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Stare Decisis and Due Process

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STARE DECISIS AND DUE PROCESS

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INTRODUCTION

Courts and commentators have devoted a great deal of attention lately to the constitutional limits of stare decisis. The Eighth Circuit's decision in *Anastasoff v. United States* has sparked scholarly and judicial debate about whether treating unpublished opinions as devoid of precedential effect violates Article III.[1] Debates have also erupted over the question whether Congress has the power to abrogate stare decisis by statute,[2] and the related question whether stare decisis is a

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1. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g* en banc, 235 F.3d 1054 (8th Cir. 2000). For cases addressing this issue, see Symbol Technologies, Inc. v. Lemelson Med., Educ., & Research Found., 277 F.3d 1361 (Fed. Cir. 2002); Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001); Williams v. Dallas Rapid Area Transit, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); Suboh v. City of Revere, 141 F. Supp. 2d 124, 144 n.18 (D. Mass.), *aff'd in part, rev'd in part*, 298 F.3d 81 (1st Cir. 2001). For a sampling of recent literature addressing this issue, see Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2D 17 (2000); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43; Thomas R. Lee & Lance S. Lehnhof, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135 (2001); Polly J. Price, *Precedent & Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000); Kenneth Anthony Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002); Daniel B. Levin, Case Note, *Fairness and Precedent*, 110 YALE L.J. 1295 (2001); Lance A. Wade, Note, Honda *Meets* Anastasoff*: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001).

2. *See* John Harrison, *The Power of Congress Over Rules of Precedent*, 50 DUKE L.J. 503 (2000); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMM. 191 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

doctrine of constitutional stature or merely of judicial discretion.[3]

This Article explores a different constitutional limit on the doctrine of stare decisis: the Due Process Clause. Most writing about stare decisis treats the doctrine as one of exclusively institutional concern.[4] Courts and commentators conceive of stare decisis as a doctrine that binds judges rather than litigants, and they have traditionally devoted the study of stare decisis to the doctrine's systemic costs and benefits. For example, the concerns driving the contemporary debate about stare decisis include whether stare decisis is efficient,[5] whether overruling precedent harms the public's perception of the judiciary,[6] and whether certain kinds of social reliance interests should count more heavily than others in a court's overruling calculus.[7]

Missing from the discussion is an appreciation for the way that stare decisis affects individual litigants. To the extent that stare decisis binds judges, it inevitably binds litigants as well. Indeed, when viewed from the perspective of an individual litigant, stare decisis often functions like the doctrine of issue preclusion—it precludes the relitigation of issues decided in earlier cases. This preclusive effect is real, and it can affect an individual litigant dramatically. Courts and commentators, however, generally fail to focus on the way that stare decisis precludes individual litigants, much less on the question that occupies most of the discussion in the parallel context of issue preclusion: whether preclusion of litigants, particularly nonparty litigants, offends the Due Process Clause.

In this Article, I argue that the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality. The Due Process Clause requires that a person receive notice and an opportunity for a hearing before a court deprives her of life, liberty, or property.[8] In the context of preclusion, courts have translated this requirement into the

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3. *See* Richard Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001).

4. *See infra* notes 69–76 and accompanying text.

5. *See infra* note 76.

6. *See infra* note 75.

7. *See infra* note 70.

8. U.S. CONST. amends. V, XIV.

general rule that a judicial determination can bind only the parties to a dispute, for only the parties have received notice of the proceeding and an opportunity to litigate the merits of their claims.[9] The preclusion literature summarily asserts that this "parties only" requirement does not apply to stare decisis because prior judicial determinations do not "bind" nonparties through the operation of stare decisis; stare decisis, in contrast to issue preclusion, is a flexible doctrine permitting error-correction.[10] Yet stare decisis often functions *inflexibly* in the federal courts, binding litigants in a way indistinguishable from nonparty preclusion.[11] I argue that in its rigid application—when it effectively forecloses a litigant from meaningfully urging error-correction—stare decisis unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims. To avoid the due process problem, I argue that stare decisis must be flexible in fact, not just in theory.

The Article proceeds as follows. Parts I and II set up the problem. Part I describes the ways in which precedent precludes litigants, despite the common assumption that a court's ability to distinguish cases deprives precedent of any potentially preclusive effect. Part II explains the way in which the courts have fleshed out the requirements of due process in the context of issue preclusion. In Part II, I highlight the tension created by the courts' solicitude for the due process rights of litigants for purposes of preclusion and the corresponding lack of such solicitude for purposes of stare decisis.

Part III analyzes whether stare decisis differs from issue preclusion in a way that justifies its remarkably different treatment of nonparty litigants. I first examine the conventional theoretical justification for the difference, which

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9. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971) ("Due process prohibits estopping [nonparties] despite one or more existing adjudications of the identical issue which stand squarely against their position."). *See infra* notes 95–96 and accompanying text (discussing the limits of issue preclusion).

10. *See infra* notes 123–26 and accompanying text. I limit this assertion to one found in the preclusion literature because courts have not grappled with the due process difference between stare decisis and issue preclusion. To the extent that they consider issue preclusion and stare decisis in conjunction, they tend to consider stare decisis to be a variant of preclusion, but one that reaches beyond the parties to a dispute. *See infra* notes 117–20 and accompanying text.

11. *See infra* Part I.A.

is the supposed flexibility of stare decisis. The Due Process Clause generally prohibits the application of issue preclusion to nonparties because the initial case presents the only opportunity for a hearing on the merits; in later cases, courts will not entertain arguments about whether the prior determination was correct. Under a flexible version of stare decisis, by contrast, the initial case does not present the only opportunity for a hearing; in later cases, litigants may challenge the merits of the earlier decision. Part III argues that while the flexibility rationale works as a matter of theory, it fails to justify the way that the federal courts apply precedent to nonparties in practice. The federal courts, particularly the courts of appeals, generally have taken an *inflexible* approach to stare decisis. Once precedent is set, a court rarely revisits it, even in the face of compelling arguments that the precedent is wrong.

Part III thus asks whether a rationale other than flexibility can justify binding nonparties for purposes of stare decisis but not issue preclusion. Specifically, I examine whether the difference between factual determinations and legal ones can justify applying the Due Process Clause in one context but not the other. Because issue preclusion historically applied only to questions of fact, one might be tempted to assume that the right to a hearing extends only to factual disputes. Part III argues that this assumption is flawed. As an initial matter, it is no longer true that issue preclusion applies exclusively to matters of fact. Courts have extended preclusion to issues of law, thereby at least implicitly recognizing that the Due Process Clause guarantees a hearing with respect to legal as well as factual disputes. And that implicit recognition is correct. Whether federal courts act to resolve legal or factual questions, they can act only through adjudication, and adjudication necessarily triggers the Due Process Clause. It is the act of adjudication, not the nature of the determination at stake, that determines whether the Due Process Clause applies.

Part IV considers the implications of due process for stare decisis. The primary implication is that courts should apply precedent flexibly. As a matter of theory, a litigant's ability to secure error-correction is what distinguishes stare decisis from issue preclusion. To the extent that a court applies the rules of stare decisis in a way that makes it impossible, practically speaking, for a litigant to convince a court to overrule

erroneous precedent, the court deprives that litigant of a hearing on the merits of her claim. Part IV emphasizes, however, that a flexible approach to stare decisis does not render reliance interests irrelevant. Particularly when the alleged error is one that falls within a court's federal common law authority, or its ability to choose one reasonable interpretation of a text rather than another, a court should seriously consider reliance interests in deciding whether to adhere to precedent. But the court must also account for the due process rights of individual litigants, and, when precedent clearly exceeds the bounds of statutory or constitutional text, reliance interests should figure far less prominently in a court's overruling calculus.

Two limitations on my analysis are worth mentioning at the outset. My exploration of these two doctrines is limited to their treatment by the federal courts. And my exploration of stare decisis is limited to its "horizontal," as opposed to its "vertical" effect; in other words, I consider a court's obligation to follow its own precedent, rather than its obligation to follow the precedent of a superior court.[12]

Because most contemporary studies of stare decisis focus on the Supreme Court, it is worth emphasizing that the primary implications of this study will be for the courts of appeals. As a general rule, the district courts do not observe horizontal stare decisis.[13] And while the force of horizontal stare decisis is certainly felt in the Supreme Court, the courts of appeals feel it more keenly. It is rare that a litigant is wholly precluded by precedent in the Supreme Court, because the Supreme Court generally grants certiorari only on open

12. The nature of a lower court's obligation to obey higher courts is a topic in its own right. *See generally* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 272–79 (1992); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); *see also* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33 (1989).

13. Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., 240 F.3d 956, 965 n.14 (11th Cir. 2001); United States v. Cerceda, 172 F.3d 806, 812 n.6 (11th Cir. 1999); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995); Crown Builders v. Stowe Eng'g Corp., 8 F. Supp. 2d 483 (D.V.I. 1998); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 1997) [hereinafter MOORE'S FEDERAL PRACTICE]; *see also* Lee & Lehnhof, *supra* note 1, at 168–69 (describing long historical tradition of district courts refusing to treat the precedent of other district courts, even within the same district, as controlling).

questions, or on questions that the Court deliberately selects for reconsideration.[14]

I. STARE DECISIS

"Stare decisis" is short for *stare decisis et non quieta movere*, which means "stand by the thing decided and do not disturb the calm."[15] The term "stare decisis" is used in varying ways.[16] At its most basic level, however, stare decisis refers simply to a court's practice of following precedent, whether its own or that of a superior court.[17] I will use the term in this respect.

