikely to abandon stare decisis completely and deviations within a certain range have always been accepted.ⁿ⁴⁹⁶ More importantly, even if stare decisis is necessary for judicial legitimacy, it does not automatically follow that the discrete practice of issuing non-precedential opinions threatens that legitimacy. Stare decisis is not an end in itself, but a means to serve important values of the legal system.ⁿ⁴⁹⁷ Therefore, as long as non-precedential opinions do not undermine those values, the legitimacy of the courts will be preserved.

In this Part, I describe the values that are said to be served by adherence to precedent and consider the degree to which those values actually are promoted by the current practice of stare decisis. I then argue that non-precedential decisions do not significantly undermine these values. As long as courts adopt narrow rules for determining whether a decision should have precedential force, along with mechanisms to ensure compliance with those rules, non-precedential opinions pose little danger to the underlying values of stare decisis. [*108]

A. The Values Served by Adherence to Precedent

The most frequent claim made on behalf of stare decisis is that it fosters certainty in the law.ⁿ⁴⁹⁸ By agreeing to follow established rules, the courts enable individuals to predict the legal consequences of their actions.ⁿ⁴⁹⁹ A person who writes a will according to accepted procedures can be confident that the courts will enforce that will after his or her death. Likewise, a corporation developing a new product can anticipate its liability for potential defects. This certainty is desirable in its own right: it satisfies a basic human need for security and stability.ⁿ⁵⁰⁰ Certainty also has instrumental worth. When individuals and businesses are able to predict the circumstances under which courts will enforce contracts, impose tort liability, or extend the protection of bankruptcy laws, they are more likely to engage in the kinds of activities that lead to a prosperous and productive society. By contrast, if courts routinely change legal rules, people will hesitate to risk their time and money in pursuit of goals that might ultimately be thwarted.

An equally important value said to be served by stare decisis is equality.ⁿ⁵⁰¹ When the courts decide today's cases in accordance with yesterday's cases, they ensure that legal rules are applied consistently and fairly.ⁿ⁵⁰² As Karl Llewellyn observed, there is an "almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances."ⁿ⁵⁰³ This sense of justice is especially strong in our society. From the Declaration of Independence's claim that "all men are created equal"ⁿ⁵⁰⁴ to the Fourteenth Amendment's guarantee of "equal protection of the laws,"ⁿ⁵⁰⁵ our democracy has displayed a deep commitment to the principle of equal treatment. By adhering strictly to their own precedents, the courts help to strengthen that commitment.

The third value served by stare decisis is judicial efficiency.ⁿ⁵⁰⁶ Though less lofty than equality, efficiency is vital to our legal system. If individuals with legitimate grievances cannot have their complaints heard within a reasonable time, the courts will have failed in their role as a protector of rights. Stare decisis [*109] helps prevent this from happening. By basing their decisions on precedent, courts avoid the need to reexamine all legal principles from scratch.ⁿ⁵⁰⁷ They can take for granted a certain number of principles and focus their energy on issues that are truly in dispute. "The labors of judges would be increased almost to the breaking point if every past decision could be reopened in every case," wrote Justice Cardozo.ⁿ⁵⁰⁸ By following precedent, a judge can lay his "own course of bricks on the secure foundation of the courses laid by others who have gone before him."ⁿ⁵⁰⁹

Finally, proponents of stare decisis claim that it promotes judicial restraint and impartiality.ⁿ⁵¹⁰ When judges are required to base their decisions primarily on precedent, they have less room to exercise discretion or bias.ⁿ⁵¹¹ This, in turn, reinforces the perception that we live under a government of laws and not of men. In the words of the second Justice Harlan, adherence to prior decisions, even those that are incorrect, is justified by "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."ⁿ⁵¹²

These four values provide strong support for a doctrine of precedent. Yet some scholars question the extent to which the actual practice of stare decisis serves these values. For instance, because American courts do not regard precedent as absolutely binding, some writers argue that the value of certainty is not significantly realized.ⁿ⁵¹³ How, they ask, can individuals predict the legal consequences of their actions if courts are free to overrule precedents they find sufficiently disagreeable?ⁿ⁵¹⁴ A non-absolute policy of stare decisis also impairs [*110] judicial efficiency.ⁿ⁵¹⁵ When the courts are not absolutely bound by prior decisions, they must evaluate precedents for their merit as well as their applicability.ⁿ⁵¹⁶ They also must apply the standard for determining whether a particular decision can be overruled. This creates additional work for the courts, especially as the number of precedents increases. In *Planned Parenthood v. Casey* alone, the Court devoted fifteen pages to a discussion of stare decisis.ⁿ⁵¹⁷ Thus, it is unclear how much efficiency is created by adherence to precedent.ⁿ⁵¹⁸

Another writer argues that even if stare decisis were strictly followed, it could never achieve the goal of equality.ⁿ⁵¹⁹ When a court treats one party unjustly, this argument goes, stare decisis dictates that the court also treat a similarly situated party unjustly.ⁿ⁵²⁰ But although the court thereby ensures equal treatment among those two parties, it necessarily treats them differently from all other parties who are treated justly.ⁿ⁵²¹ And because "every person in the world is situated identically with respect to his or her entitlement to be treated justly," this differential treatment violates the principle of equality.ⁿ⁵²²

Finally, some scholars question whether stare decisis actually ensures judicial impartiality.ⁿ⁵²³ This claim is valid, they argue, "if and only if it can be assumed that the judge who laid down the original rule was himself free from bias or prejudice."ⁿ⁵²⁴ If he was not, "the doctrine of precedent surely runs the risk of inexorably perpetuating that bias or prejudice in every subsequent decision . . ."ⁿ⁵²⁵ Other scholars argue that stare decisis is not even needed to ensure judicial integrity.ⁿ⁵²⁶ The civil law expressly forbids reliance on precedent, they argue. Yet, "there is no complaint on the Conti-

ment that the judges are not sufficiently bound, as impartiality may be obtained by requiring a statement of the reasons on which a judgment is based even though no prior cases are cited."ⁿ⁵²⁷

These arguments raise valid questions about the extent to which the current [*111] practice of stare decisis promotes the values it is thought to serve. However, even if the current practice has not been fully successful, it also has not been entirely unsuccessful. Individuals may not always be able to predict the legal consequences of their actions, but vast areas of the law remain fixed and unchanged. Likewise, although absolute equality may be unobtainable, the practice of treating like cases alike assures a measure of equal treatment that would be difficult to obtain if judges were free to apply different substantive rules in every case. And though the efficiency benefits of stare decisis may diminish as precedents pile up, a system in which the courts "eyed each issue afresh in every case"ⁿ⁵²⁸ would certainly be more unwieldy. Thus, any attempt to eliminate stare decisis, even in its non-absolute form, would threaten values that are important to the legal system.

B. Non-Precedential Opinions and the Rule of Disposition

But although a complete abandonment of stare decisis might undermine these values, the practice of issuing non-precedential decisions does not necessarily have the same effect. For one thing, the practice likely increases judicial efficiency instead of reducing it. According to one empirical study, "selective publication significantly enhances the courts' productivity."ⁿ⁵²⁹ Judges save time writing nonprecedential opinions because they need not include the facts or worry about how their words will be scrutinized in the future.ⁿ⁵³⁰ They also save time researching legal issues, because the body of case law is substantially reduced.ⁿ⁵³¹

More fundamentally, non-precedential opinions do not eliminate the restraining force of stare decisis. As Professor Frederick Schauer has demonstrated, the doctrine of precedent restrains courts in two ways.ⁿ⁵³² First, it requires a court to decide today's case in conformance with yesterday's decision.ⁿ⁵³³ This is the backward-looking aspect of stare decisis. Second, because [*112] tomorrow's court must treat today's decision as presumptively binding, a court must also consider the implications of its decision for any case that might arise in the future.ⁿ⁵³⁴ This is the forward-looking aspect of stare decisis. A court issuing a nonprecedential decision is relieved of this latter responsibility, but still has an obligation to follow past decisions. And it is this obligation that preserves the force of stare decisis. In other words, if Tuesday's court is bound by Monday's decision, and Wednesday's court is also bound by Monday's decision, why should it matter that Tuesday's decision is non-precedential? As long as both the Tuesday and Wednesday courts follow Monday's decision, there will be no difference between the two opinions, and certainty, equality, and judicial integrity will be maintained.

The primary objection to this argument is that although both the Tuesday and Wednesday courts must adhere to the same decision, few cases are identical. The facts of Tuesday's case will likely differ in some way from the facts of both Monday's and Wednesday's cases. As a result, Tuesday's decision will carve out a rule that was not encompassed by Monday's decision. And because Wednesday's court will not be bound by that rule - and may not even be aware of it - there will be less certainty and equality in the law and a greater potential for judicial bias.

The objection does not refute the argument, however; it merely demonstrates that the key consideration is the scope of the rule that determines how a case must be disposed - what I will call the rule of disposition. If the rule is broad, allowing courts to issue non-precedential decisions whenever a case is remotely similar to an earlier case, the deviation between precedential and nonprecedential decisions will be significant and a body of underground law will develop. However, if the rule is sufficiently narrow, the deviation between Monday's and Tuesday's decisions will be practically non-existent, and the values of certainty, equality, and judicial impartiality will be preserved.

In many circuits, the rule of disposition is already narrow. The Seventh Circuit provides that an opinion shall be published - and therefore precedential - if it does any one of the following: 1) establishes or changes a rule of law; 2) involves an issue of continuing public interest; 3) criticizes or questions existing law; 4) constitutes a significant and non-duplicative contribution to legal literature; 5) reverses a lower court opinion that was published; or 6) disposes of a case on remand from the Supreme Court.ⁿ⁵³⁵ The Fourth, Fifth, Sixth, Ninth, and D.C. Circuits also have fairly extensive rules.ⁿ⁵³⁶ Other circuits, by contrast, provide [*113] almost no guidance as to when a decision should be given precedential effect. The Eighth Circuit rules state that unpublished opinions are not precedent, but do not specify how judges should decide whether or not to publish.ⁿ⁵³⁷ The Tenth and Eleventh Circuits are similarly silent on this matter.ⁿ⁵³⁸ Apparently, in these circuits the decision is left to the discretion of the panel issuing the opinion. It is no surprise, therefore, that Judge Arnold complains about the growth of an underground body of case law.ⁿ⁵³⁹ Without a detailed rule of disposition, such a development is inevitable.ⁿ⁵⁴⁰

What exactly should the rule of disposition provide? The goal is to ensure [*114] that non-precedential opinions offer nothing that cannot already be found in the case law. Therefore, the rule should be narrow enough to ensure that all nonprecedential opinions are merely mechanical and rote applications of existing doctrine. Although the Seventh Circuit rule is a promising start, the courts should adopt an even more detailed rule that combines aspects of the current practice in all the circuits and in some state courts. I recommend that an opinion be given precedential effect if it:ⁿ⁵⁴¹

- 1) establishes, alters, modifies or clarifies a rule of law;
- 2) calls attention to a rule of law that appears to have been generally overlooked;
- 3) applies an established rule to facts significantly different from those in previous published opinions applying the rule;
- 4) contains an historical review of a legal rule that is not duplicative, or explains, criticizes, or reviews the history of existing decisional law or enacted law;
- 5) criticizes or questions the existing rule;
- 6) disposes of a case in which the lower court or agency decision was published;
- 7) reverses a decision by a lower court or agency, or affirms the decision on grounds different from those set forth below;
- 8) involves a case that has been reviewed by the Supreme Court and had its merits addressed by a Supreme Court opinion;
- 9) resolves, identifies, or creates an apparent conflict within the circuit or between the circuit and other circuits;
- 10) interprets state law in a way conflicting with state or federal precedent interpreting the state rule;
- 11) is accompanied by a concurring or dissenting opinion;
- 12) is an en banc opinion; or
- 13) involves a legal or factual issue of unique interest or substantial public importance.