A. The Preclusive Effect of Stare Decisis

An initial burden in making a due process argument about stare decisis is convincing the audience that precedent matters. Conventional wisdom has it that stare decisis is a flexible doctrine, and, to the extent that doctrinal rules ever *require* a particular result, precedent is manipulable enough to leave

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14. The discretionary nature of certiorari means that the Supreme Court need not (and usually does not) take cases that can be decided comfortably by its existing case law. Thus, while stare decisis is the primary means of enforcing the status quo in the courts of appeals, in the Supreme Court, the status quo generally is enforced by the denial of certiorari. The Supreme Court's discretionary jurisdiction has another effect on stare decisis: it has created a smaller body of Supreme Court case law. Litigants are freer in the Supreme Court because there are more open issues. In a court of appeals, particularly one with a heavy docket, a larger number of cases controls the court's moves. The court's decision at the circuit level will also be more confined by the rule that one panel cannot overrule another. While the Supreme Court is constrained by strong doctrinal presumptions against overruling—which are not insignificant—the "no panel overruling" rule erects an additional, firmer bar to overruling in the courts of appeals.

15. James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U.L. REV. 345, 347 (1986).

16. For example, Frederick Schauer uses "stare decisis" to refer to a lower court's obligation to obey superior court case law and "precedent" to refer to a court's obligation to obey its own prior case law. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 n.11 (1987) [hereinafter Schauer, *Precedent*]. Polly Price uses "stare decisis" to mean "a strict practice of following precedent," and "the doctrine of precedent" to mean a practice of looking to prior case law. Price, *supra* note 1, at 84 n.10, 105.

17. I will use the terms "horizontal" stare decisis and "vertical" stare decisis to distinguish between a court's practice of following its own precedent and a court's practice of following the precedent of a superior court.

courts free to escape that result if they choose. Certainly, if this is true, one need not worry about the impact of stare decisis on individual litigants.

1. Doctrinal Rules Treat Precedent as Preclusive

Despite the conventional wisdom—and despite the fact that the conventional wisdom is sometimes right—precedent does operate to preclude litigants in the mainstream of cases. Once a court decides an issue in a published opinion, a later litigant may debate whether the earlier case applies, but she typically may not debate whether the court correctly decided it. Thus, if the Eighth Circuit decides in Plaintiff A's case that tax refund claims are timely under the Internal Revenue Code only when the IRS *receives* them on time, Plaintiff B cannot successfully argue in the Eighth Circuit that tax refund claims are timely when *mailed* on time.[18] Precedent settles the issue for Plaintiff B, no matter what arguments Plaintiff B can advance in support of a "mailbox rule." First-in-time litigants usually receive the only opportunity to air arguments on the merits of a legal issue.

The merits are closed to Plaintiff B because the rules and presumptions that the federal courts have adopted to guide the treatment of precedent ensure, as they are intended to, that overruling rarely occurs. Litigants feel precedent's preclusive effect most keenly in the courts of appeals, which candidly describe their approach to stare decisis as "strict," "binding," and "rigid."[19] This rigidity comes largely from the rule, followed in every circuit, that one panel cannot overrule

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18. *Cf.* Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) (rejecting appellant's arguments for a "mailbox" rule to gauge timeliness of tax-refund claims because *Christie v. United States* established a "receipt" rule); Christie v. United States, 1992 U.S. App. LEXIS 38446, at *7 (8th Cir. Mar. 20, 1992) (per curiam) (establishing "receipt" rule to gauge timeliness of tax refund claims).

19. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001) (describing federal stare decisis as "a system of strict binding precedent"); *id.* at 1167 (doubtful that the "Framers viewed precedent in the rigid form that we do today"); Ford v. Cimarron Ins. Co., 230 F.3d 828, 832 (5th Cir. 2000) (rule that one panel cannot overrule another is "immutable"); FDIC v. Abraham, 137 F.3d 264, 268 (5th Cir. 1998) ("We are, of course, a strict stare decisis court."); Sam & Ali, Inc. v. Ohio Dep't of Liquor Control, 158 F.3d 397, 405 (6th Cir. 1998) (prior panel decision is "binding stare decisis"); Robbins v. Amoco Prod. Co., 952 F.2d 901, 904 (5th Cir. 1992) (panel "owe[s] strict obedience to circuit precedent").

another.[20] A panel possesses the authority to overrule precedent only when there has been an intervening, contrary decision by the Supreme Court or by the relevant court of appeals sitting en banc.[21] Thus, while a litigant may make persuasive arguments for overruling precedent, the panel is obliged by circuit rule to ignore them.[22] Indeed, the Federal Circuit recently went so far as to say that it "would not welcome" future appeals on a particular issue given the obligation of future panels to follow precedent.[23]

Litigants will find the merits of certain issues foreclosed even in courts with the authority to overrule precedent, such as the Supreme Court or a court of appeals sitting en banc. Neither the Supreme Court nor any of the courts of appeals

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20. *See* Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, 136 F.3d 34, 40 (1st Cir. 1998); Woodling v. Garrett Corp., 813 F.2d 543, 557 (2d Cir. 1987); Abdulai v. Ashcroft, 239 F.3d 543, 553 (3d Cir. 2001); 3D CIR. I.O.P. 9.1; Norfolk & West. Ry. Co. v. Dir., Office of Worker's Comp. Programs, 5 F.3d 777, 779 (4th Cir. 1993); *Abraham*, 137 F.3d at 268; *Sam & Ali*, Inc., 158 F.3d at 405; Dir., Office of Workers' Comp. Programs v. Peabody Coal Co., 554 F.2d 310, 333 (7th Cir. 1977); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1297 (8th Cir. 1994); *In re* Osborne, 76 F.3d 306, 309 (9th Cir. 1996); United States v. Meyers, 200 F.3d 715, 720 (10th Cir. 2000); 11TH CIR. RULE 36-3; United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc); Thompson v. Thompson, 244 F.2d 374, 375 (D.C. Cir. 1957); LaForte v. Horner, 833 F.2d 977, 980 (Fed. Cir. 1987).

21. *See* cases cited *supra* note 20.

22. A colleague has raised the question whether the "no panel overruling" rule is more fairly characterized as a rule of stare decisis or as a rule of circuit administration. A fair number of cases explicitly treat the rule as a variant of stare decisis. *See, e.g.*, Stauth v. Nat'l Union Fire Ins. Co., 236 F.3d 1260, 1267 (10th Cir. 2001); United States v. Lewko, 269 F.3d 64, 66 (1st Cir. 2001); *Abraham*, 137 F.3d at 269; Williams v. Chrans, 50 F.3d 1356, 1357 (7th Cir. 1995). Even putting the courts' apparent understanding of the rule aside, I think the rule is fairly treated as part of stare decisis doctrine. The "no panel overruling" rule, like the rules of stare decisis generally, specifies the terms on which precedent may be overruled. Granted, it is a rule of circuit administration insofar as it allocates decisionmaking power between panels situated earlier in time, panels situated later in time, and the en banc court. *Cf.* North Carolina Util. Comm'n v. FCC, 552 F.2d 1036, 1045 (4th Cir. 1977) ("If the rule of interpanel accord serves a purpose different from that of stare decisis, its purpose must be to allocate decision-making power between coequal panels subject to reversal by the Court of Appeals en banc."). But in this respect, stare decisis itself is a rule of judicial administration. It too "allocate[s] decisionmaking responsibility among successive courts, by specifying the point at which an issue may be addressed." Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 304 (1979). The "no panel overruling" rule, like stare decisis generally, is a means by which the courts order the exercise of the judicial power so as to maintain stability in the law.

23. Phonometrics Inc. v. Choice Hotels Int'l, Inc., 2001 WL 1217219, at *912 (Fed. Cir. Oct. 9, 2001).

will overrule precedent absent "special justification."[24] Error in the precedent does not so qualify.[25] Instead, in addition to the error, courts consider a series of factors. To be overruled, a case should be not only erroneous, but also unworkable.[26] Overruling it should not tarnish the public's perception of the judiciary or upset reliance interests.[27] The very strong presumption in the federal courts is that precedent will stand.[28]

In certain categories of cases, courts have strengthened this presumption even further. The Supreme Court and many of the courts of appeals have adopted a "super strong" presumption of irreversibility for statutory precedent on the theory that Congress's failure to amend a statute in response to a judicial interpretation of it reflects approval of that interpretation.[29] This "super strong" presumption for statutory

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24. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000); United States v. Int'l Bus. Mach. Corp., 517 U.S. 843, 856 (1996); Payne v. Tennessee, 501 U.S. 808, 849 (1991) ("[T]his Court has never departed from precedent absent 'special justification.'"); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (same); Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Arecibo Cmty. Health Care v. Puerto Rico, 270 F.3d 17, 22 (1st Cir. 2001) ("A departure from stare decisis must . . . be supported by some 'special justification.'"); United States v. Reveron Martinez, 836 F.2d 684, 687 n.2 (1st Cir. 1988) (same); *see also* Emery G. Lee, III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582 (2002) (arguing that the "special justification" standard is a relatively new requirement).

25. *See* cases cited *supra* note 24; *see also* Emery G. Lee, III, *supra* note 24, at 582 ("special justification" requires "more than the belief that the precedent was wrongly decided").

26. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854–55 (1992) (considering, *inter alia*, whether prior rule was unworkable); Gately v. Massachusetts, 2 F.3d 1221, 1226 (1st Cir. 1993) (noting that "a decision may properly be overruled if seriously out of keeping with contemporary views or passed by in the development of the law or proved to be unworkable").

27. *Casey*, 505 U.S. at 855–56, 865.

28. *See, e.g.*, *Payne*, 501 U.S. at 827 ("Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)); *Gately*, 2 F.3d at 1226 ("[T]here is a heavy presumption that settled issues of law will not be reexamined.").

29. *Patterson*, 491 U.S. at 172–73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); *see also* Hohn v. United States, 524 U.S. 236, 251 (1998); Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424, n.34 (1986); Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). The courts of appeals apply the same presumption. *See, e.g.*, Elec. Contractors, Inc. v. NLRB, 245 F.3d 109, 120–21 (2d Cir. 2001); Stewart v. Dutra Constr. Co., 230 F.3d 461, 467 (1st Cir. 2000); Bath Iron Works Corp. v. Dir., Office of Workers'

precedent is relatively recent.[30] Other categories of cases, however, such as commercial cases and cases involving property rights, have long received heightened protection from overruling.[31] Precedent infused with a "super strong" presumption of irreversibility binds litigants even more tightly to results obtained by those who have gone before them.[32]

2. Does Distinguishing Dampen the Preclusive Effect of Stare Decisis?

Cynics might argue that precedent does not bind litigants because, no matter what the rules of stare decisis require, courts generally circumvent precedent they do not like.[33] In this view, a court's ability to distinguish cases significantly undercuts any potentially preclusive effect of stare decisis.

The ability to distinguish cases, however, either honestly or disingenuously, does not entirely deprive stare decisis of its bite.[34] To take disingenuous distinguishing (distinguishing the

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Comp., 136 F.3d 34, 42 (1st Cir. 1998); United States v. Coleman, 158 F.3d 199, 204 (4th Cir. 1998) (Widener, J., dissenting); Mid-America Tablewares, Inc. v. Mogi Trading Co., 100 F.3d 1353, 1364 (7th Cir. 1996); Chi. Truck Drivers v. Steinberg, 32 F.3d 269, 272 (7th Cir. 1994); Wash. Legal Found. v. United States Sentencing Comm'n, 17 F.3d 1446, 1448–49 (D.C. Cir. 1994); General Dynamics Corp. v. Benefits Review Bd., 565 F.2d 208, 212 (2d Cir. 1977). The phrase "super strong" presumption belongs to William Eskridge. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

30. Thomas R. Lee, *Stare Decisis in Historical Perspective*, 52 VAND. L. REV. 647, 730–32 (1999) [hereinafter Lee, *Historical Perspective*] (arguing that the statutory presumption is a twentieth-century development).

31. *See infra* note 74 (collecting cases). The Supreme Court has also suggested that cases resolving "intensely divisive" issues should receive special protection from overruling. *Casey*, 505 U.S. at 866–67.

32. *Cf.* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948) ("More than any other doctrine in the field of precedent, [the presumption against overruling statutory cases] has served to limit the freedom of the court.").

33. *See, e.g.*, Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 1017 n.186 (1986) ("Stare decisis is not binding because cases can always be distinguished.").

34. *Cf.* Lea Brilmayer, *A Reply*, 93 HARV. L. REV. 1727, 1728 (1980) ("Neither the cliché that any two cases are potentially distinguishable nor the characterization of some precedents as formative or tentative solves the problem. If taken literally, these seem to suggest that it would not make any difference whether adverse precedents were established. Regardless of whether one perceives the proper role of stare decisis as strong or weak, in the real world of litigation, precedents do have some binding force."); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV.

plainly indistinguishable) first: It undeniably happens, and every lawyer has her favorite example of it. Judicial dishonesty, however, simply cannot be the rule rather than the exception. Karl Llewellyn once described what he called the "steadying factors in our appellate courts."[35] He argued that, among other things, the education of judges, the expectations of them on the bench, and the public nature of decisionmaking work strongly against any impulse to engage in unreasoned and willful decisionmaking.[36] Llewellyn's description is sensible, and practice appears to bear it out. In the main, judges do not treat precedent with thinly disguised contempt. Instead, they write their opinions as if precedent counts.[37]

A court's capacity for "honest" distinguishing (distinguishing fairly allowed by the rules of stare decisis) does somewhat blunt a case's effect on later litigants.[38] Courts cannot, however, fairly distinguish every case. As Frederick Schauer has observed, the idea that a judge can, in "all or even most" cases, rationalize from precedent a result she wants is "at least erroneous and at times preposterous."[39]

Cases involving judicial review illustrate well the fact that precedent is sometimes indistinguishable. Judicial review can affect nonparty litigants acutely. Once a court holds a statute or a portion of a statute facially unconstitutional, it is virtually impossible for later courts to resurrect it. For example, after *United States v. Morrison*,[40] it is doubtful that any litigant could successfully bring a private cause of action under the Violence Against Women Act. After *United States v. Lopez*,[41] it

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603, 652 (1992) ("[T]he undesirability of having an adverse precedent on the books is unquestionable.").

35. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19–61 (1960).

36. *Id.*

37. This is true even when they do not agree with precedent. *See, e.g.*, *infra* notes 48–49 (collecting cases in which courts follow precedent while noting disagreement with it).

38. The ability to distinguish is not logically inconsistent with preclusive effect. Courts can also distinguish prior cases for purposes of issue preclusion, and we have no trouble considering issue preclusion "preclusive." *See infra* note 92 and accompanying text.

39. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 411 (1985).

40. United States v. Morrison, 529 U.S. 598 (2000).

41. United States v. Lopez, 514 U.S. 549 (1995). The precedential effect of *Morrison* and *Lopez* is, of course, primarily vertical. The point remains the same, however, when one considers the impact of such judicial review cases from a horizontal perspective.

is unlikely that any federal prosecutor could secure a conviction under the Gun-Free School Zones Act.

Cases interpreting texts are often difficult to distinguish; thus, they too can have a significant impact on later litigants. If a court holds that "mere possession" of a gun qualifies as "use" of it under the federal drug trafficking statute,[42] later defendants cannot persuasively argue that "use" requires "active employment." Or, if a court holds that a correctible vision impairment is not a "disability" under the Americans with Disabilities Act,[43] later plaintiffs cannot successfully argue that it does so qualify.

The vagueness of language does not significantly diminish the potentially broad impact of textual interpretations on later litigants. For example, the word "use" may have a range of possible meanings, and it may be unclear which of those meanings Congress intended to convey in a particular statute. A court may hold that "brandishing" a gun violates a statutory prohibition on "using" a gun. This interpretation, to be sure, does not rule out all possible interpretations—if a later case presents the question whether "mere possession" constitutes "use" under the same statute, the earlier case will not answer the question. Nonetheless, the earlier case still makes at least one interpretation concrete. And that one, concrete interpretation ("brandishing" constitutes "use") will govern all later cases presenting the same interpretive question.

Even when it is distinguishable, precedent binds litigants. A litigant distinguishing a prior case does not contest that the precedent binds her *as to the issue decided in that case*. She simply argues that a different issue is at stake. Thus, a plaintiff who challenges a crèche and menorah display on city property is bound by *Lynch v. Donnelly*,[44] which upheld a public crèche display, and by *County of Allegheny v. ACLU*,[45] which upheld a public menorah display. To win, she must argue that the display is unconstitutional despite these holdings.

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42. *Cf.* United States v. Torres-Rodriguez, 930 F.2d 1375, 1385 (9th Cir. 1991) (holding that mere possession constitutes "use" under Section 924(c)), *overruled by* Bailey v. United States, 516 U.S. 137, 143 (1995) (holding that "use" under Section 924(c) requires some active employment).

43. *Cf.* Sutton v. United Airlines, 527 U.S. 471, 488–89 (1999) (holding that a correctible vision impairment is not a disability for purposes of the Americans with Disabilities Act).

44. 465 U.S. 668 (1984).

45. 492 U.S. 573 (1989).

Whether a litigant argues by distancing herself from precedent or by trying to come within its terms, she acknowledges its binding effect. And even where prior cases do not control directly, they are likely to affect the outcome simply by defining the terms of the argument. As students of path-dependence theory have observed; "[T]he order in which cases arrive in the courts can significantly affect the specific legal doctrine that ultimately results."[46] This is precisely why litigants with an agenda in mind orchestrate the order in which "test" cases arrive in the courts.[47]

Whatever theoretical arguments one might make about the ability of distinguishing to gut stare decisis, neither judges nor litigants behave as if precedent were meaningless. Instead, they treat precedent as having real effect on outcomes. For example, judges sometimes publicly assert that they are following precedent despite disagreement with either its reasoning or the result it commands.[48] A recent Seventh Circuit case is illustrative. There, the court stated:

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46. Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001); *see also* Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 425–26 (1988) [hereinafter Easterbrook, *Stability and Reliability in Judicial Decisions*]; Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 817–21 (1982); Maxwell Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995). Frederick Schauer has observed that first cases can "distort by 'hogging the stage;'" they set the frame of reference even though the first decisionmaker could not necessarily anticipate later issues that would be affected. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 655 (1995) [hereinafter Schauer, *Giving Reasons*]; *see also* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 722–23 (2001) ("[B]ecause of the binding force given to circuit precedents, early decisions rendered in . . . imperfect settings may and often will establish how all future cases raising the particular legal issue are litigated and decided.").