This rule is admittedly complex at first glance, but it can be broken down into several categories that make it easier to understand. Sections 1 through 5 concern the substantive legal rule in the case and direct the court to issue a precedential opinion if it has done anything other than routinely apply an established rule to facts highly similar to those of previous precedential opinions. Sections 6 through 8 relate to the actions of lower and higher courts in the same case. The point here is to flag cases that have been addressed in a meaningful way by either a lower or a higher court or that have been the subject of disagreement along the hierarchical ladder. Sections 9 and 10 focus on potential conflicts both within a circuit and between circuits, and on conflicting interpretations [*115] of state law. Sections 11 and 12 concern the status of the court deciding the case: if the court is divided or is en banc, there is good reason for giving the opinion precedential effect. Finally, section 13 focuses on the subject matter of the case and requires a precedential opinion if the topic is of unique public interest or importance. The reasoning here is that such cases will usually raise new and significant legal issues even if they appear to be squarely covered by an existing legal rule.

Categorized in this way, the rule can be easily grasped and applied. If judges follow these guidelines, an opinion adding anything even remotely new to the law would become binding precedent. And any opinion not given precedential effect would be so redundant and routine that its absence from the body of case law would in no way undermine the values served by stare decisis.

Of course, this leads to another objection, which is that even if courts adopt a narrow rule of disposition, there is no guarantee that it will be followed. Judges are faced with many pressures when deciding a case and may be tempted to issue a non-precedential opinion even though the rules direct otherwise. They may hope to bury a decision that is unsupported by case law or that fails to adequately address arguments by one party.ⁿ⁵⁴² Whatever the reason, if judges wish to circumvent the requirements of the rule, there is nothing to prevent them from doing so.

This argument proves too much, however. Judges are free to ignore and distort not only the rule of disposition, but any rule of law. Even in a precedential opinion, they can rely on false distinctions, shoddy reasoning, or incomplete statements of the law to avoid the force of precedent. So if the lack of assurance that judges will follow a given rule renders stare decisis ineffective, we are in trouble even without nonprecedential decisions. Yet most of us do not believe

that simply because judges can get away with ignoring rules of law they will necessarily do so. We recognize that judges are restrained by the very methods and practices that constitute the activity of judging - what Karl Llewellyn called "operating technique."ⁿ⁵⁴³ In addition, Stanley Fish has emphasized the way in which people are constrained by membership in a "community of interpretation."ⁿ⁵⁴⁴ Because judges are socialized members of a profession with similar training and practice, Fish argues, they internalize ways of reading and understanding legal texts that limit their discretion.ⁿ⁵⁴⁵ If such constraints give us confidence that judges will follow ordinary rules of law, they should also provide assurance that judges will follow a rule of disposition. "We are trusted sufficiently [*116] to decide a case[.]" one judge has noted. "Why can't sic we be trusted enough to then make the ancillary decision whether it should be published?"ⁿ⁵⁴⁶

Two potential responses might be offered. The first is that a rule concerning the manner of disposition is less likely to command respect and adherence than a rule concerning the content of the disposition. It is one thing for a judge to disregard a rule that protects the vague and indefinite values of certainty and equality; it is far different to ignore a rule that protects the legitimate expectations of a party immediately at hand. The injustice of the latter situation is more palpable and therefore more of a restraint on the judge. Although this argument initially seems appealing, it has several flaws. For one thing, it assumes that judges care more about the interests of the parties before them than about the overall integrity of the law, an assumption that is questionable in light of the frequency with which courts apply precedents they believe to be unjust. Moreover, the most likely reason a judge would disregard a rule of disposition is to cover up her manipulation of a rule affecting the outcome of the case. Therefore, it makes little difference whether judges are more inclined to disregard rules of disposition than rules of decision. Their fidelity to the former will usually be tested only after they have already decided to ignore the latter.

The more formidable response is that although judges are trusted to apply rules of law generally, their work is policed by Supreme Court and en banc review. Even if only a small fraction of cases are ultimately reversed through this process, the mere possibility of being caught keeps judges from intentionally distorting rules of law. Non-precedential decisions are also subject to reversal. But because of limited time and resources, the Supreme Court and en banc courts are less likely to review decisions that affect only the immediate parties and will not become binding precedent.ⁿ⁵⁴⁷ Judges realize this, and thus feel less constrained to follow not only the rule of disposition, but any rule of law, because by issuing non-precedential decisions they can keep deviations from precedent off the radar screen.

The strength of this argument depends upon the validity of the premise that the Supreme Court and the en banc courts care more about the long-term effects of bad decisions than about whether the parties receive justice - or at least that given two equally unjust decisions, the courts would first review the one likely to be perpetuated. With regard to the Supreme Court, this premise seems mostly accurate. The Court follows a general policy of using its certiorari discretion to resolve important issues of law, not to correct case-specific errors.ⁿ⁵⁴⁸ And although the justices occasionally grant certiorari to review nonprecedential [*117] opinions,ⁿ⁵⁴⁹ it seems a safe bet that they are more likely to review opinions that have precedential effect. The circuit courts use varying criteria for deciding whether to hear a case en banc,ⁿ⁵⁵⁰ and they may be more inclined than the Supreme Court to review non-precedential opinions that deviate from circuit precedent. Unfortunately, there appears to be no way of testing this empirically. Even if the majority of decisions reviewed en banc are precedential, this could simply be evidence that judges are in fact following the rule of disposition. It could also be evidence that non-precedential opinions, true to design, rarely involve important issues worthy of review (in which case, they would not attract en banc attention even if they were precedential).

That said, I am willing to accept the proposition that, other things being equal, the en banc courts, like the Supreme Court, are more likely to review precedential opinions than non-precedential opinions. Even so, that is not a sufficient reason to eliminate non-precedential opinions. For although these modes of review cannot be relied upon to keep judges in line, there are other mechanisms available to guard against potential abuses.

The first mechanism is a requirement that even when a court issues a non-precedential opinion it must give reasons for its decision. Surprisingly, Judge Arnold's opinion does not mention this requirement; it leaves courts free to issue one-line summary dispositions that simply state "affirmed" or "reversed" - as long as the disposition can be cited as precedent in later cases.ⁿ⁵⁵¹ But surely courts will be more constrained under a regime in which they must explain their decisions, however briefly, than under a regime in which they need not give reasons but must allow citation to one-line summary dispositions. Setting aside the problem of how a court could possibly be held to a one-line disposition that gives no details of the case, the requirement of a written opinion has [*118] at least two advantages. First, the process of justification itself has a restraining effect for it forces a court to confront the weaknesses of its conclusion.ⁿ⁵⁵² This is a familiar phenomenon: nearly everyone has had the experience of making a snap judgment, only to find that it cannot be justified on paper. Judges face this same difficulty and often talk about decisions that just "won't write" no matter

how appealing they seemed during conference.ⁿ⁵⁵³ Second, a written opinion provides a basis for evaluation by the parties in a case, by the bar at large, and by the academy. Judges pride themselves on their independence, and rightly so. However, they are still part of the legal community, and when forced to write an opinion that will be read and scrutinized by others within this community, they are less likely to deviate from rules of law.

One might respond that the requirement of a written opinion will only encourage compliance with substantive rules of law, not with the rule of disposition. After all, how many lawyers and scholars will examine whether a particular opinion was properly labeled as nonprecedential; they are more likely to focus on the outcome of the case. However, this response misses the point. As noted above, the most likely reason a judge would circumvent the rule of disposition is to cover up her manipulation of substantive rules of law. So any measure that increases compliance with substantive rules of law will also increase compliance with the rule of disposition by eliminating the incentive to depart from it.ⁿ⁵⁵⁴

In addition to this external scrutiny of court decisions, there are also several internal mechanisms that can be employed to guard against judicial noncompliance. First, the circuits can require that decisions be given precedential effect unless all three judges on the panel agree otherwise. Although a few circuits already have adopted this rule, most either leave the decision to a majority of judges on the panel or provide no guidelines.ⁿ⁵⁵⁵ Some judges claim that, in [*119] practice, the decision is nearly always left to the author, which would suggest that it makes no difference what the rule specifies.ⁿ⁵⁵⁶ However, it seems probable that at least sometimes judges defer to the author's preference because they cannot insist on publication alone and do not want to appear difficult. A formal requirement of unanimity may lessen the reluctance of judges to express their true beliefs on the matter and thus provide a front-line defense against manipulation of the practice.ⁿ⁵⁵⁷

Second, because it is possible that an entire panel may agree to circumvent the rule of disposition, the staff of each circuit could distribute summaries of non-precedential opinions before they are issued. Several circuits currently distribute pre-publication reports of precedential opinions so that judges can quickly scan for decisions that appear erroneous. If non-precedential decisions were added to this list, judges would be more aware of the opinions that are being omitted from the body of case law. The D.C. Circuit has already adopted this approach.ⁿ⁵⁵⁸ As a further check, the circuits could adopt rules allowing any judge on the court to request, within a certain time frame, that a decision previously designated as non-precedential be given precedential effect. The panel could then be given an opportunity to explain its reasons for issuing a nonprecedential decision. But if the judge was unsatisfied with the explanation and could persuade a limited number of other judges that the opinion should be given precedential effect, the panel would be required to change the form of disposition.ⁿ⁵⁵⁹

Other safeguards could also be implemented. Circuits could require that each non-precedential decision explain not only the reasons for the outcome but also the panel's reason for not issuing a precedential opinion. They could also assign staff members to scrutinize recently issued non-precedential opinions and distribute lists of those that potentially deviate from the circuit's rules. Judges [*120] could then examine the opinions on these lists and request that any non-precedential opinions be re-designated as precedential.

A likely objection to these internal mechanisms is that they would be expensive and time-consuming. Judges already have enough work without monitoring the flood of non-precedential opinions that are issued each week. But although these procedures might increase the workload somewhat, the complete elimination of nonprecedential opinions would certainly increase it more. Moreover, if courts are able to assign some of the oversight duties to staff members, the burden on judges would be minimal.

The point of this discussion is not to provide a detailed framework that the circuits can implement wholesale. Each circuit has different needs and must develop a monitoring system that suits those needs. The point is to demonstrate that there are ways to guard against the use of non-precedential opinions to deviate from rules of law, and that those methods are every bit as effective as the potential for Supreme Court and en banc review. If non-precedential opinions are undermining the values that are served by stare decisis, it is not because they necessarily must do so. It is only because adequate safeguards have not been implemented to assure the same degree of conscientiousness that is expected of judges generally.

CONCLUSION

After being ignored for more than two centuries, the constitutional status of stare decisis is poised to emerge as a central topic in federal courts litigation and scholarship. Judge Arnold's analysis in *Anastasoff v. United States* has opened up a provocative line of inquiry that lawyers and judges will likely mine for years to come. This is unquestionably a positive development. For decades, most scholars have focused exclusively on the jurisdictional aspects of Article

III, asking how far the judicial power extends. Now, the academic community can begin to focus on the equally important question of what the judicial power entails.

But although Judge Arnold's analysis points out a valuable new area of research, his conclusions about the history of stare decisis are contestable. Far from being an immemorial custom, the obligation to follow precedent developed over hundreds of years in response to the changing needs and conditions of the legal system. It was not finally accepted in England until the late eighteenth century and was widely disregarded by judges in this country until the beginning of the nineteenth. It is therefore doubtful that the founding generation would have viewed stare decisis as an inherent limit on judicial power. It is also doubtful that the Framers intended for stare decisis to operate as part of the checks and balances implicit in the Constitution's structure. The Framers expressed few concerns about the potential abuse of judicial power and thought the courts would be sufficiently restrained by other checks, such as impeachment and congressional control over jurisdiction. Moreover, stare decisis is an intra-branch check that depends upon the self-restraint of the very officials it is meant to constrain. [*121] The Framers, however, eschewed such self-policing in favor of a system in which each branch was given "the necessary constitutional means and personal motives" to frustrate the ambitions of the other branches.