47. Hathaway, *supra* note 46, at 648–50. Hathaway gives the examples of Thurgood Marshall's strategy in segregation cases and Justice Ruth Bader Ginsburg's strategy in gender discrimination cases. *Id.*

48. *See, e.g.*, Clay v. United States, 2002 WL 126094 (7th Cir. Jan. 25, 2002), *rev'd*, 123 S. Ct. 1072 (2003) ("Bowing to *stare decisis*, we are reluctant to overrule a recently-reaffirmed precedent without guidance from the Supreme Court."); Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987) (bowing to precedent but urging that it be overruled en banc); United States v. Hoover, 246 F.3d 1054, 1065 (7th Cir. 2001) (Rovner, J., concurring) ("I accept, as I must, the panel's holding in *Jackson*; it is the law of this circuit . . . . I do so, however, with great reservation as to the prudence [of the panel's decision in that case]"); Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 876 (5th Cir. 2000) (Wiener, J., concurring); Bellsouth Corp. v. FCC, 162 F.3d 678, 697 (D.C. Cir. 1998) (Sentelle, J., concurring) (joining majority's result "only for reasons of stare

> [T]he judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court's recent precedent in *Todd* . . . . [W]e believe that we must adhere to the holding in *Todd* . . . .[49]

Other opinions are to the same effect.[50]

The recent controversy over the legitimacy of unpublished opinions is more evidence that the federal courts take stare decisis very seriously.[51] This issue is only significant because federal courts perceive published opinions as binding.[52] Judges on both sides of the issue have made that much clear.[53] If stare decisis were nothing but a "noodle," to borrow a word from

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decisis and binding precedent, not because I believe it correct"); Geib v. Amoco Oil Co., 163 F.3d 329, 330–31 (6th Cir. 1995) (Engel, J., concurring) ("Were this issue before us as an original matter . . . I am quite certain that I would hold [otherwise] . . . . However, I agree that we are bound to honor our prior decision as a matter of stare decisis . . . ."). For the expression of similar sentiment with respect to vertical stare decisis, see, for example, *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring) ("For the second time in my judicial career, I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution."), *overruled by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001); Sojourner T. v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992) (Garza, J., concurring) (following *Planned Parenthood v. Casey* despite disagreement with it); Loughney v. Hickey, 635 F.2d 1063, 1065 (3d Cir. 1980) (Aldisert, J., concurring) (following precedent despite "vehement disagreement" with it).

49. Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1066 (7th Cir. 2000) (adhering to *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998)).

50. *See supra* note 48 (collecting cases).

51. *See supra* note 1 (collecting post-*Anastasoff* literature); *see also* Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119 (1994); Lauren K. Robel, *The Myth of the Disposable Opinions: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109 (1995); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 29 MERCER L. REV. 477 (1988).

52. *See, e.g.*, Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996) (citing the distinction as justification for its departure from prior unpublished opinion).

53. *See* Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001); Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000); *see also* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999); Boggs & Brooks, *supra* note 1; Kozinski & Reinhardt, *supra* note 1; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999).

Judge Posner,[54] the distinction between published and unpublished opinions would be of no consequence.[55]

Litigants, too, take stare decisis seriously. Repeat litigants settle cases that are not sure wins for fear of the effect that a loss could have on cases coming down the pike. Repeat players who settle also try to convince the court to vacate precedent so as to escape its stare decisis effect. Nonparties invested in an issue file amicus briefs in an effort to shape the precedent that will later affect them. Nonparties occasionally seek even greater involvement. Courts grant motions for intervention as of right based on the potential for adverse stare decisis effects.[56] In the high-profile case *Piscataway Township Board*

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54. Bethesda Lutheran Homes & Serv., Inc. v. Born, 238 F.3d 853, 858 (7th Cir. 2001).

55. Indeed, the use of unpublished opinions may be attributable at least in part to the rigidity of stare decisis. Because it is so difficult to overrule a published opinion, the courts of appeals sometimes use unpublished opinions to avoid precedential effect. *See, e.g.*, *Milton S. Kronheim & Co.*, 91 F.3d at 204–05 (Silberman, J., concurring) (noting that prior opinion was unpublished so as to avoid giving it precedential effect, thereby preserving the opportunity to raise the issue again); *see also* Cooper & Berman, *supra* note 46, at 739–40 (advocating use of the unpublished opinion as a way to avoid prematurely setting circuit precedent in stone); Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric*, 62 U. CHI. L. REV. 1371, 1374 (1995) ("I have seen judges purposely compromise on an unpublished opinion incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent."). Interestingly, Thomas R. Lee and Lance S. Lehnhof have asserted that the founding generation's approach to precedent "is most closely aligned with the current treatment accorded to unpublished opinions, not with the more rigid adherence extended to their published counterparts." Lee & Lehnhof, *supra* note 1, at 154.

56. *See, e.g.*, Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 844 (10th Cir. 1996); Sierra Club v. Glickman, 82 F.3d 106, 109–10 (5th Cir. 1996); Oneida Indian Nation v. New York, 732 F.2d 261, 265–66 (2d Cir. 1984); Corby Recreation, Inc. v. General Elec. Co., 581 F.2d 175, 177 (8th Cir. 1978); NRDC v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978); Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967); Fla. Power Corp. v. Granlund, 78 F.R.D. 441, 444 (M.D. Fla. 1978); *In re* Oceana Int'l, Inc., 49 F.R.D. 329, 332 (S.D.N.Y. 1970). The adverse stare decisis effects of a decision on nonparties do not typically require joinder under Rule 19, *see* Geoffrey Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1288 n.183 (1961), although some scholars have argued that maybe they should, *see* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 777 (1987). In addition, while courts generally refuse to certify class actions based on adverse impact from stare decisis (because, of course, this would make all or most actions certifiable), they have certified classes when the possibility of adverse stare decisis effects is coupled with some sort of pre-existing legal relationship between class members. Elizabeth Barker Brandt, *Fairness to the Absent Members of a Defendant Class: A*

of Education v. Taxman, nonparties engineered a settlement between the parties just before oral argument in the Supreme Court for fear of the blow that bad precedent in that case could deal to affirmative action.[57] The preclusive power of stare decisis is real, and those faced with its threat treat it as so.

3. The Due Process Question

This preclusive effect raises serious due process issues, and, as I shall argue below, occasionally slides into unconstitutionality. In adjudication—where, by definition, life, liberty, or property is at stake—the Constitution guarantees litigants due process of law.[58] Due process includes the right to an opportunity to be heard on the merits of one's claims or defenses.[59] To the extent that a rigid application of stare decisis deprives litigants of this opportunity, it raises a due process issue.

Occasionally, a court or commentator has at least flagged this problem.[60] For example, in *Northwest Forest Resource Council v. Dombeck*, the D.C. Circuit recognized that the improper application of stare decisis can offend the Due

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Proposed Revision of Rule 23, 1990 B.Y.U. L. REV. 909, 948 n.80 (1990) (collecting cases).

57. Taxman v. Bd. of Educ. of Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996), *cert. granted sub nom.* Piscataway Township Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997), *cert. dismissed*, 522 U.S. 1010 (1997); *see also* Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and its Lessons about Interest Group Path Manipulation*, 9 GEO. MASON U. CIV. RTS. L.J. 207 (1999); Linda Greenhouse, *Settlement Ends High Court Case on Preferences: Tactical Retreat*, N.Y. TIMES, Nov. 22, 1997, at A1.

58. U.S. CONST. amend. V; *see also infra* notes 171–73 and accompanying text (discussing adjudication and due process).

59. Richards v. Jefferson County, 517 U.S. 793, 797–98, 797 n.4 (1996); Martin v. Wilks, 490 U.S. 755, 761–62 (1989); Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971); Hansberry v. Lee, 311 U.S. 32, 40 (1940).

60. John McCoid has observed that if rigorously followed, the "no panel overruling" rule "seems to be on the borderline of a denial of due process to the party who is adversely affected by the prior decision. He has no true day in court on his claim or defense." John McCoid, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 513 (1991); *see also* Brilmayer, *supra* note 22, at 306–07 (1979) (identifying a due process problem in the application of stare decisis, albeit a due process problem of less severity than that posed by res judicata). In a related vein, Barry A. Miller has argued that sua sponte appellate rulings can violate a litigant's due process right to an opportunity to be heard. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253 (2002).

Process Clause.[61] In *Dombeck*, the district court had rejected the plaintiffs' challenges to a federal environmental plan on the ground that it was bound by the stare decisis effect of a decision by a court in another district.[62] The D.C. Circuit held that stare decisis did not apply because a district court is not bound by decisions from another district, and the rejection of the plaintiffs' claims on this ground violated their "right to be heard on the merits of their claims."[63]

Similarly, in *Colby v. J.C. Penney Co.*, a district judge treated precedent from another district as outcome-determinative in a sex discrimination suit against J.C. Penney.[64] The Seventh Circuit pointed out that neither claim nor issue preclusion could apply to the *Colby* plaintiff because she had not been a party to the prior suit.[65] It then reversed the district court for treating persuasive authority as authoritative. In doing so, it observed that "within reason, the parties to cases before [this court and the district courts of this circuit] are entitled to our independent judgment."[66] While the Seventh Circuit did not ground its decision in the Due Process Clause, its decision appears to rest on due process concerns.

Both *Dombeck* and *Colby* raise more questions than they answer. In asserting that the due process failure lay in the district court's choice to treat persuasive precedent as binding, *Dombeck* implies that the Due Process Clause would have permitted the court to foreclose the merits of the litigants' claims with precedent from the same jurisdiction. The case does not explain why the rigid application of precedent offends the Due Process Clause in the former context but not the latter. Similarly, *Colby* does not explain why preclusion by out-of-

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61. 107 F.3d 897 (D.C. Cir. 1997). By contrast, the Sixth Circuit has dismissed the argument that rigid application of precedent to a nonparty violates the Due Process Clause as "obviously without merit." Kent v. Johnson, 821 F.2d 1220, 1228 (6th Cir. 1987).

62. In *Dombeck*, the plaintiffs challenged the Secretary of Interior's plan for managing forests in the Pacific Northwest. Other groups unsuccessfully had challenged the same plan in the Western District of Washington. *Dombeck*, 107 F.3d at 898.

63. *Id.*

64. 811 F.2d 1119 (7th Cir. 1987). J.C. Penney only permitted those employees who were "heads of household" to opt into the company's medical and dental insurance plans. The EEOC had challenged the same policy unsuccessfully before a district court in Detroit. *Id.* at 1122.

65. *Id.* at 1124–25.

66. *Id.* at 1123.

circuit precedent offends fairness but preclusion by in-circuit precedent does not. The question of whether and how the Due Process Clause applies to the doctrine of stare decisis remains unexamined in existing scholarship and case law.

B. The Standard Account of Stare Decisis

Courts and scholars have given the topic of stare decisis serious attention.[67] But with very few exceptions, they have not paid attention to the preclusive effect of precedent on individual litigants,[68] much less to whether this preclusion

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67. For a sampling of the literature, see, for example, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); PRECEDENT IN LAW (Lawrence Goldstein ed., 1987); LLEWELLYN, *supra* note 35; Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); William Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5 (1994); Charles Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988); James Eisenhower, III, *Four Theories of Precedent*, 61 TEMP. L. REV. 871 (1988); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994); Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Lee, *Historical Perspective*, *supra* note 30; Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988) [hereinafter Maltz, *The Nature of Precedent*]; Earl Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467 [hereinafter Maltz, *Death of Stare Decisis*]; Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993); Paulsen, *supra* note 2; Christopher Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996); Lewis Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 16; Max Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137 (1936); Schauer, *Precedent*, *supra* note 16; Jed Bergman, Note, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969 (1996).

68. Notable exceptions are Lea Brilmayer, Christopher Peters, and William Rubenstein. While none of these scholars has explored the due process problem, each has observed the way that stare decisis affects individual litigants. *See* Brilmayer, *supra* note 22 (arguing that the justiciablity doctrines can be understood as a way of ensuring that later litigants are adequately represented in the litigation of cases that will bind them); Christopher Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) (arguing that adjudicative lawmaking is democratically legitimate so long as later litigants are similarly situated to the parties who originally litigated a precedential case); William Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (proposing a "group decisionmaking" model for civil-rights litigation to counter the problem of individual litigants unilaterally binding other group members through the operation of stare decisis). There are a few others who have noted the preclusive effect on individual litigants at least in passing. *See, e.g.*, Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of* Cooper v. Aaron, 58 U. DET. J. OF URBAN LAW 573, 574 (1981)

implicates due process. Instead, the standard account of stare decisis has treated stare decisis as a doctrine of exclusively institutional concern.

The questions that traditionally have occupied courts and scholars with respect to stare decisis are systemic. Courts and commentators have considered the kinds of errors that justify or even require the overruling of precedent.[69] They have thought about the kinds of reliance interests that justify keeping an erroneous decision on the books.[70] They have debated whether the force of a precedent should vary with its subject matter—whether it should be particularly weak in constitutional cases[71] and cases dealing with procedure and

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(observing that "Supreme Court decisions, in constitutional cases at least, are de facto class actions"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 285–86 (1994) (making same *de facto* class action point). Occasionally a court has noted the implications of stare decisis for individual litigants. *See, e.g.*, Richmond Newspapers v. Virginia, 448 U.S. 555, 595 (1979) (Brennan, J., concurring) (observing that cases involving individuals "impose official and practical consequences upon members of society at large").

69. *See, e.g.*, Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL. 39, 39–42 (1994) (arguing that judges may adhere to even constitutional errors); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y. 23 (1994) (arguing that judges are bound by the judicial oath to correct errors of constitutional interpretation); Lee, *Historical Perspective, supra* note 30, at 655–59 (detailing vacillation on Supreme Court regarding whether existence of error is grounds for overruling); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 18 (2001) (arguing that demonstrable errors should be overruled); Geoffrey Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y. 67, 71–73 (1988).

70. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 855–57 (1992) (holding that reliance on availability of abortion counts in stare decisis calculus); *id.* at 956–57 (Rehnquist, C.J., dissenting) (insisting that such abstract interests do not count); Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67, 78 (1993) (claiming that reliance interests at stake in *Casey* were even greater than plurality imagined); *see also* A. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 74 (1971) (arguing that stare decisis should be strongest when overruling precedent would contract individual freedom and weakest when overruling would expand individual freedom), *quoted in* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 403 (1988).

71. The Supreme Court often notes that stare decisis should be weaker in constitutional cases, because constitutional amendment—the only way around a constitutional decision if it is not overruled—can be accomplished only with great difficulty. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997); Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Smith v. Allwright, 321 U.S. 649, 665–66 (1944); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting). Courts of appeals make the same point. *See, e.g.*, Joy v. Penn-

evidence,[72] and particularly strong in statutory cases[73] and cases dealing with property and contract.[74] They have worried about whether a weak form of stare decisis would harm the

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Harris-Madison Sch. Corp., 212 F.3d 1052, 1065–66 (7th Cir. 2000); United States v. Babich, 785 F.2d 415, 417 (3d Cir. 1986); Gault v. Garrison, 523 F.2d 205, 207 (7th Cir. 1975); Whiteside v. S. Bus Lines, 177 F.2d 949, 951 (6th Cir. 1949). For commentary discussing this "weak" constitutional presumption, see, for example, Easterbrook, *Stability and Reliability in Judicial Decisions*, *supra* note 46, at 430–31 (arguing that constitutional presumption should be strong, not weak). In addition to the standard "difficulty of amendment" rationale, some advance the judicial oath to uphold the Constitution as a reason for giving stare decisis less force in constitutional cases. *See, e.g.*, South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); Lawson, *supra* note 69; Paulsen, *supra* note 2, at 1548 n.38.

72. *See infra* note 74.

73. Both the Supreme Court and the courts of appeals treat statutory precedent as particularly binding. *See supra* note 24 (citing cases). For commentary discussing this "super strong" statutory presumption, see, for example, Easterbrook, *Stability and Reliability in Judicial Decisions*, *supra* note 46, at 426–29 (criticizing presumption); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (criticizing presumption); Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 1, 12 n.45 (1988) (supporting presumption); Levi, *supra* note 32, at 540 (supporting presumption); Maltz, *The Nature of Precedent*, *supra* note 67, at 388–89 (criticizing presumption); Lawrence C. Marshall, *Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989) (supporting presumption).

74. The Supreme Court has said that "[c]onsiderations of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ; the opposite is true in cases . . . involving procedural and evidentiary rules." Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)); *see also* Hohn v. United States, 524 U.S. 236, 251–52 (1998); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); *Burnet*, 285 U.S. at 405–11 (Brandeis, J., dissenting); United States v. Title Ins. & Trust Co., 265 U.S. 472 (1924); The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458 (1852); Smith v. Turner, 48 U.S. (7 How.) 283, 470 (1849). For similar discussion in the courts of appeals, see Johnson & Johnston Assoc., Inc. v. R.E. Serv. Co., 285 F.3d 1046, 1066 (Fed. Cir. 2002) (property); United States v. Boyd, 208 F.3d 638, 652 (7th Cir. 2000) (procedure); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 960 (9th Cir. 1982) (property); Cherokee Nation v. Oklahoma, 402 F.2d 739, 746 (10th Cir. 1968) (property); United States v. Minnesota, 113 F.2d 770, 774 (8th Cir. 1940) (property); Dunn v. Micco, 106 F.2d 356, 359 (10th Cir. 1939) (property); Am. Mortgage Co. v. Hopper, 64 F. 553 (9th Cir. 1894) (property); *see also* Meadows v. Chevron, 782 F. Supp. 1189, 1192 (E.D. Tex. 1991) (stare decisis applies with special force to decisions affecting title to land). The view that cases involving property rights should receive special protection from stare decisis has been sharply criticized. *See, e.g.*, *Payne*, 501 U.S. at 852–53 (Marshall, J., dissenting) ("[S]tare decisis is in many respects even *more* critical in adjudication involving constitutional liberties than in adjudication involving commercial entitlements."); Bader, *supra* note 67, at 5; Gerhardt, *supra* note 70, at 78–79.

public's perception of the judiciary.[75] They have analyzed whether stare decisis is efficient.[76]

To the extent that the traditional account has focused on precedent's binding effect, it has focused on judges. As the Federal Circuit has put it; "[S]tare decisis is a doctrine that binds courts.... It does not bind parties."[77] Stare decisis is regarded as a doctrine of judicial restraint.[78] Alexander Hamilton touted the virtues of stare decisis on this basis in Federalist No. 78.[79] Advocates of a particularly binding form of stare decisis often rest their arguments on the need to restrain the judicial power,[80] and arguments bemoaning the supposed demise of stare decisis tend to be arguments about how the law has become nothing but what a majority of judges says it is.[81] That judges feel stare decisis operating directly upon them in a personal way, rather than upon litigants, is made evident

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75. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 866–67 (1992); Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1118–20 (1995) (claiming that the Court's concern about how stare decisis will affect its image is a twentieth-century trend that *Casey* fully developed); Maltz, *Death of Stare Decisis*, *supra* note 67, at 484; Powell, Jr., *supra* note 67, at 484; John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2 (1983).

76. *See, e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000) [hereinafter Lee, *Economic Perspective*]; Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989).

77. Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1373–74 (Fed Cir. 2001); *see also* 18 MOORE'S FEDERAL PRACTICE, *supra* note 13, at § 130.01 n.2 (similar).

78. *See* Nelson, *supra* note 69, at 8 (arguing that stare decisis developed as a means of restraining the discretion "that legal indeterminacy would otherwise give judges"). Viewing stare decisis as a means of protecting a court's appearance of legitimacy goes to this same concern: by exercising restraint in following precedent, a court preserves its public legitimacy. *See supra* note 75 and accompanying text.