If stare decisis is constitutionally required, it is not because of original understanding, intent, or the structure of the constitution. Instead, it is simply because the courts have staked their legitimacy upon adherence to precedent.

Even if this is true, however, it does not follow that non-precedential opinions are also unconstitutional. Stare decisis is not an end in itself, but a means to serve important values in the legal system. And as this Article demonstrates, the practice of issuing nonprecedential opinions does not necessarily undermine those values. As long as courts adopt a narrow rule of disposition and mechanisms to assure compliance with that rule, the values of stare decisis will be preserved and the legitimacy of the courts will be maintained.

Legal Topics:

For related research and practice materials, see the following legal topics:

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Governments
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Judges
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Judicial Precedents

FOOTNOTES:

n1 See *infra* notes 41-42 and accompanying text.

n2 See JAMES W. TUBBS, *THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS*, 17, 179 (2000).

n3 See *infra* notes 56-59 and accompanying text.

n4 For instance, the Court has stated on several occasions that stare decisis is not "an inexorable command." E.g., *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). However, this does not necessarily imply that courts are free to abandon the presumption that precedent is binding. It could mean only that the presumption itself is not inexorable. In other words, although the Court has concluded that stare decisis does not require absolute adherence to precedent, it has left open the question of whether this less-than-absolute doctrine of stare decisis is nonetheless constitutionally required.

n5 One of the first scholars to broach the issue was Henry Monaghan, who speculated in 1988 that perhaps "the principle of stare decisis inheres in the 'judicial power' of article III." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *COLUM. L. REV.* 723, 754-55 (1988). Six years later, another professor argued that stare decisis is in fact unconstitutional, at least in cases raising constitutional issues. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 *HARV. J.L. & PUB. POL'Y* 23 (1994). Most recently, a third writer asserted that stare decisis is a "judicial policy" that is "not grounded in the Constitution." Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *YALE L.J.* 1535, 1548 (2000). This conclusion was

based on the Court's statements that "stare decisis is not an inexorable command." *Id.* However, as I have explained, these statements leave open the possibility that a less-than-absolute doctrine of stare decisis is constitutionally required. See *supra* note 4.

n6 223 F.3d 898 (8th Cir. 2000), vacated as moot, *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

n7 See *id.* at 905.

n8 See *id.* at 900-904.

n9 U.S. CONST. art. III., § 1, cl. 1.

n10 See *Anastasoff*, 223 F.3d at 904-05.

n11 See *id.*

n12 *Id.* at 905.

n13 See *id.*

n14 See Jerome I. Braun, Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions, 84 JUDICATURE 90, 92 (2000) (describing the opinion as "a wholly original pronouncement . . . quite unexampled in the law of any other circuit"). I refer to the argument as "Judge Arnold's" because he was clearly the dominant force behind it. A year earlier, he had written a journal article that strongly criticized non-precedential opinions and questioned whether they were constitutional. At the time, however, he did not answer his own question. See Richard S. Arnold, Unpublished Opinions: A Comment, 1 J. APP. PRAC. & PROCESS 219, 226 (1999).

n15 See, e.g., Charles E. Carpenter, Jr., The No-Citation Rule For Unpublished Opinions: Do the Ends of Expediency For Overloaded Appellate Courts Justify the Means of Secrecy?, 50 S.C. L. REV. 235, 247-256 (1998) (arguing that noncitation rules lower the quality of appellate opinions, create a body of shadow law, and foster mistrust of the courts); Martha J. Dragich, Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?, 44 AM. U. L. REV. 757, 785-800 (1995) (arguing that non-precedential opinions generate a secret body of law, undermine certainty and stability, and fail to offer guidance for future judges).

n16 Indeed, not even the parties in *Anastasoff* challenged the practice as unconstitutional. The case involved a dispute over a tax refund and the plaintiff argued merely that the court was not bound by an unpublished decision unfavorable to her. See *Anastasoff*, 223 F.3d at 899. Judge Arnold raised the constitutional issue on his own. See *id.*

n17 See Evan Caminker, Allocating the Judicial Power in a "Unified Judiciary," 78 TEX. L. REV. 1513, 1513 (2000); Michael C. Dorf, Dicta and Article III, 142 U. PA. L. REV. 1997, 1998 (1994).

n18 See Caminker, *supra* note 17, at 1514 (noting that congressional actions have invited a shift from the question of "when and where" judicial power must be exercised to the question of "how" it must be exercised); James S. Liebman & William F. Ryan, "Some Effectual

Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696 (1998) (arguing that Article III is relevant to the quality of judicial power, not just the quantity); Dorf, *supra* note 17, at 1998 (stating that Article III raises jurisprudential issues).

n19 See Administrative Office of the United States Courts, 1999 Judicial Business of the United States Courts 49, Table S-3 (2000), available at <http://www.uscourts.gov/judbus1999/s03sep99.pdf> (reporting that seventy-eight percent of opinions or orders in the courts of appeals were unpublished in the twelve-month period ending in September 1999). By unpublished, I mean they do not appear in the federal reporters, though they usually appear in Lexis and Westlaw and are available on the circuit court web pages.

n20 The First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits explicitly deny precedential effect to unpublished decisions. See 1st CIR. R. 36(b)(2)(F); 2nd CIR. R. 0.23; 5th CIR. R. 47.5.4; 7th CIR. R. 53(b)(2)(iv); 8th CIR. R. 28A(i); 9th CIR. R. 36-3; 10th CIR. R. 36.3(A); 11th CIR. R. 36-2; D.C. CIR. R. 28(c). The Fourth and Sixth Circuits disfavor the citation of unpublished opinions, but allow it when the opinion has precedential value and there is no published opinion that would serve as well. See 4th CIR. R. 36(c); 6th CIR. R. 28(g). The Third Circuit rules make no mention of unpublished opinions, but imply that only published opinions are binding. See 3d CIR. R. 28.3(b).

n21 See The Honorable Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 OHIO S. L.J. 177, 184-86 (1999).

n22 The number of cases disposed of by the courts of appeals rose from 10,669 in 1970 to 51,194 in 1997. See Dragich, *supra* note 15, at 758 n.48; Administrative Office of the United States Courts, 1997 Judicial Business of the United States Courts, Report of the Director, at Table B-1 (1997), available at <http://www.uscourts.gov/judicialbusiness/b01sep97.pdf>. This increase has been offset somewhat by an increase in judgeships from 97 to 167 over the same period. See Arnold, *supra* note 14, at 222. However, the number of cases per judge has still increased two-hundred percent. For anecdotal evidence of the increasing workload of circuit court judges, see Martin, *supra* note 21, at 181-83.

n23 See Martin, *supra* note 21, at 190.

n24 See Braun, *supra* note 14, at 92 (noting that the Eighth Circuit's opinion "arguably extends to all Article III courts, making every district court order binding precedent within the district").

n25 See, e.g., *United States v. Cerceda*, 172 F.3d 806, 812 n.6 (11th Cir. 1999) ("The opinion of a district court carries no precedential weight, even within the same district."); *Anderson v.*

Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority.").

n26 Supreme Court practice might also be affected. Although the Court generally gives precedential effect to all its written opinions, the court has suggested that its summary dispositions are not entitled to full deference. See *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

n27 See *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000).

n28 See *id.* at 1056.

n29 See *id.*

n30 In a recent journal article, Judge Arnold stated: "This practice disturbs me so much that it is hard to know where to begin in discussing it." Arnold, *supra* note 14, at 222. He described the practice as "startling" and argued that it "is creating a vast underground body of law." *Id.* at 221, 225. He also revealed that he has voted to change the circuit's rule on several occasions and that other members of the court have joined him. See *id.* at 225-26.

n31 The Ninth Circuit is already dealing with the issue. The circuit's Judicial Conference and Rules Advisory Committee recently recommended that the court allow citation to unpublished opinions. See Braun, *supra* note 14, at 94. The court rejected the recommendation, but the issue will remain on the table during a two-year public comment period. See *id.* In addition, a lawsuit was filed challenging the Ninth Circuit's prohibition against citing unpublished opinions. A district court dismissed the suit for lack of standing. See *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 1048 (N.D. Cal. 2001). Several other courts have also responded to Anastasoff. See *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260-64 (5th Cir. 2001) (Smith J., dissenting) (recommending that en banc court address the constitutionality of non-precedential opinions); *McGuinness v. Pepe*, 150 F. Supp. 227, 234 (D. Mass. 2001) (citing Anastasoff for the propriety of discussing unpublished opinions); *Community Visual Communications, Inc. v. City of San Antonio*, 148 F. Supp. 2d 764, 774-75 (W.D. Tex. 2000) (discussing Anastasoff and requesting that the 5th Circuit reconsider its rule barring citation to unpublished opinions). For an analysis of Judge Arnold's argument by a sitting judge, see Danny J. Boggs & Brian Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2d 17 (2000). For a recently published "mini-symposium" on the issue, see Anastasoff, *Unpublished Opinions, and 'No-Citation' Rules*, 3 J. APP. PRAC. & PROCESS 169 (2001). For more general commentary on the practice of issuing non-precedential opinions, see, e.g., *In re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, J., dissenting) (criticizing the practice); *National Classification Comm'n v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J., concurring) (same); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Decisions*, CALIFORNIA LAWYER, June 2000 (defending the practice); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 170-71 (1996) (same); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986) (same).

n32 Anastasoff, 223 F.3d at 900.

n33 *Id.* at 903.

n34 *Id.*

n35 *Id.*

n36 *Id.*

n37 See EDWARD S. CORBIN, *THE DOCTRINE OF JUDICIAL REVIEW* 16 (1914).

n38 See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia J., concurring) (stating that "the judicial Power of the United States . . . must be deemed to be the judicial power as understood by our common-law tradition"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter J., concurring) (noting that the judicial power was modeled on the "business of the Colonial courts and the courts of Westminster when the Constitution was framed"); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU. L. REV. 75, 84 (asserting that constitutional terms such as "judicial" should be given the meaning associated with them "through centuries of AngloAmerican practice"). By accepting this premise, I am not endorsing originalism as an exclusive approach to constitutional interpretation. I support a pluralistic method that looks not only to original understanding and intent but also to structural, doctrinal, ethical, and prudential concerns. See, e.g., Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 700-751 (1980) (describing a pluralistic approach to interpretation that includes six forms of constitutional argument). Nevertheless, I recognize that originalist claims carry considerable weight with many judges and scholars, which is why I spend so much energy challenging Judge Arnold's historical assertions.

n39 In doing so, I follow the example of Professor Wasserstrom. See RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 39 (1961).

n40 See RUPERT CROSS & J.W. HARRIS, *PRECEDENT IN ENGLISH LAW* 5, 19, 135 (Clarendon Press 4th ed., 1991).

n41 See WASSERSTROM, *supra* note 39, at 52 (1961) ("For, if the doctrine of precedent has any significant meaning, it would seem necessary to imply that rules are to be followed because they are rules and not because they are 'correct' rules."); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (noting that "the doctrine of stare decisis would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter").

n42 See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (stating that stare decisis requires that a "departure from precedent . . . be supported by some special justification"); *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) (stating that the decision to overrule must be supported by "reasons that go beyond mere demonstration that the overruled opinion was wrong"); *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (stating that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided").

n43 See Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84-85 (2000).

n44 See *id.*

n45 *Anastasoff v. United States*, 223 F.3d 898, 904-05 (8th Cir. 2000).

n46 *Id.*

n47 See *id.* at 905.

n48 *Id.* at 900.

n49 *Id.* at 901.

n50 *Id.*

n51 *Id.* at 900-02.

n52 In describing the practice of issuing non-precedential opinions, Judge Arnold writes that courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." *Id.* He then writes, "As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat." *Id.* at 904. If Judge Arnold believed that courts must only begin their analysis with past decisions, he would have found only the second part of his imagined statement problematic - the part where the courts tell the bar that it cannot remind them of past decisions. That he also objects to the courts' message that they are not bound by past decisions indicates that he thinks courts must not only start their analysis with precedent, but must adhere to it as well.