79. In Federalist No. 78, Hamilton argued that in order "[t]o 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...." THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

80. *See generally id.*

81. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson, *and the Consquences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 56; Maltz, *Death of Stare Decisis*, *supra* note 67, at 484.

simply by the number of times phrases like "we are constrained by" and "we are bound by" appear in judicial opinions.[82] Those chafing against stare decisis typically frame their arguments as arguments about why *judges* should be free to follow their own best judgment in deciding a case.[83] No one makes the argument that stare decisis should leave *litigants* free. In the conventional view, stare decisis is an obligation that runs with the judicial office, binding each judge to commitments made by her predecessors.[84]

Of course—and this is true despite the system's failure to acknowledge it—to the extent that precedent binds judges, it inevitably binds litigants.[85] We take no account of this effect, however, in shaping stare decisis doctrine. In the traditional account of stare decisis, individual litigants are invisible players.

II. ISSUE PRECLUSION AND THE REQUIREMENTS OF DUE PROCESS

This oversight in stare decisis doctrine is surprising given the painstaking attention we have paid to the implications of preclusion for litigants in other areas of the law. The problem in stare decisis comes into focus when seen through the lens of issue preclusion, which litigants experience in much the same way as stare decisis. Although the two doctrines *affect* litigants similarly, they *treat* litigants quite differently. While stare

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82. *See, e.g.*, United States v. Humphrey, 287 F.3d 422, 450 (6th Cir. 2002); Perez v. Volvo Car Corp., 247 F.3d 303, 313 (1st Cir. 2001); Harris v. Philip Morris Inc., 232 F.3d 456, 459 (5th Cir. 2000); Ass'n of Civilian Technicians Mont. Air Chapter v. FLRA, 756 F.2d 172, 176 (D.C. Cir. 1985); Ransom v. S & S Food Ctr., 700 F.2d 670, 674 (11th Cir. 1983); United States v. Rosales-Lopez, 617 F.2d 1349, 1354 (9th Cir. 1980); Pitcairn v. Fisher, 78 F.2d 649, 653 (8th Cir. 1935).

83. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 644 n.4 (1987) (Stevens, J., concurring) (relying on Justice Cardozo to argue that a judge ought to be free to overrule a decision inconsistent with her sense of justice); Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) (calling wrongly decided precedent a "sort of intellectual adverse possession"); CARDOZO, *supra* note 67, at 152 ("If judges have woefully misinterpreted the mores of their day, or the mores of their day are no longer ours, they ought not to tie, in helpless submission, the hands of their successors.").

84. Amar, *supra* note 69, at 41–43 (stating that stare decisis gives earlier courts priority over later courts); Brilmayer, *supra* note 22, at 304 ("Stare decisis in effect subordinates the opinions and policy choices of later courts to those of the present court.").

85. *See supra* Part I.A.

decisis virtually ignores individual litigants, issue preclusion makes them a primary concern.

A. Issue Preclusion and the Requirements of Due Process

Stare decisis and issue preclusion operate in much the same way: Both are judge-made doctrines that use the resolution of an issue in one suit to determine the issue in later suits.[86] Thus, under stare decisis, a decision holding a municipal curfew unconstitutional[87] will control the disposition of this issue when it recurs in a later suit. Similarly, under issue preclusion, a decision holding a statute constitutional will control the disposition of that issue when it recurs in a later suit.[88]

Issue preclusion arises when an issue "actually litigated" in a suit and "necessary" to the resolution of it recurs in a later suit.[89] Issue preclusion will not apply unless the party to be precluded had a "full and fair opportunity to litigate" in the prior suit.[90] It can be invoked by one litigant against another

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86. For an overview of the requirements of issue preclusion, see 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4416 (2d ed. 2002) [hereinafter WRIGHT ET AL., FEDERAL PRACTICE].

87. *See, e.g.*, Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997) (holding unconstitutional a municipal curfew ordinance).

88. *See, e.g.*, Montana v. United States, 440 U.S. 147 (1979) (binding the United States to the Montana Supreme Court's prior determination that a particular tax statute was constitutional).

89. Va. Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1311–12 (4th Cir. 1987); Mother's Restaurant, Inc. v. Mama's Pizza, 723 F.2d 1566, 1569 (Fed Cir. 1983); RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 39 (1982) [hereinafter RESTATEMENT]; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at §§ 4419, 4421. *Cf.* United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (asserting that prior court decision not binding precedent on a point neither raised by counsel nor discussed in opinion of court); Webster v. Fall, 266 U.S. 507, 511 (1925) (same); Nat'l Cable Television Ass'n v. Am. Cinema Editors, 937 F.2d 1572, 1581 (Fed. Cir. 1991) (same); *see also* Matter of Ellis, 674 F.2d 1238, 1250 (9th Cir. 1982) (asserting that both collateral estoppel and stare decisis "give effect only to matters that have formed an essential basis for the earlier decision").

90. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333 (1979); Blonder-Tongue Lab. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971); RESTATEMENT, *supra* note 89, at §§ 28, 29. A variety of factors might render the litigant's first opportunity to litigate less than "full" or "fair." The amount at stake in the first suit may have been small, thereby decreasing the party's incentive to litigate well. *Parklane Hosiery Co.*, 439 U.S. at 333; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4423. Counsel in the first suit may have been inexperienced or incompetent. *Id.* at § 4465 n.32. The party may not have been able to foresee at the time of the first suit that there would be later litigation raising the same issue, which might also affect her incentive. *Id.* at §§ 4415 & 4423–24. Limited

or a court can raise it sua sponte.[91] When preclusion applies, the merits are closed. A court will not listen to a litigant's arguments for a different result, regardless of whether she can argue persuasively that the first court wrongly decided the issue. Because the stakes of preclusion are high, in preclusion, as in stare decisis, litigants wrangle over whether the issue in the prior suit is close enough to control, as well as over whether the issue decided in the prior suit was "necessary" to the ultimate resolution of the case. In either context, a court can distinguish a prior determination, or reinterpret it as "dicta."[92]

Issue preclusion and stare decisis share similar goals.[93] Both seek to promote judicial economy, avoid the disrepute to the system that arises from inconsistent results, and lay issues to rest so that people can order their affairs.[94] Issue preclusion,

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procedures, such as restrictive rules of evidence, may have been used in the first suit. Standefer v. United States, 447 U.S. 10, 22–23 (1980); *Parklane Hosiery Co.*, 439 U.S. at 333. The jury's verdict in the first suit may have been a compromise—for example, in a jurisdiction where contributory negligence would be an absolute bar to the plaintiff's recovery, a jury might split the difference by finding liability but awarding much lower damages than a finding of liability appears to deserve. 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4423; 18A *id.* §4465.

91. *See* Arizona v. California, 530 U.S. 392, 412 (2000) (noting, in a case of original jurisdiction, that the Court could raise preclusion sua sponte); Jackson v. N. Bank Towing Corp., 213 F.3d 885, 889 (5th Cir. 2000) (permitting a court to raise the issue of res judicata sua sponte to affirm the district court); Doe v. Pfrommer, 148 F.3d 73, 80 (2d Cir. 1998) ("[F]ailure of a defendant to raise res judicata does not deprive a court of the power to dismiss a claim on that ground."); Indep. Sch. Dist. No. 283 v. S.D., 88 F.3d 556, 562 n.5 (8th Cir. 1996); Studio Art Theatre of Evansville, Inc. v. City of Evansville, 76 F.3d 128, 130 (7th Cir. 1996); *see also* 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4405 ("It has become increasingly common to raise the question of preclusion on the court's own motion.").

92. *Cf.* RESTATEMENT, *supra* note 89, at § 27 cmt. h (determinations not essential to the judgment "have the characteristics of dicta"); 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4417 (delineating the issue that is or is not precluded is "one of the most difficult problems" in the application of issue preclusion).

93. *Cf.* Ute Indian Tribe v. Utah, 114 F.3d 1513, 1525–26 (10th Cir. 1997) ("The related doctrines of collateral estoppel and stare decisis are exactly the sorts of tools that have been designed to ensure uniformity and compliance with binding precedent.").

94. For the goals for stare decisis, see, for example, *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("Stare decisis . . . promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Schauer, *Precedent*, *supra* note 16, at 595–601 (similar). For the goals of issue preclusion, see, for example, *Allen v. McCurry*, 449 U.S. 90, 94 (preclusion "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance

however, pursues these aims on a smaller scale than does stare decisis. Issue preclusion can be invoked only against someone who was a party to the first suit; thus, its reach is limited to a small group of litigants. Stare decisis, on the other hand, reaches a group as large as the jurisdiction of the deciding court.

The Due Process Clause is what narrows the scope of issue preclusion. While courts impose no due process limit on the application of stare decisis, they have imposed significant due process limits on the application of issue preclusion. The Due Process Clause requires that a litigant receive notice of a proceeding and an opportunity to be heard in it before she is bound to any determinations resulting from it.[95] In observance of this guarantee, courts generally apply issue preclusion only against those who were parties to the first suit.[96] Parties to the first suit have already received one "opportunity to be heard" on an issue; due process does not require that they receive a second. Most nonparties, however, have received neither notice nor a hearing; consequently, they cannot be bound.

Courts and scholars have seriously considered whether any circumstances exist in which judgments can bind nonparties.[97] Indeed, concern over how the expansion of judgments might affect a litigant's right to a "day in court" is a consistent theme in the case law and literature of preclusion.[98] A settled exception to the nonparty limitation on judgments is the rule of privity. Courts may bind nonparties in a special relationship with parties; the relationships that qualify for this exception

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on adjudication."); 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4403 (similar); McCoid, *supra* note 60, at 488–89 (similar). The doctrines share narrower objectives as well. For example, both accord particularly strong effect to decisions involving property, where reliance interests are considered especially significant. *See* RESTATEMENT, *supra* note 89, at tit. E, Introductory Note (property interests receive particular weight for purposes of preclusion); *Payne*, 501 U.S. at 828 (asserting that property interests are given particular weight for purposes of stare decisis) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

95. Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971); *see also* Richards v. Jefferson County, 517 U.S. 793, 797–98, 797 n.4 (1996); Martin v. Wilks, 490 U.S. 755, 761–62 (1989); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313–17 (1950); Hansberry v. Lee, 311 U.S. 32, 40 (1940); Galpin v. Page, 85 U.S. 350, 368–69 (1873).