n53 The Article also does not address the obligation of lower courts to follow the decisions of higher courts, which is sometimes misleadingly referred to as vertical stare decisis. This obligation does not derive from the mere existence of the decisions, but from the hierarchical relationship of the courts and is therefore fundamentally different from horizontal stare decisis. For a complete discussion of the constitutional and pragmatic aspects of vertical stare decisis, see Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817 (1994).

n54 See WASSERSTROM, *supra* note 39, at 52; Nelson, *supra* note 41, at 8.

n55 See WASSERSTROM, *supra* note 39, at 52.

n56 *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting).

n57 *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989); *Johnson v. Transp. Agency*, 480 U.S. 616, 644-45 & n.4 (1987) (Stevens, J., concurring).

n58 *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia J., dissenting).

n59 See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-64 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

n60 See Nelson, *supra* note 41, at 48-52.

n61 CROSS & HARRIS, *supra* note 40, at 221.

n62 See CARLETON KEMP ALLEN, *LAW IN THE MAKING* 170, 177 n.1 (Clarendon Press 7th ed., 1964).

n63 See *id.* at 171, 175-76.

n64 See Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 30, 41 (1959).

n65 See Harold J. Berman & Charles J. Reid Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 444-45 (1996).

n66 See ALLEN, *supra* note 62, at 170.

n67 See *id.* at 172-73.

n68 Id.

n69 Berman & Reid, *supra* note 65, at 444-45.

n70 See Jim Evans, *Precedent in the Nineteenth Century*, in *PRECEDENT IN LAW* 35, 35-36 (Laurence Goldstein, ed., 1987); W. S. Holdsworth, *Case Law*, 50 L.Q. REV. 180, 190 (1934); Albert Kocourek & Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. B.J. 971, 973-74 (1935).

n71 There is some dispute about precisely when the modern doctrine of precedent took shape. Carleton Kemp Allen argued that although the doctrine was well advanced in the late eighteenth century, the final touches were not added until the nineteenth century. See ALLEN, *supra* note 62, at 219, 219 n.1. Other scholars agree. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 308 (1929) (stating that "it is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established"); CROSS & HARRIS, *supra* note 40, at 24 (noting that "the strict rules [of precedent] are the creature of the nineteenth and twentieth centuries"). William Holdsworth, however, maintained that the modern theory was substantially in place by the end of the eighteenth century. See Holdsworth, *supra* note 70, at 180. The dispute seems minor, given that Holdsworth did not rule out the possibility of additional refinements in the nineteenth century. See Kempin, *supra* note 64, at 30 n.4. In any case, these scholars all focused on the doctrine of precedent in English courts, and there is strong evidence that American courts did not accept the modern doctrine of precedent until the early nineteenth century. See *id.* at 36, 50-51 ("It can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis."); See also Caminker, *supra* note 53, at 661 ("There is no consensus as to precisely when the notion of case law precedent gained currency in English common law. But most legal historians have agreed that the eighteenth and nineteenth centuries marked an important point of transition.").

n72 TUBBS, *supra* note 2, at 18.

n73 See T. Ellis Lewis, *The History of Judicial Precedent I*, 46 L.Q. REV. 207 (1930) [cited hereinafter as Lewis, *The History of Judicial Precedent I*]; PERCY H. WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 146 (1925) ("There is practically no trace of law reporting under the Norman kings.").

n74 See ALLEN, *supra* note 62, at 187; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209.

n75 See Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 212.

n76 See TUBBS, *supra* note 2, at 7-20.

n77 See Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209-212. Bracton also kept a private notebook that contained references to roughly 2,000 cases. See *id.* at 209.

n78 TUBBS, *supra* note 2, at 18-19.

n79 See *id.* at 19; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209-212.

n80 See PLUCKNETT, *supra* note 71, at 304; TUBBS, *supra* note 2, at 19.

n81 See PLUCKNETT, *supra* note 71, at 304.

n82 See *id.* at 180 (stating that Bracton's use of cases was "not based upon their authority as sources of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions upon lines which he considers sound"); TUBBS, *supra* note 2, at 20 (declaring that "Bracton's cases are carefully selected to show what the law ought to be, not because he thinks they have any binding authority"); Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 210-12 (stating that Bracton's "cases were not authorities in the modern sense, but merely apposite illustrations of the point at issue").

n83 See PLUCKNETT, *supra* note 71, at 303 (noting that Bracton was "undertaking research into the present and former condition of the law by a novel method which he had devised").

n84 See *id.*

n85 See HAROLD POTTER, *POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS* 282 (A.K.R. Kiralfy ed., 4th ed., 1958); PLUCKNETT, *supra* note 71, at 181.

n86 See PLUCKNETT, *supra* note 71, at 303.

n87 *Id.* at 303.

n88 See *id.* at 181; TUBBS, *supra* note 2, at 20.

n89 See PLUCKNETT, *supra* note 71, at 182, 304.

n90 *Id.*

n91 See WINFIELD, *supra* note 73, at 158.

n92 See POTTER, *supra* note 85, at 270.

n93 See *id.* at 269; TUBBS, *supra* note 2, at 42.

n94 See WINFIELD, *supra* note 73, at 159.

n95 See ALLEN, *supra* note 62, at 200-01; POTTER, *supra* note 85, at 270; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 21718.

n96 THEODORE F.T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 103-04 (Cambridge 1958).

n97 See POTTER, *supra* note 85, at 269-70; TUBBS, *supra* note 2, at 42.

n98 See TUBBS, *supra* note 2, at 42, 180.

n99 See *id.*

n100 ALLEN, *supra* note 62, at 202.

n101 TUBBS, *supra* note 2, at 42. See also ALLEN, *supra* note 62, at 201 ("To speak of a 'system of precedents' in connexion with the Year Books would be a complete anachronism."); PLUCKNETT, *supra* note 71, at 306 (noting that "the Year Books themselves . . . were not regarded as collections of authoritative or binding decisions").

n102 See TUBBS, *supra* note 2, at 42-43.

n103 See *id.* at 181.

n104 See ALLEN, *supra* note 62, at 190.

n105 *Id.* at 194.

n106 *Id.* 194-95.

n107 *Id.*

n108 *Id.* at 194.

n109 See *id.* at 191; TUBBS, *supra* note 2, at 43.

n110 See TUBBS, *supra* note 2, at 43-44.

n111 See T. Ellis Lewis, *The History of Judicial Precedent II*, 46 L.Q. REV. 341, 342 (1930) [cited hereinafter as Lewis, *The History of Judicial Precedent II*].

n112 See ALLEN, *supra* note 62, at 193-95. Often, it appears, they were remembering their own years as practitioners. See *id.* at 196.

n113 See TUBBS, *supra* note 2, at 44.

n114 See ALLEN, *supra* note 62, at 193.

n115 See Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 357.

n116 See POTTER, *supra* note 85, at 271; TUBBS, *supra* note 2, at 181.

n117 See ALLEN, *supra* note 62, at 190 n.3; POTTER, *supra* note 85, at 277; TUBBS, *supra* note 2, at 64; T. Ellis Lewis, *The History of Judicial Precedent III*, 47 L.Q. REV. 411 (1931) [cited hereinafter as Lewis, *The History of Judicial Precedent III*].

n118 ALLEN, *supra* note 62, at 198-99.

n119 See *id.*

n120 See *id.* at 200; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 215; Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 421-23.

n121 PLUCKNETT, *supra* note 71, at 302; See Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 354-55; Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 416, 421-22.

n122 See ALLEN, *supra* note 62, at 200.

n123 Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 348.

n124 ALLEN, *supra* note 62, at 200.

n125 *Id.*

n126 Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 414.

n127 Lewis, *The History of Judicial Precedent II*, *supra* note 73, at 220.

n128 POTTER, *supra* note 85, at 275.

n129 *Id.*

n130 *Id.*

n131 See TUBBS, *supra* note 2, at 187-88.

n132 ALLEN, *supra* note 62, at 200.

n133 See *id.* at 203.

n134 See T. Ellis Lewis, *The History of Judicial Precedent IV*, 48 L.Q. REV. 230, 230-31 (1932) [cited hereinafter as Lewis, *The History of Judicial Precedent IV*].

n135 See *id.* at 230-34.

n136 See ALLEN, *supra* note 62, at 205-06.

n137 See *id.* at 206.

n138 See PLUCKNETT, *supra* note 71, at 163-65.

n139 See ALLEN, *supra* note 62, at 207.

n140 *Id.*

n141 See PLUCKNETT, *supra* note 71, at 200, 203.

n142 See *id.* at 202-04.

n143 See *id.* at 200.

n144 See ALLEN, *supra* note 62, at 208; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 235.

n145 See ALLEN, *supra* note 62, at 208.

n146 *Id.*

n147 See *id.*

n148 PLUCKNETT, *supra* note 71, at 200-01; see also WINFIELD, *supra* note 73, at 188.

n149 See ALLEN, *supra* note 62, at 208; PLUCKNETT, *supra* note 71, at 200-01; WINFIELD, *supra* note 73, at 189. In his report of Calvin's Case alone, Coke cited 140 decisions. One analysis of his reports found that he cited sixteen times the number of precedents that appeared in the next most prolific reporter of his day. See Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 236.

n150 See Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 235.

n151 See JOHN HOSTETTLER, *SIR EDWARD COKE: A FORCE FOR FREEDOM*, 63, 66-69 (Barry Rose Law Publishers Ltd. 1997).

n152 *Id.* at 70, 73-75. Coke later conceded in his *Institutes* that statutes could not be struck down by reference to the common law. See *id.* at 75.

n153 See *id.* at 69.

n154 See *id.*

n155 CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* 304-05 (1957).

n156 *Id.* at 305.

n157 See *id.* His point was proved shortly afterward when the King attempted to hear a case but became so confused he was forced to give up. "I could get by well hearing one side only," he said, "but when both sides have been heard, by my soul I know not what is right." HOSTETTLER, *supra* note 151, at 71.

n158 See ALLEN, *supra* note 62, at 245; PLUCKNETT, *supra* note 71, at 86.

n159 See *supra* notes 67-68 and accompanying text.

n160 See JOHN GREVILLE AGARD POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 46-51 (1987); see also H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1537, & n.91 (1987) (discussing the way in which the use of precedent by Coke and later judges has been viewed as expanding the power of the common law courts).

n161 Berman & Reid, *supra* note 65, at 450.

n162 See *id.* at 446-47; Holdsworth, *supra* note 70, at 185 ("Coke is never tired of insisting that the fact that a rule would lead to inconvenient results - inconvenient either technically or substantially - is a good argument to prove that the rule is not law.").

n163 See ALLEN, *supra* note 62, at 207-08.

n164 See *id.*

n165 *Id.*

n166 See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 186-87 (1998).

n167 POCOCK, *supra* note 160, at 33. Matthew Hale similarly praised the adaptability of the common law, writing that "long experience and use, had successfully 'wrought out' the 'errors, distempers or iniquities of men or times.'" DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* 44 (1989) (quoting MATHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 30 (Charles M. Gray ed., Univ. of Chi. Press 1971)).

n168 See POCOCK, *supra* note 160, at 34 (explaining Davies's view that law enacted by a prince or parliament would grow obsolete, while the common law would adapt because it was constantly put to the test by judges).

n169 See *id.* at 34. When the doctrine of precedent hardened in the nineteenth century, it was the common law that came to be seen as rigid and the civil law that appeared flexible. See Holdsworth, *supra* note 70, at 192-93.

n170 POCOCK, *supra* note 160, at 35 (quoting SIR EDWARD COKE, *SEVENTH REPORTS, CALVIN'S CASE* (Thomas & Fraser (London 1826), vol. iv, page 6.)).

n171 See POCOCK, *supra* note 160, at 36.

n172 *Id.* at 35.

n173 *Id.*

n174 ALLEN, *supra* note 62, at 209; see also Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 247 (stating that "there were conflicting notions as to the authority of judicial decisions" during the seventeenth and eighteenth centuries and that "this conflict was not finally settled until late in the nineteenth century").

n175 Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 244.

n176 See *id.* at 240-44.

n177 ALLEN, *supra* note 62, at 209.

n178 *Id.*

n179 *Id.* at 209-10.

n180 See CROSS & HARRIS, *supra* note 40, at 30 ("If a previous decision is only evidence of what the law is, no judge could ever be absolutely bound to follow it, and it could never be effectively overruled because a subsequent judge might always treat it as having some evidential value."); Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in *PRECEDENT IN LAW* 79 (Laurence Goldstein, ed., 1987) (noting that "the law, unchanging and unchangeable in essential content, is formally independent of its judicial expression").

n181 See ALLEN *supra* note 62, at 207.

n182 *Id.* at 210.

n183 WILLIAM BLACKSTONE, *COMMENTARIES* *69.

n184 See Holdsworth, *supra* note 70, at 184-85; see also CROSS & HARRIS, *supra* note 40, at 35 ("The declaratory theory was beneficial in at least one respect. It provided a court with an excellent reason not to follow or apply a case of which it strongly disapproved.").

n185 See Holdsworth, *supra* note 70, at 185-87.

n186 James Ram, *The Science of Legal Judgments*, in 9 *LAW LIBR.* 76 (John S. Littell 1835); see also Berman & Reid, *supra* note 65, at 514; Holdsworth, *supra* note 70, at 188-89; Kempin, *supra* note 64, at 30.

n187 See Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 *IOWA L. REV.* 1, 5-9 (1986).

n188 See ALLEN, *supra* note 62, at 221-28; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 244.

n189 ALLEN, *supra* note 62, at 228.

n190 See WILLIAM DOMNARSKI, *IN THE OPINION OF THE COURT* 13 (1996). This practice was so pervasive that one reporter confessed to having "a drawer marked 'Bad Law' into which I threw all cases which seemed to me to be improperly ruled." *Id.* at 14. The reporters not only omitted many cases, but also supplemented their accounts of cases with their own opinions. See *id.* Because they did not distinguish their contributions from the official opinion, this extra-judicial commentary was hard to separate from the judicial pronouncement that was intended to serve as evidence of the law. See *id.* As a result, "the common law of England . . . was fashioned as much by the reporters . . . as by the judges and their decisions." *Id.* at 13; See also ALLEN, *supra* note 62, at 231 (noting that "by 'editing,' some learned reporters formulated better law than the judges whom they were reporting").

n191 DOMNARSKI, *supra* note 190, at 13. The practice of reporting only select English decisions continued into the twentieth century. See ARTHUR L. GOODHART, *CASE LAW IN ENGLAND AND AMERICA IN ESSAYS IN JURISPRUDENCE AND COMMON LAW* 57 (1931) (stating that "unless a case deals with a novel point of law - and novelty is strictly construed - it will rarely find its way into the Reports").

n192 Coke "warned the judges, when there were not more than thirty books on the common law, against reporting all cases." Alden I. Rosbrook, *The Art of Judicial Reporting* 10 *CORNELL L.Q.* 103 (1925). Hale also argued for fewer reports, describing the growing body of precedents as "the rolling of a snowball that increaseth in bulk in every age, until it become utterly unmanageable." Braun, *supra* note 14, at 91.

n193 ALLEN, *supra* note 62, at 230.

n194 See Holdsworth, *supra* note 70, at 187-88.

n195 See ALLEN, *supra* note 62, 219-222; Holdsworth, *supra* note 70, at 187-88; Kempin, *supra* note 64, at 31; TUBBS, *supra* note 2, at 181-82.

n196 See ALLEN, *supra* note 62, at 209; WINFIELD, *supra* note 73, at 190.

n197 See TUBBS, *supra* note 2, at 181; WINFIELD, *supra* note 73, at 190.

n198 *Robinson v. Bland*, 96 Eng. Rep. 141, 142 (K.B. 1760).

n199 27 Eng. Rep. 440 (Ch. 1768).

n200 *Id.* at 441.

n201 See LIEBERMAN, *supra* note 167, at 86-87 (stating that precedents were viewed "in two lights" in the eighteenth century); Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 247 (noting that in the eighteenth century, "there were conflicting notions as to the authority of judicial decisions, and this conflict was not finally settled until late in the nineteenth century").

n202 See LIEBERMAN, *supra* note 167, at 86; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 246-47.

n203 BLACKSTONE, *supra* note 183, at *69.

n204 *Id.* at *70.

n205 *Id.*

n206 See MAX RADIN, *STABILITY IN LAW* 18 (Brandeis Lawyers Soc'y Publ'g., vol. 1, 1942-46).

n207 See ALLEN, *supra* note 62, at 211; LIEBERMAN, *supra* note 167, at 122-133.

n208 LIEBERMAN, *supra* note 167, at 124.

n209 *Jones v. Randall* (1774) *Cowp.* 37.

n210 *Id.* at 39. Mansfield expressed similar sentiments in other cases. See, e.g., *Rust v. Cooper*, (1777) *Cowper* 629, 632 ("The law does not consist in particular cases, but in general principles which run through cases and govern the decision of them."); *James v. Price*, (1773) *Lofft* 219, 221 (the law is founded "in equity, reason, and good sense").

n211 LIEBERMAN, *supra* note 167, at 126.

n212 ALLEN, *supra* note 62, at 212.

n213 *Id.* at 212.

n214 See Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 *B.U. L. REV.* 877, 957 (1987); Evans, *supra* note 70, at 36-37.

n215 See ALLEN, *supra* note 62, at 216 n.1; Coquillette, *supra* note 214, at 958-62; Evans *supra* note 70, at 37.

n216 LIEBERMAN, *supra* note 167, at 142.

n217 See *id.* at 135.

n218 See *id.*

n219 See *id.* at 139.

n220 See *id.*

n221 *Id.* at 139-40.

n222 *Id.* at 140.

n223 See Evans, *supra* note 70, at 35.

n224 See *id.* at 46-53; Ram, *supra* note 186, at 72-74.

n225 See Evans, *supra* note 70, at 57-63.

n226 See *Beamish v. Beamish*, 11 Eng. Rep. 7359 H.L. Cas. 273 (1861); See also Evans, *supra* note 70, at 55-58.

n227 See Kempin, *supra* note 64, at 31-33.

n228 Evans, *supra* note 70, at 45.

n229 See *id.*

n230 POTTER, *supra* note 85, at 279.

n231 See Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 367, 369, 411, 414 (1907).

n232 See Kempin, *supra* note 64, at 52 n.75. One exception seems to be Virginia, which was initially governed by a code that was printed in London in 1612 and enforced by the first governor, Sir Thomas Smith. See Reinsch, *supra* note 231, at 404. The code was exceedingly severe, however, and was later replaced by a set of laws passed by Virginia's first legislative assembly. See *id.*

n233 See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 90-91 (Simon & Schuster, 1973 2nd ed.); Reinsch, *supra* note 231, at 410.

n234 See Reinsch, *supra* note 231, at 410.

n235 See *id.* at 369, 411.

n236 *Id.* at 372.

n237 *Id.* at 401. In Pennsylvania, "The administration of justice was rather founded upon the ideas of the magistrate than on any rules of positive law." *Id.* at 398. In New York, judgments were given "according to law and good conscience." *Id.* at 393.

n238 *Id.* at 380.

n239 See *id.* at 413.

n240 *Id.* at 376.

n241 See *id.* at 370, 382, 390, 412. In Delaware, no professionally trained lawyer sat as a judge until after the revolution. See *id.* at 396. In Massachusetts, only four of the 30 justices who sat between 1701 and 1776 were lawyers. See PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTHCENTURY AMERICA* 28 (1997).

n242 See WILLIAM HAMILTON BRYSON, *LAW REPORTING AND LEGAL RECORDS IN VIRGINIA* 329; Kempin, *supra* note 64, at 34-35; Reinsch, *supra* note 231, at 382.

n243 See Reinsch, *supra* note 231, at 410.

n244 *Id.* at 382; see also OLIVER P. CHITWOOD, *JUSTICE IN COLONIAL VIRGINIA* 51 (De Capo Press NY 1971) (Originally published by Johns Hopkins Press 1905); GEORGE LEWIS CHUMBLEY, *COLONIAL JUSTICE IN VIRGINIA: THE DEVELOPMENT OF A JUDICIAL SYSTEM, TYPICAL LAWS AND CASES OF THE PERIOD* 156 (orig. published The Dietz Press, Richmond, 1938) (reprint Gaunt, Inc. 1997).

n245 See Reinsch, *supra* note 231, at 370. The colonies also began to appoint professional lawyers to the bench. See *id.* In New York, a professional English lawyer was named Chief Justice in 1700 and resolved to introduce the common law and the practices of the English courts. See *id.* at 393-94. His approach was too aggressive, however, and after complaining that some colonists were unwilling to accept English laws, his popularity diminished. See *id.* Massachusetts appointed its first professional lawyer to the post of Chief Justice in 1712 and New Hampshire did the same in 1754. See *id.* at 385, 388.

n246 See *id.* at 370.

n247 See *id.* at 400, 410. Virginia had also expressed an early allegiance to the common law, using it as the model for its statutory scheme. See *id.* at 405.

n248 See *id.* at 408.

n249 See *id.* at 371; See also Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law: 1780-1820*, in 5 *PERSPECTIVES IN AMERICAN HISTORY* 294 (1971) [cited hereinafter as Horwitz, *The Emergence of an Instrumental Conception of American Law*]. The question of whether the colonies desired to adopt the common law was, of course, only one part of the debate. The other question was whether they were entitled to the common law. Although some English scholars, most notably Blackstone, claimed the colonies had no right to the common law until the King decided otherwise, the predominant view was to the contrary. See *id.* at 294.

n250 See Reinsch, *supra* note 231, at 370, 384, 415.

n251 See *id.* at 414-15.

n252 See Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 293; ROBERT VON MOSCHZISKER, *STARE DECISIS, RES JUDICATA AND OTHER SELECTED ESSAYS* 108 (Cyrus M. Dixon Publ'g. 1929).

n253 Reinsch, *supra* note 231, at 408.

n254 *Id.*

n255 See CRAIG EVAN KLAFTER, *REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT* 42 (1993). For instance, Massachusetts rejected the common law rule of primogeniture in favor of more progressive inheritance laws; Rhode Island and Pennsylvania passed laws fostering religious freedom; and Virginia offered creditors relief against fraudulent devices.