96. *Blonder-Tongue Lab.*, 402 U.S. at 329; RESTATEMENT, *supra* note 89, at § 34.

97. *See infra* notes 101–05.

98. *See infra* notes 101–05.

are known as relationships of "privity."[99] Under the rule of privity, a court might bind a beneficiary to a judgment entered against a trustee, a principal to a judgment entered against her agent, or a class member to a judgment entered against the class representative.[100] A court might also bind a nonparty if the nonparty has exercised sufficient control over the suit from the sidelines.[101] In these kinds of relationships, the nonparty effectively has been heard by virtue of either the obligation that the party has to protect her interests (as in a trust relationship) or the control that she exercises over the party (as in an agency relationship).

The "parties or privies" limit on preclusion's reach imposes significant costs in efficiency and consistency. As a result, scholars and courts debate the legitimacy of binding nonparties to judgments on a theory of "virtual representation."[102] In its

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99. *See* RESTATEMENT, *supra* note 89, at ch.1, 1 ("The concept of 'privity' refers to a cluster of relationships under which the preclusive effects of a judgment extend beyond a party to the original action and apply to persons having specified relationships to that party, for example, the relationship of successor in interest."). "Privity" has been criticized for being a conclusory term rather than an analytical tool. *See, e.g.*, 18A WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at §§ 4448–49 (arguing that privity is "no more than a convenient means of expressing conclusions [regarding preclusion] that are supported by independent analysis").

100. *See* RESTATEMENT, *supra* note 89, at § 41.

101. *See, e.g.*, Montana v. United States, 440 U.S. 147, 154–55 (1979) (binding the United States to the result of a suit brought by a private contractor because the United States had a sufficient "laboring oar" in the conduct of the first suit to trigger preclusion); Va. Hosp. Ass'n v. Baliles, 830 F.2d 1308, 1312 (4th Cir. 1987) (explaining that a nonparty can be collaterally estopped by the judgment in a prior suit if the nonparty (1) "had a direct financial or proprietary interest in the prior litigation" and (2) "assumed control over the prior litigation"); RESTATEMENT, *supra* note 89, at § 39 ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party.").

102. For commentary supporting a broad version of virtual representation, see, for example, Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 ARIZ. ST. L.J. 511, 532; Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 206–18 (1992); Lawrence C. George, *Sweet Uses of Adversity:* Parklane Hosiery *and the Collateral Class Action*, 32 STAN. L. REV. 655 (1980); Allan D. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 380 (1974); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974); Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098 (1968). For commentary opposing broad use of virtual representation, see, for example, James R. Pielemeier, *Due Process Limitation on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. REV. 383 (1983); Jack L. Johnson, Comment, *Due or Voodoo Process:*

broad form, virtual representation would bind a nonparty to the result of an earlier suit based on nothing more than similarity of circumstances to those of one of the parties in the prior suit.[103] Virtual-representation advocates would not give the nonparty the right to participate either personally or through a surrogate with whom she has a special relationship. According to virtual-representation theory, if the party and the nonparty face similar facts, and thus share an interest in a similar outcome, courts can assume that the party adequately represented the nonparty's interests.[104] And in this view, adequate representation satisfies the Due Process Clause; nothing more is required.[105]

The debate over virtual representation is particularly useful to a study of the due process implications of stare decisis because, as other scholars have observed, virtual representation bears a striking resemblance to stare decisis.[106] Indeed, some scholars have defended the constitutionality of virtual representation on this very ground.[107] Like virtual representation, stare decisis binds nonparties based on nothing

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Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim, 68 TUL. L. REV. 1303 (1994).

103. The seminal case for this theory of virtual representation in the federal courts is generally thought to be *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975). *See also* Cauefield v. Fidelity & Cas. Co., 378 F.2d 876 (5th Cir. 1967) (applying Louisiana law). Robert Bone has pointed out that other forms of "virtual representation" have historically existed; for example, he points to the fact that in the eighteenth century, successors in interest like remaindermen could be bound to results achieved by the tenant in tail. Bone, *supra* note 102, at 206–18. But "virtual representation" as a theory rooted in interest representation did not surface explicitly until the 1970s in cases like *Aerojet-General,* 511 F.2d at 710.

104. Berch, *supra* note 102, at 532; George, *supra* note 102, at 662, 671–73; Vestal, *supra* note 102, at 380.

105. Berch, *supra* note 102, at 532; George, *supra* note 102, at 662, 671–73; Vestal, *supra* note 102, at 380. *But see* Pielemeier, *supra* note 102, at 383 (arguing that due process requires more).

106. *See* Brilmayer, *supra* note 22, at 306–07; Peters, *supra* note 68 (passim). Despite this similarity, not even the minimalist due process standard of "adequate representation" has ever been applied to stare decisis. *Cf.* EEOC v. Trabucco, 791 F.2d 1, 4 (1st Cir. 1986) ("We have found no case . . . that supports [the] contention that a weak or ineffective presentation in a prior case deprives the ruling of precedential effect.").

107. *See, e.g.*, ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE (2001); Berch, *supra* note 102, at 531–32. If courts may bind similarly situated strangers to suits through stare decisis, the argument goes, surely they may do so through virtual representation. Casad and Clermont assert that the constitutionality of stare decisis is self-evident. *See* CASAD & CLERMONT, *supra*, at 15–16 (claiming that "nobody questions the constitutionality of stare-decisis").

more than shared circumstances with prior litigants. If Plaintiff A unsuccessfully challenges the timeliness rule adopted by the Internal Revenue Service for refund claims, Plaintiff B, challenging the same rule, will be bound to the result—not because of a special relationship between A and B, but because they are similarly situated with respect to the IRS.[108]

Apart from a few early cases, courts have largely rejected the broad form of virtual representation as inconsistent with due process.[109] Courts occasionally apply a narrow form of virtual representation to bind a nonparty when, in the absence of a relationship traditionally described as one of privity, the nonparty nonetheless had some connection to a party in the prior suit, or exercised some measure of control over it.[110] But the requirement of some actual participation is firm. The Supreme Court has held that nonparties cannot be bound to a judgment simply because their interests are "essentially identical" to those of the parties.[111] The Court has also held that a litigant cannot be bound to the result of a suit simply because she failed to intervene in it.[112] In the context of preclusion, courts are generally vigilant about protecting a litigant's opportunity to be heard.

B. The Tension between Stare Decisis and Issue Preclusion

From the perspective of a litigant, stare decisis and issue preclusion overlap in effect, yet diverge in due process protection. This creates tension in the law; at times, this tension is particularly striking. A court could not use issue

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108. *See supra* note 18 and accompanying text.

109. *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793, 805 (1996); Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 193 F.3d 415, 428–29 (6th Cir. 1999).

110. *See, e.g.*, Tyus v. Schoemehl, 93 F.3d 449, 455–58 (8th Cir. 1996); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338–341 (5th Cir. 1982) (holding that an express or implied relationship between the parties and nonparties is required; similarity of interests is not enough).

111. *Richards*, 517 U.S. at 796, 799–805.

112. Martin v. Wilks, 490 U.S. 755, 765 (1989); *see also* RESTATEMENT, *supra* note 89, at § 39, cmt. c ("To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced on behalf of the party to the action. He must also have control over the opportunity to obtain review. . . . It is not sufficient . . . that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as amicus curiae.").

preclusion to hold a criminal defendant to the determination in a codefendant's case of a particular sentencing issue, or of the question whether a trial was rendered unfair by pretrial publicity. Not having been a party in the codefendant's case, a criminal defendant would be entitled, under preclusion law, to her "own day in court" on those issues. But the federal courts have employed "strict adherence to prior circuit precedent" to the same effect, refusing even to entertain arguments on issues previously raised in appeals of codefendants.[113] Similarly, some courts, after refusing to preclude a nonparty on due process grounds, have used stare decisis to exactly the same end.[114] The federal courts say that they rely on stare decisis to "clean up" after issue preclusion; stare decisis ensures uniformity in those cases that issue preclusion does not reach.[115] In this vein,

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113. *See, e.g.*, United States v. Hoover, 246 F.3d 1054, 1057 (7th Cir. 2001) (holding that stare decisis effect of case involving appellant's fellow gang members prevented appellant from relitigating issue whether surveillance tapes were properly admitted against him); United States v. Jackson, 2001 WL 1092784 (7th Cir. Sept. 14, 2001) (same); United States v. Reveron Martinez, 836 F.2d 684, 687 (1st Cir. 1988) (holding that stare decisis effect of case involving codefendants precluded appellant from relitigating issue whether pretrial publicity deprived appellant of his right to a fair trial); *see also* Heldt v. Nicholson, 2000 U.S. App. LEXIS 21246, at *4 (6th Cir. Aug. 10, 2000) (holding one civil appellant "barred" by issue preclusion and the co-appellant "barred" by the precedential effect of decisions concerning the other appellant). *But see* United States v. Youngpeter, 1998 U.S. App. LEXIS 7434, at *10 (10th Cir. Apr. 13, 1998) (refusing to follow *Diaz-Bastardo* and *Reveron Martinez* because "the principle of stare decisis cannot eclipse a defendant's right to be present and represented during critical stages of his sentencing").