See *id.*

n256 See Reinsch, *supra* note 231, at 370-71.

n257 *Id.* at 388.

n258 *King v. Hopkins*, 57 N.H. 334, *7 (1876) (giving an account of Livermore's statement).

n259 *Id.* at *9.

n260 John Adams, *Minutes of the Argument*, in 2 *LEGAL PAPERS OF JOHN ADAMS* 127 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965).

n261 See Kempin, *supra* note 64, at 37 (citing 1 Har. & M' Hen. 452, 453.).

n262 See *id.* at 38.

n263 1 H. & McH. 434, *2 (Md. 1772).

n264 1 H. & McH. 409, *16 (Md. 1771).

n265 See Kempin, *supra* note 64, at 37-38 ("It should be noticed that Mansfield is cited, rather than his case. It appears that the case merely provides a medium for the expression of the opinion of that eminent jurist.").

n266 See *King v. Rapp*, 1 Dall. 11 (Pa. 1764).

n267 *Id.*

n268 Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 292. According to John Adams, however, Hutchinson himself "wriggled to evade" cases that were cited as authority. See KARSTEN, *supra* note 241, at 28.

n269 Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 292.

n270 See *id.* at 297; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* 8-9 (1977). Perhaps one reason Horwitz jumps so quickly to this conclusion is that his focus is on the status of *stare decisis* during the years after the Revolution, not in colonial America. Horwitz concludes that during this later period judges regularly disregarded precedent, and it is only by way of contrast that he makes any claims about pre-war attitudes toward precedent. *Id.* at 30.

n271 See Kempin, *supra* note 64, at 34-35; KARSTEN, *supra* note 241, at 28 (noting that "as late as 1783 only about 1 in every 5 of the nearly 150 volumes of published reports of the opinions of English courts were, in fact, available in America"); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571-78 (1993).

n272 See KARSTEN, *supra* note 241, at 30. In his *Anastasoff* opinion, Judge Arnold cites Karsten for the proposition that judges and lawyers of the founding era "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum." *Anastasoff v. United States*, 223 F.3d 898, 903 (8th Cir. 2000). Karsten says only that lawyers and judges sometimes used these decisions to help decide later cases. He does not suggest that judges felt bound by unpublished decisions that were cited from memory or from a lawyer's notes of a case. See KARSTEN, *supra* note 241, at 30. And given that English and American judges felt free to disregard decisions that did not appear in reliable law reports, it seems highly unlikely that they would have felt bound by decisions that were not reported at all.

n273 See FRIEDMAN, *supra* note 233, at 322 ("What was not reported was barely law.").

n274 See Kempin, *supra* note 64, at 36-37, 50 (stating that "it can be established that American cases, up to the year 1800, had no firm doctrine of *stare decisis*").

n275 Between 1776 and 1884, eleven of the original 13 states adopted the common law. See Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 291-92. The other two states, Rhode Island and Connecticut, followed suit in 1798 and 1818, respectively. See *id.* at 292 n.18.

n276 See *id.* at 287-89.

n277 *Id.* at 288.

n278 *Id.*

n279 1 Kirby 114 (Conn. 1786).

n280 See *id.* at 114-15.

n281 *Id.* at 116-17.

n282 1 Dall. 175 (Pa. 1786).

n283 *Id.* at 178.

n284 *Id.* The court did follow precedent in *Kerlin's Lessee*, but primarily to maintain consistency. In addition, the court did not indicate that it thought the earlier case had been wrongly decided. See *id.* at 178-79.

n285 See KLAFTER, *supra* note 255, at 57-58, 78-93.

n286 1 Johns. Cas. 184, 190 (N.Y. Sup. Ct. 1799).

n287 See *id.*

n288 2 Root 303 (Conn. 1795).

n289 See *id.* at *7-*8.

n290 See KLAFTER, *supra* note 255, at 78.

n291 1 Va. (1 Wash.) 26 (1791).

n292 See id.

n293 Id. at *6.

n294 2 Johns. 75 (N.Y. Sup. Ct. 1806).

n295 See id. at 76.

n296 Id. at 75-76. For other examples of courts adapting common law rules to meet American circumstances, see *Jackson v. Brownson*, 7 Johns. 227, 237 (N.Y. Sup. Ct. 1810) (opinion of Spencer, J.) (dismissing English law of waste as "inapplicable to a new, unsettled country" because it inhibited the improvement of land); *Findlay v. Smith*, 20 Va. (6 Munf.) 134, 142, 148 (Va. 1818) (same); *Ross v. Poythress*, 1 Va. (1 Wash.) 120 (1792) (rejecting English rule requiring that judgments be paid in cash because of the lack of currency in the United States).

n297 See FRIEDMAN, *supra* note 233, at 110-12.

n298 11 Johns. 16 (N.Y. Sup. Ct. 1814).

n299 See id.

n300 Id.

n301 See id. at 20.

n302 3 Cai. R. 307 (N.Y. Sup. Ct. 1805).

n303 See Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 289.

n304 *Palmer*, 3 Cai. R. at 314.

n305 See id. Other cases in which courts disregarded English decisions issued before 1776 include *Naylor v. Fosdick*, 4 Day 146 (Conn. 1810) (overruling early eighteenth century English precedents allowing a debtor to assign his estate to a trustee without the consent of all his creditors); *Chappel v. Brewster*, 1 Kirby 175 (Conn. 1786); *Wilford v. Grant*, 1 Kirby 114 (Conn. 1786) (ignoring established common law rule against partial reversals); *Downman v. Downman's Executors*, 1 Va. (1 Wash.) 26 (1791) (setting aside pleading requirement followed in England since 1705).

n306 4 Dall. 308 (Pa. 1804).

n307 See *Murgatoyd v. Crawford*, 3 Dall. 491 (Pa. 1799).

n308 See *Duncanson*, 4. Dall. at *16.

n309 10 Johns. 203 (N.Y. Sup. Ct. 1813).

n310 See *id.* at 204.

n311 See *id.* at 205.

n312 See *id.* at 205-06. For other cases in which state courts overruled domestic precedents, see *Bevan v. Taylor*, 7 Serg. & Rawle 397 (Pa. 1821) (overruling *Walker v. Smith*, 3 Yeates 480 (Pa. 1803)); *Girard v. Taggart*, 5 Serg. & Rawle 19 (Pa. 1818) (overruling *Willing v. Rowland*, 4 Dall. 106 (Pa. 1791)); *Conner v. Shepherd*, 15 Mass. 164 (1818) (overruling *Nash v.*

Boltwood (Mass. 1783)); *Coffin v. Coffin*, 2 Mass. 358, 366 (1807) (overruling *Holbrook v. Pratt*, 1 Mass. 96 (1805)); *Fitch v. Brainerd*, 2 Day 163 (Conn. 1805) (overruling *Kellogg v. Adams* (1788)).

n313 JAMES KENT, *I COMMENTARIES ON AMERICAN LAW* 474 (14th ed., John M. Gould, ed. 1896) (1826).

n314 *Id.* at 475.

n315 *Id.*; see also DOMNARSKI, *supra* note 190, at 11 (noting that Daniel Webster thought reporters should "omit those cases that turned merely on evidence, while others suggested that cases should be omitted if they covered the same ground as already published cases").

n316 KENT, *supra* note 313, at 475.

n317 *Id.* at 474.

n318 *Id.* at 477 (emphasis added).

n319 See JAMES WILSON, *THE WORKS OF JAMES WILSON* 2, 37, 501-02 (Harvard Univ. Press 1967) (Robert Green McCloskey ed.) (1804).

n320 *Id.* at 501-02 (emphasis added).

n321 See *id.*

n322 *Id.* at 40.

n323 Nathaniel Chipman, A Dissertation on the Act Adopting the Common and Statute Laws of England, in N. CHIP. 124-26 (1793).

n324 *Id.* at 129, 137-38.

n325 See David Currie, The Constitution in the Supreme Court, 1789-1801, 48 U. CHI. L. REV. 819 (1981).

n326 See DOMNARSKI, *supra* note 190, at 7.

n327 See *id.* at 6-7; Craig Joyce, The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy, 83 MICH. L. REV. 1291, 1294-95 (1985).

n328 See DOMNARSKI, *supra* note 190, at 7; Joyce, *supra* note 327, at 1301.

n329 See DOMNARSKI, *supra* note 190, at 7; Joyce, *supra* note 327, at 1303-05.

n330 See DOMNARSKI, *supra* note 190, at 7.

n331 See *id.* at 8-9.

n332 See *id.* at 9.

n333 See Caminker, *supra* note 53, at 833 n.69.

n334 See FRIEDMAN, *supra* note 233, at 134.

n335 See Caminker, *supra* note 53, at 833 n.64.

n336 See FRIEDMAN, *supra* note 233, at 135.

n337 *Id.* at 119; See also David E. Engdahl, What's In a Name? The Constitutionality of Multiple "Supreme" Courts, 66 *IND. L.J.* 457, 502 n.225 (1991) (stating that "in its earliest years, the Supreme Court cited its own prior holdings not as precedents in the common law sense, but to spare the trouble of reiterating sound analyses to which the Justices still subscribed.

It was a kind of shorthand, not an ascription of authoritativeness.").

n338 See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *VAND. L. REV.* 647, 667 (1999). The lack of reliable law reports and the fact that the court often addressed issues of first impression may explain Marshall's inattention to precedent in some cases. In others cases, however, he apparently was well aware that precedents supported his opinion, yet did not rely on them for his conclusion. See *id.*

n339 David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 *U. CHI. L. REV.* 646, 661, 674, 701 (1982). Marshall's lack of regard for precedent was apparent even during his years as a practicing attorney. In *Ross v. Poythress*, 1 *Va.* (1 Wash.) 155 (1792), for example, he argued successfully that the English rule requiring judgments to be paid in cash should be abandoned because of the lack of currency in the United States.

n340 Currie, *supra* note 339, at 680. On the other hand, the Marshall Court only overruled three opinions during its thirty-five-year span, the lowest number of any Supreme Court since. See DAVID M. O'BRIEN, *1 CONSTITUTIONAL LAW & POLITICS* 118 (W.W. Norton & Co. 1997).

This statistic, however, is misleading. The Marshall Court frequently addressed questions of first impression, while later courts have been faced with "an ever-expanding target of 'settled decisions.'" Lee, *supra* note 338, at 649. In addition, the Marshall court was dominated by one justice - Marshall. See *id.* He wrote the majority of opinions and encountered little dissent from associate justices. It is not surprising, therefore, that his Court did not overrule many of its opinions. See *id.*

n341 8 U.S. (4 Cranch) 75 (1807).

n342 See *id.* at 100. Marshall also relied on precedent in *Hampton v. McConnell*, 16 U.S. (3 Wheat.) 234 (1818) (writing that the case was covered by a doctrine announced in an earlier decision).

n343 25 U.S. (12 Wheat.) 213 (1827).

n344 *Id.* at 263-64.

n345 See William Cranch, *Preface of 5 U.S.* (1 Cranch) iii-iv (1804).

n346 *Id.*

n347 *THE FEDERALIST NO. 78*, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

n348 Letter from James Madison to Samuel Johnson (June 21, 1789), reprinted in *12 PAPERS OF JAMES MADISON* 250 (1979).

n349 Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 391 (Marvin Meyers, ed. 1981).

n350 *Id.*

n351 *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 103-04 (Johnson J., dissenting).

n352 See Kempin, *supra* note 64, at 31-36.

n353 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 377, at 349-50 (Rothman & Co. 1991). Story, of course, greatly increased the power of the federal courts by expanding their admiralty jurisdiction and by ruling in *Swift v. Tyson* that diversity cases would be governed by federal common law. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 30-35 (1977). In addition, some scholars have suggested that his statement about the importance of precedent was directed toward the practice of vertical, not horizontal, *stare decisis*. See Lee, *supra* note 338, at 664 n.84.

n354 STORY, *supra* note 353, § 377 at 349.

n355 See Kempin, *supra* note 64, at 36-51.

n356 *Id.* at 39, 41.

n357 FRIEDMAN, *supra* note 233, at 21; Kempin, *supra* note 64, at 41.

n358 Kempin, *supra* note 64, at 50-52.

n359 *Robinson v. Bland*, 96 Eng. Rep. 141, 144 (K.B. 1760).

n360 LIEBERMAN, *supra* note 167, at 86, 122-32; see also *supra* notes 207-10 and accompanying text.

n361 See *supra* notes 199-200, 211-215, 313-14, 319-20 and accompanying text.

n362 Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 207; see also TUBBS, *supra* note 2, at 180.

n363 ALLEN, *supra* note 62, at 222.

n364 See Kempin, *supra* note 64, at 34-35, 34 n.21.

n365 See *id.* at 50 (stating that "it can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis").

n366 See *supra* note 346 and accompanying text.

n367 See *supra* note 347 and accompanying text.

n368 It is harder to make this case for pre-revolutionary English decisions than for later cases, because most colonies expressly adopted the common law as it existed prior to 1776. However, as pointed out above, most colonies left room for the courts to depart from common law rules when local conditions made it necessary. See *supra* notes 25254 and accompanying text.

n369 See *supra* notes 306-12 and accompanying text.

n370 KENT, *supra* note 313, at 477 (emphasis added).

n371 *Id.*

n372 See *supra* note 186 and accompanying text.

n373 See *supra* notes 192, 315-16 and accompanying text.

n374 Rosbrook, *supra* note 192, at 131.

n375 KENT, *supra* note 313, at 475.

n376 See Price, *supra* note 43, at 92-93.

n377 See Robert J. Pushaw, Jr., Article III's Case / Controversy Distinction and the Dual Functions of Federal Courts, 69 NOTRE DAME L. REV. 447, 467 (1994) (noting that "the Framers broke with English legal principles in significant ways.").

n378 See SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 50 (1993).

n379 See U.S. CONST. art. III, § 2, cl. 1 (stating that "the judicial Power shall extend to all Cases, in Law and Equity").

n380 See *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

n381 See Caminker, *supra* note 53, at 833 n.69.

n382 See Joyce, *supra* note 327, at 1298 (noting that the Court provided little assistance to early reporters, declining to reduce even its most important opinions to writing).

n383 See Currie, *supra* note 339, at 656, 661, 680, 694, 701; Lee, *supra* note 338, at 669-671.

n384 Apart from Wilson, the justices who had attended the Convention were John Blair Jr., John Rutledge, William Patterson, and Oliver Ellsworth. See *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 25, 155, 347, 389, 535 (Melvin I. Urofsky, ed., Garland Publ'g, Inc., 1994).

n385 John Jay, the first Chief Justice, wrote five of the Federalist Papers, while William Cushing and James Iredell attended their states' ratifying conventions. See *id.*

n386 See *supra* note 353 and accompanying text.

n387 See Pushaw, *supra* note 377, at 468.

n388 See *id.* at 469.

n389 See BARBER, *supra* note 378, at 34.

n390 See *id.*; Pushaw, *supra* note 377, at 469.

n391 *THE FEDERALIST* NO. 22, at 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Elsewhere, Hamilton called it a "striking absurdity" that the government lacked "even . . . the shadow of constitutional power to enforce the execution of its own laws." *THE FEDERALIST* NO. 21, at 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

n392 Liebman & Ryan, *supra* note 18, at 709-10.

n393 U.S. CONST. art. III, § 1.

n394 See *id.* at § 2, cl. 1.

n395 Liebman & Ryan, *supra* note 18, at 747. The only disagreement was over "how best to insure that independence." *Id.* at 713.

n396 THE FEDERALIST NO. 78, supra note 347, at 523 (Alexander Hamilton).

n397 Id.

n398 U.S. CONST. art. III, § 1.

n399 See Todd D. Peterson, Restoring Structural Checks on Judicial Power in the Era of Managerial Judging, 29 U.C. DAVIS L. REV. 41, 47 (1995). Life tenure for judges was considered so essential that the colonists listed the lack of tenure as one of their complaints against King George III in the Declaration of Independence. See THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776) (stating that "he has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries").

n400 See U.S. CONST. art. III, § 1.

n401 THE FEDERALIST NO. 78, supra note 347, at 522 (Alexander Hamilton).

n402 Id. at 522-23.

n403 Id. at 522.

n404 Id.

n405 Id. at 523.

n406 THE FEDERALIST NO. 49, at 341 (James Madison) (Jacob E. Cooke ed., 1961).

n407 THE FEDERALIST NO. 78, supra note 347, at 524 (Alexander Hamilton).

n408 See id. at 523 ("For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'") (quoting MONTESQUIEU, SPIRIT OF THE LAWS, vol. 1 at 181).

n409 THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

n410 Id. at 336 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195).

n411 Id. at 337. Hamilton also made clear that the legislature was more likely to assume judicial power than the courts were to encroach on legislative turf. See THE FEDERALIST NO. 78, supra note 347, at 522-23 (Alexander Hamilton).

n412 THE ANTI-FEDERALIST 183 (Herbert J. Storing ed., 1985).

n413 Id.

n414 See id. at 165-66.

n415 See id. at 166-67.

n416 See id.

n417 See id. at 186.

n418 See Paulsen, *supra* note 5, at 1575-76.

n419 See THE FEDERAL FARMER XV, reprinted in 2 THE COMPLETE ANTI FEDERALIST 315, 316
(Herbert J. Storing ed., 1981).

n420 Id.

n421 See *supra* notes 167-73, 207-20 and accompanying text.

n422 See U.S. CONST. art. II, § 2, cl. 2 (declaring that "[the president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

n423 See THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that the involvement of the Senate "would tend greatly to prevent the appointment of unfit characters from State prejudice").

n424 See Michael J. Gerhardt, Putting Presidential Performance in the Federal Appointments Process in Perspective, 47 CASE W. RES. L. REV. 1359, 1366 n.10 (1997) (predicting that "the possibility of rejection" would motivate the president to nominate acceptable candidates for civil offices); see also THE FEDERALIST NO. 76, *supra* note 423, at 513 (Alexander Hamilton).

n425 U.S. CONST. art. II, § 4.

n426 Thirteen federal judges have been impeached by the House of Representatives. Of those, seven have been convicted by the Senate and removed from office. See Sambhav N. Sanker, Disciplining the Professional Judge, 88 CAL. L. REV. 1233, 1249 (2000).

n427 See THE ANTI-FEDERALIST, supra note 412, at 185.

n428 THE FEDERALIST NO. 81, at 546 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

n429 Id.

n430 See U.S. CONST. art. II; § 3 (stating that the president "shall take Care that the Laws be faithfully executed").

n431 THE FEDERALIST NO. 78, supra note 347, at 523 (Alexander Hamilton).

n432 See Liebman & Ryan, supra note 18, at 703.

n433 See U.S. CONST. art. III, § 1 (declaring that "the judicial Power shall be vested in on supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

n434 See Liebman & Ryan, supra note 18, at 716-718, 765.

n435 See U.S. Const. art. III, § 2.

n436 See Henry M. Hart Jr., The Power of Congress to Limit the Jurisdiction of the Federal Court: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1370 (1953); Liebman & Ryan, supra note 18, at 700 n.9 (describing the "majority view" that Congress has control over federal court jurisdiction).

n437 See Liebman & Ryan, supra note 18, at 705-07.

n438 See, e.g., Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 229-30, 238-59 (1985); Lawrence Gene Sager, The Supreme Court, 1980 Term Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 42-68 (1981); Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 YALE L.J. 498, 522, 527 (1974).

n439 See Liebman & Ryan, supra note 18, at 767-773.

n440 THE FEDERALIST NO. 81, supra note 428, at 545 (Alexander Hamilton).

n441 Id.

n442 THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

n443 Letter from James Madison to Thomas Jefferson (June 27, 1823), reprinted in 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83-84 (Max Farrand ed., 1911).

n444 See THE FEDERALIST NO. 78, *supra* note 347, at 528-29 (Alexander Hamilton).

n445 *Id.* at 529.

n446 See *Anastasoff v. United States*, 223 F.3d 898, 902 (8th Cir. 2000).

n447 *Lee*, *supra* note 338, at 663; see also *Paulsen*, *supra* note 5, at 1573-74.

n448 See *Paulsen*, *supra* note 5, at 1573-74.

n449 THE FEDERALIST NO. 78, *supra* note 347, at 525 (Alexander Hamilton).

n450 See *BARBER*, *supra* note 378, at 49; see also *Paulsen*, *supra* note 5, at 1576 (arguing that any claims about the binding effect of precedent would have provided Anti-Federalists with additional weapons in their attack on the judiciary).

n451 *BARBER*, *supra* note 378, at 111.

n452 *Paulsen*, *supra* note 5, at 1574.

n453 See *id.*

n454 THE FEDERALIST NO. 47, at 323 (James Madison) (Jacob E. Cooke ed., 1961) ("One of the principal objections inculcated by the more respectable adversaries of the constitution is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.").

n455 See *id.* at 325.

n456 *Id.*

n457 *Id.* at 325-26.

n458 THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison).

n459 *Id.* at 333.

n460 *Id.*

n461 See THE FEDERALIST NO. 49, *supra* note 406, at 339 (James Madison).

n462 See *id.* at 338-39.

n463 *Id.* at 339.

n464 *Id.*

n465 See *id.* at 339-40. In Federalist No. 50, Madison argued that similar concerns mitigated against a provision calling for conventions at fixed intervals. If the intervals were too short, he argued, the same passions that led to the dispute would govern its resolution, with the legislature being better placed to influence the public's decision. If the intervals were too long, the damage would be done before the distribution of powers could be clarified. See THE FEDERALIST No. 50, at 343-46 (James Madison) (Jacob E. Cooke ed., 1961).

n466 THE FEDERALIST NO. 48, *supra* note 409, at 338 (James Madison).

n467 THE FEDERALIST No. 51, at 347-48 (James Madison) (Jacob E. Cooke ed., 1961).

n468 *Id.* at 349.

n469 See *id.*

n470 *Id.* (emphasis added).

n471 See U.S. CONST. art. I, § 8.

n472 See U.S. CONST. art. I, § 7, cl. 2.

n473 U.S. CONST. art. II, § 3.

n474 See U.S. CONST. art. II, § 2, cl. 2.

n475 See U.S. CONST. art. I, § 7, cl. 2.

n476 See U.S. CONST. art. I, § 2, cl. 5 (providing for the power of the House to impeach); *Id.* at art. I, § 3, cl. 6 (providing for the power of the Senate to convict); *Id.* at art. II, § 4 (providing for the impeachment of the president).

n477 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The Chief Justice of the United States also presides over any trial of conviction in the Senate. See U.S. CONST. art. I, § 3, cl. 6.

n478 See U.S. CONST. art. II, § 2, cl. 2.

n479 THE FEDERALIST NO. 51, *supra* note 467, at 349 (James Madison).

n480 See THE FEDERALIST NO. 78, *supra* note 347, at 523 (Alexander Hamilton) (explaining that the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments").

n481 See U.S. CONST. art. I, § 2, cl. 5 (the power of the House to impeach); art. I, § 3, cl. 6 (the power of the Senate to convict); art. II, § 4 (providing for the impeachment of all civil officers of the United States).

n482 See U.S. CONST. art. III, § 1 (stating that Congress "may from time to time ordain and establish" lower federal courts); art. III, § 2, cl. 2 (giving Congress the power to make "Exceptions" and "Regulations" to the appellate jurisdiction of the Supreme Court).

n483 THE FEDERALIST NO. 51, *supra* note 467, at 349 (James Madison).

n484 But see Peterson, *supra* note 399, at 52-56 (arguing that the obligation to follow precedent restrains judicial power). Peterson does not explain how *stare decisis* can check judicial power if judges decline to police themselves. See *id.*

n485 THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison). It is true that the Framers relied on intra-branch checks to restrain legislative power. They divided Congress into two houses, with different modes of election and terms of office, and ensured that neither house could accomplish anything without the cooperation of the other. However, as Madison explained in Federalist No. 51, this intra-branch checking mechanism was necessary to prevent legislative dominance over the other two branches. And it operates on the same principles underlying the larger system of checks and balances - that is, it pits the ambition of the two houses against each other instead of relying on the self-restraint of Congress as a whole.

n486 Cf. Liebman & Ryan, *supra* note 18, at 772 (pointing out that judicial compliance with internal obligations "confers a kind of power - i.e., the neutrality and integrity needed to command the respect and acquiescence of states and federal branches disadvantaged by the judges' decisions").

n487 See supra note 443 and accompanying text.

n488 See U.S. CONST. art. VI, cl. 2.

n489 See THE FEDERALIST NO. 48, supra note 409, at 332-33 (James Madison).

n490 Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992) ("The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.").

n491 *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting).

n492 *Casey*, 505 U.S. at 867. See also Monaghan, supra note 5, at 748-762 (discussing the role of stare decisis in promoting system legitimacy).

n493 Lawson, supra note 5, at 28 ("At least as a prima facie matter, the reasoning of *Marbury* thoroughly de-legitimizes precedent.").

n494 See WASSERSTROM, supra note 39, at 42-53.

n495 See Bobbitt, supra note 38, at 751-75 (arguing that the legitimacy of judicial practices is guaranteed solely by their use and acceptance).

n496 By one count, the Supreme Court overruled 212 decisions between 1801 and 1986, yet the Court's legitimacy is not seriously in doubt. See O'BRIEN, supra note 340, at 118. Some departures from precedent, such as the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), have even bolstered its legitimacy.

n497 See Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis, 105 YALE L.J. 2031, 2037-40 (1996). A few scholars have offered deontological justifications for stare decisis, but as Professor Peters demonstrates, those accounts are difficult to defend. See *id.* at 2065-112. The far more common claim is that stare decisis is worthwhile because of the ends it serves. See *id.* at 2039-40.

n498 See GOODHART, supra note 191, at 61-62; WASSERSTROM, supra note 39, at 60-66; Earl Maltz, The Nature of Precedent, 66 N.C. L. REV. 367, 368 (1988); Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 597 (1987).

n499 See WASSERSTROM, supra note 39, at 61-66.

n500 See *id.*; Maltz, supra note 498, at 368.

n501 See WASSERSTROM, supra note 39, at 69-72; Maltz supra note 498, at 369.

n502 See WASSERSTROM, *supra* note 39, at 66-72.

n503 Karl Llewellyn, *Case Law*, in 3 *ENCYCLOPEDIA OF SOCIAL SCIENCES* 249 (Macmillan Co. 1930).

n504 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

n505 U.S. CONST. amend. XIV, § 1.

n506 See WASSERSTROM, *supra* note 39, at 72-73.

n507 See *id.*

n508 BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1925).

n509 *Id.* See also *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("No judicial system could do society's work if it eyed each issue afresh in every case.").

n510 See WASSERSTROM, *supra* note 39, at 75-78; Maltz, *supra* note 498, at 371.

n511 See WASSERSTROM, *supra* note 39, at 78; Maltz, *supra* note 498, at 371.

n512 *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Justice Thurgood Marshall expressed similar sentiments in *Vasquez v. Hillery*, 474 U.S. 254, 265-56 (1986) (stating that adherence to precedent "contributes to the integrity of our constitutional system of government both in appearance and in fact" and ensures "that bedrock principles are founded in law rather than in the proclivities of individuals.").

n513 See WASSERSTROM, *supra* note 39, at 64.

n514 See *id.* One scholar has gone so far as to suggest that *stare decisis* has not contributed at all to legal certainty:

Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves - the government of the living by the dead, as Herbert Spencer has called it.

JOHN H. WIGMORE, *PROBLEMS OF LAW* 79 (1920).

n515 See Maltz, *supra* note 498, at 370.

n516 See WASSERSTROM, *supra* note 39, at 72-73.

n517 *Planned Parenthood v. Casey*, 505 U.S. 833, 854-69.

n518 See Paulsen, *supra* note 5, at 1545 ("It is not clear at all that the 'obligation to follow precedent' . . . creates any true judicial efficiency gains at all.").

n519 See Peters, *supra* note 497, at 2065-73.

n520 See *id.*

n521 See *id.*

n522 *Id.* at 2068.

n523 See WASSERSTROM, *supra* note 39, at 75-79.

n524 *Id.* at 78.

n525 *Id.* at 78-79.

n526 See Lawson, *supra* note 5, at 24.

n527 GOODHART, *supra* note 191, at 56.

n528 *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

n529 Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 *LOY. U. CHI. L.J.* 1, 12 (1989). Another study found "no support for the hypothesis that limited publication enhances productivity." William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Circuit Court of Appeals: The Price of Reform*, 48 *U. CHI. L. REV.* 573, 596 (1981). However, the authors did find that unpublished opinions are usually much shorter than published opinions, which they said suggests that the practice may save judges time. See *id.* at 600. In any event, there is no evidence that writing non-precedential opinions reduces productivity.

n530 See Martin, *supra* note 21, at 190 (estimating that he and his clerks spend half the time working on unpublished opinions that they spend on published opinions).

n531 See *id.*

n532 Schauer, *supra* note 498, at 572-573.

n533 See *id.*

n534 See *id.* at 589.

n535 See 7TH CIR. R. 53(c)(1).

n536 See 4TH CIR. R. 36(a) (an opinion will be published only if it establishes, alters, modifies, clarifies, or explains a rule of law within the circuit; involves a legal issue of continuing public importance; criticizes existing law; contains an historical review of a legal rule that is not duplicative; or resolves an intra-circuit conflict, or creates a conflict with another circuit); 5TH CIR. R. 47.5.1 (an opinion is published if it establishes, alters, or modifies a rule of law, or calls into question a rule of law that has been generally overlooked; applies an established rule to facts significantly different from those in prior published opinions; explains, criticizes, or reviews the history of existing case law or statutes; creates or resolves an intra-circuit or inter-circuit conflict; concerns or discusses a factual or legal issue of significant public interest; or is rendered in a case that has been reviewed by, and had its merits addressed by, the U.S. Supreme Court); 6TH CIR. R. 206(a) (in deciding whether to publish, court shall consider whether the opinion establishes, alters, or modifies a rule of law or applies an established rule to novel facts; creates or resolves an intra-circuit or inter-circuit conflict; discusses a legal or factual issue of continuing public interest; is accompanied by a concurrence or dissent; reverses the decision below; addresses a lower court or agency decision that was published; or is a decision that has been reviewed by the Supreme Court); 9TH CIR. R. 36-2 (a disposition should be published only if it establishes, alters, modifies, or clarifies a rule of law; calls attention to a rule generally overlooked; criticizes existing law; involves a legal or factual issue of unique interest or substantial public importance; addresses a lower court or agency decision that was published; disposes of a case following reversal or remand by the Supreme Court; is accompanied by a concurrence or dissent written by a judge who requests publication); D.C. CIR. R. 36(a)(2) (opinion should be published if it resolves an issue of first impression; alters, modifies, or significantly clarifies a rule of law previously announced by the court; calls attention to a rule of law generally overlooked; criticizes or questions existing law; resolves an intra-circuit conflict or creates an inter-circuit conflict; reverses a published agency or district court decision, or affirms on different grounds; or warrants publication in light of other factors that give it general public interest).

n537 The Eighth Circuit does list criteria by which judges should decide whether to affirm or enforce a lower court decision without an opinion. The court may forego a written opinion if the judgement of the district court is based on findings of fact that are not clearly erroneous; the evidence in support of a jury verdict is not insufficient; the order of an agency is supported by substantial evidence on the record as a whole; or no error of law appears. See 8TH CIR. R. 47B.

The Circuit provides no separate guidelines for when a written opinion should be published. See generally 8TH CIR. R. 47.

n538 The Tenth Circuit rules state only that issuance of an unpublished opinion means that "the case does not require application of new points of law that would make the decision a valuable precedent." 10TH CIR. R. 36.1. An advisory note to the Eleventh Circuit rules explains that "opinions that the panel believes to have no precedential value are not published." 11TH CIR.

R. 36-1, Advisory Note 5.

n539 See Arnold, *supra* note 14, at 224-25.

n540 See Reynolds & Reichman, *supra* note 529, at 629 ("The publication decision will be made in a more intelligent and consistent manner if the judges have detailed criteria to guide them."); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 JUDICATURE 307, 313 (1990) (explaining how a lack of precise, detailed publication rules leads to inconsistent behavior among judges).

n541 For a similar recommendation, see Braun, *supra* note 14, at 93 (2000).

n542 See Arnold, *supra* note 14, at 223 (describing ways in which judges can abuse the practice of issuing non-published decisions).

n543 KARL N. LLEWELLYN, Introduction to THE CASE LAW SYSTEM IN AMERICA xviii (Univ. of Chi. Press 1989).

n544 STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 147-48 (1980).

n545 See *id.*

n546 Martin, *supra* note 21, at 192.

n547 See William L. Reynolds & William L. Richman, The Non-Precedential Precedent: Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167, 1203 (1978) (speculating that the Supreme Court would be less likely to review unpublished opinions than published opinions).

n548 See SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 113 (7th ed. 1993).

n549 See Johnson v. United States, 529 U.S. 694 (2000); Sims v. Apfel, 530 U.S. 103 (2000); Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994); Houston v. Lack, 487 U.S. 266 (1988); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984); Connick v. Myers, 461 U.S. 138 (1983); Moore v. Illinois, 434 U.S. 220 (1977).

n550 The Tenth Circuit rules, for instance, state that en banc review "is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." 10TH CIR. R. 35.1(A). The Federal Rules of Appellate Procedure, which many circuits follow in the absence of a local rule on point, state that en banc review should be used to maintain the uniformity of the circuit's decisions or to resolve a question of exceptional importance.

See FED. R. APP. P. 35(a). The Sixth Circuit disapproves of en banc review for errors in nonprecedential opinions, but appears to leave open the possibility of en banc review for nonprecedential opinions that "directly conflict" with Supreme Court or Sixth Circuit precedent. See 6TH CIR. R. 35(c).

n551 Judge Arnold does argue that courts should be required to justify deviations from precedent. See 223 F.3d 898 (8th Cir. 2000), vacated as moot, Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc). But he makes no mention of a general requirement that they explain the reasons for their decisions. See *id.*

n552 See Richard A. Posner, Judges' Writing Styles (And Do They Matter?), 62 U. CHI. L. REV. 1421, 1447-48 (1995); Reynolds & Richman, *supra* note 529, at 603.

n553 See Nichols, *supra* note 31, at 915 (describing how the process of writing an opinion often clarifies whether it should be precedential or non-precedential); Peter M. Shane, Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism, 45 VILL. L. REV. 201, 225 (2000). It is true that the process of justification is most likely to encourage compliance with substantive rules of law, but it

can also promote adherence to the rule of disposition. In other words, judges may find that a particular decision just "won't write" as a non-precedential opinion.

n554 Nor should the fact that non-precedential opinions are not published in the federal reporters make any difference. Non-precedential opinions, like published opinions, are searchable in the Westlaw and Lexis databases. See Martin, *supra* note 21, at 185-86. Additionally, few lawyers today spend their time combing through the federal reporters.

n555 The First, Fifth, and Sixth Circuits require all three judges to agree on whether a decision will be published (and thus precedential). See 1ST CIR. R. 36(b)(2)(B); 5TH CIR. R. 47.5.2; 6TH CIR. R. 206(b). The Seventh, Ninth, and Eleventh Circuits require only a majority vote to determine the issue of publication. See 7TH CIR. R. 53(d)(1); 9TH CIR. R. 36-5; 11TH CIR. R. 36-2. The Fourth Circuit states that either the author or a majority of joining judges can decide whether to publish. See 4TH CIR. R. 36(a). The Eighth, Tenth, and D.C. Circuits provide for unpublished opinions, but do not specify how many judges on a panel must agree to this form of disposition. The Third Circuit rules do not address the topic of unpublished opinions at all.

n556 See Arnold, *supra* note 14, at 221.

n557 See Nichols, *supra* note 31, at 924 (stating that a requirement of unanimity is a "safeguard against injudicious failure to publish"). Indeed, there is some empirical evidence that merely specifying the number of judges on a panel who must vote on the issue of publication tends to result in a higher number of published opinions. See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 89 (2001) (finding that cases are more likely to be published in circuits requiring a majority vote for publication than in those circuits that do not specify how many judges are needed to vote on publication).

n558 See D.C. CIR. R. 36(c).

n559 I do not think it should require a majority vote to change the form of disposition. I also do not think one judge should have this power. The reason is that if an individual judge objected to the practice of issuing non-precedential decisions, she could single-handedly eliminate the practice. A requirement that one-fourth of the judges agree before the form of disposition is changed seems like a reasonable compromise.