114. *See* Perez v. Volvo Car Corp., 247 F.3d 303, 313 (1st Cir. 2001) (asserting that although prior case "has no *res judicata* effect . . . we nonetheless are bound to follow it, under principles of *stare decisis*"); United States v. 177.51 Acres of Land, 716 F.2d 78, 81 (1st Cir. 1983) (after admitting technical inapplicability of issue preclusion, using stare decisis to reach same result); Mooney v. Fibreboard Corp., 485 F. Supp. 242, 249 (E.D. Tex. 1980) (asserting that even if collateral estoppel did not apply, stare decisis did); Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 841 (E.D. Tex. 1980); *see also* McDuffie v. Estelle, 935 F.2d 682, 687 n.7 (5th Cir. 1991) (maintaining that even if collateral estoppel did not apply, same result would obtain under stare decisis); Ransom v. S & S Food Ctr., 700 F.2d 670, 674 (11th Cir. 1983) (refusing to consider whether collateral estoppel applied, because stare decisis did); *In re* Staff Mortgage & Inv. Corp., 655 F.2d 967 (9th Cir. 1981) (prior case controlled, regardless whether considered a matter of stare decisis or collateral estoppel); Brewster v. Comm'r, 607 F.2d 1369, 1374 n.5 (D.C. Cir. 1979) (same); Journal-Tribune Publ'g Co. v. Comm'r, 348 F.2d 266, 271 (8th Cir. 1965) (holding that although collateral estoppel did not apply, stare decisis required same result).

115. Markman v. Westview Instruments, 517 U.S. 370, 391 (1996) (asserting that where issue preclusion cannot be asserted against nonparties, stare decisis can be used to promote uniformity); United States v. Maine, 420 U.S. 515, 527

courts acknowledge that even where the refusal of class certification technically protects the rights of absentees who would otherwise be bound by a judgment, the stare decisis effect of an opinion—from which absentees receive no protection—is likely to affect them almost as powerfully.[116]

The Seventh Circuit's recent decision in *Bethesda Lutheran Homes and Services, Inc. v. Born* illustrates well the tension between the two doctrines.[117] There, arguing against precedent, the plaintiffs asserted that "because they [were] new parties, the previous decisions [were] not binding."[118] Judge Posner responded for the panel as follows:

> The plaintiffs' lawyer does not understand the doctrine of stare decisis. It is res judicata that bars the same party from relitigating a case after final judgment, and the

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(1975) ("Of course, the defendant States were not parties . . . to the relevant decisions, and they are not precluded by res judicata . . . . But the doctrine of stare decisis is still a powerful force . . . ."); Robbins v. Amoco Prod. Co., 952 F.2d 901, 904 (5th Cir. 1992) (asserting that once a court has construed a specific writing such as a contract or will, its construction is "'binding and conclusive in all subsequent suits involving the same subject matter, whether the parties and the property are the same or not . . . [t]his result is reached by virtue of stare decisis.'") (citations omitted); EEOC v. Trabucco, 791 F.2d 1, 2 (1st Cir. 1986) (asserting that stare decisis ensures uniformity where preclusion and res judicata cannot); CASAD & CLERMONT, *supra* note 107, at 15 (suggesting that the existence of stare decisis is a reason for not extending res judicata, since stare decisis can do much of res judicata's work); Motomura, *supra* note 33, at 1021 (noting that courts "view stare decisis as one means of using a prior judgment against a nonparty when collateral estoppel is unavailable"); JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 207 (1998) (maintaining that the "preclusion" doctrine of stare decisis does some of the same work as offensive collateral estoppel).

116. Ameritech Benefit Plan Comm. v. Communication Workers of Am., 220 F.3d 814, 821 (7th Cir. 2000); *see also* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 367 (7th Cir. 1987) (suggesting that stare decisis be given particularly powerful effect in those cases suitable for class treatment); Roberts v. Am. Airlines, Inc., 526 F.2d 757, 763 (7th Cir. 1975) (observing that although judgment rendered before class certification did not bind those who would otherwise have been members of the class, defendants had "the not inconsequential protection of stare decisis"); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (1975) (3d Cir. 1974) ("Since [a Rule 23(b)(2)] class is cohesive, its members would be bound either by the collateral estoppel or the stare decisis effect of a suit brought by an individual plaintiff."); Jack Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 833–34 (1997) (arguing that because stare decisis has such powerful effect, in many cases the benefit of using the class-action device is simply the "public relations and psychological" advantage).

117. 238 F.3d 853 (7th Cir. 2001).

118. *Id.* at 858.

> doctrine of law of the case that counsels adherence to earlier rulings in the same case. It is stare decisis that bars a different party from obtaining the overruling of a decision. The existence of different parties is assumed by the doctrine, rather than being something that takes a case outside its reach. Of course, stare decisis is a less rigid doctrine than res judicata. But it is not a noodle. For the sake of law's stability, a court will not reexamine a recent decision . . . unless given a compelling reason to do so.[119]

The Seventh Circuit thus asserts that the whole point of stare decisis is to function as a kind of nonparty preclusion. Not as absolute, perhaps, as true preclusion, but a "bar" nonetheless. The First Circuit has made a similar point, asserting that "[s]tare decisis, unlike the doctrines of res judicata and collateral estoppel, is not narrowly confined to parties and privies .... Rather, when its application is deemed appropriate, the doctrine is broad in impact, reaching strangers to the earlier litigation."[120]

Arthur S. Miller once remarked that if Supreme Court opinions bind everyone through the force of precedent, much of our class-action law, in its focus on the intricacies of who can be bound, is beside the point.[121] His insight resonates here. Why bother protecting nonparties from judgments for purposes of issue preclusion if, as the First and Seventh Circuits have claimed, stare decisis binds them anyway?

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119. *Id.* (citations omitted).

120. *Trabucco*, 791 F.2d at 2 (emphasis omitted); *see also* Milton S. Kronheim & Co. v. Dist. of Columbia, 91 F.3d 193, 209 (D.C. Cir. 1996) (Silberman, J., concurring) ("[P]rinciples of res judicata and estoppel will bar the District from relitigating the issue with the *same* party; and stare decisis should ordinarily preclude the District from relitigating the issue with a *different* party . . . .") (emphasis in original); Ute Indian Tribe v. Utah, 935 F. Supp. 1473, 1509 (D. Utah 1996) ("Stare decisis has the broadest application of all the relitigation doctrines, in the sense that it applies not only to the parties in the particular case and those in privity with them, but also to strangers to the litigation.") (quoting 1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.401 at I-2) (2d ed. 1993)); *aff'd in part, rev'd in part*, 716 F.2d 1298 (10th Cir. 1983).

121. Arthur S. Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of* Cooper v. Aaron, 58 U. DET. J. OF URBAN LAW 573, 575 (1981). Miller asserted that because of their binding effect, "Supreme Court cases, in constitutional cases at least, are de facto class actions." *Id.* at 574. "Therefore," he went on to say, "much of class-action law, as it has developed, becomes irrelevant." *Id.* at 575.

One way of resolving this tension is that proposed by defenders of virtual representation: Courts could make the doctrine of issue preclusion more like the doctrine of stare decisis. They could abandon the "parties and privies" rule and bind nonparties on the basis of shared circumstances with parties. If adequate representation satisfies the Due Process Clause, the tension dissipates.

Even putting aside the courts' general rejection of broad virtual-representation theory in the preclusion context, this approach is unsatisfactory. Virtual representation is inconsistent enough with our deep-rooted views about procedural fairness that even its most ardent proponents urge its use in a fairly limited class of cases. Courts and commentators typically conceive of virtual representation as a doctrine that might force a plaintiff to forfeit a claim but cannot impose an affirmative obligation upon a defendant.[122] It is difficult to imagine a court applying virtual representation against a civil defendant, particularly in a case involving money damages rather than injunctive relief. And no one, to my knowledge, has proposed its use in criminal cases.

These limits on virtual-representation theory mean that even those who think that preclusion doctrine overvalues the due process rights of civil plaintiffs concede a core of cases in which a court must deal with a litigant personally, rather than through a similarly situated surrogate. Agreement exists on a core of due process, even though disagreement exists about the borders of due process. This agreement makes it worth entertaining another means of resolving the tension: Perhaps the understanding of the due process developed in the preclusion context should inform our approach to stare decisis.

III. WHY THE DIFFERENCE?

A threshold question is whether the tension between stare decisis and issue preclusion is superficial. Differences in the

122. *See, e.g.*, Bone, *supra* note 102 (discussing virtual representation only in terms of precluding potential plaintiffs); Berch, *supra* note 102 (same). *But see* George, *supra* note 102, at 657 (advocating preclusion of even absent defendants on a virtual representation theory). The prominent cases addressing virtual representation have involved preclusion or potential preclusion of a plaintiff, not a defendant. *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793 (1996); Martin v. Wilks, 490 U.S. 755 (1989); Becherer v. Merrill Lynch, 193 F.3d 415 (6th Cir. 1999); Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996).

doctrines may justify the different ways they treat nonparties. If that is the case, then the understanding of due process developed in the context of issue preclusion is inapposite to a study of due process in the context of stare decisis. In this Part, I will analyze whether such fundamental differences exist.

A. Flexibility

The standard explanation as to why the doctrines treat nonparties differently is the supposed flexibility of stare decisis, as opposed to the rigidity of issue preclusion.[123] Once an issue is settled for purposes of preclusion, it is settled for all time, regardless of error, except in certain circumstances that rarely apply.[124] Arguments on the merits cannot undo it. Stare decisis, by contrast, allows for the possibility of error-correction. Nonparties are not bound to precedent because they are free to make, as Rule 11 puts it, "nonfrivolous argument[s] for the ... reversal of existing law ...."[125] According to the standard explanation, the flexibility of stare decisis preserves a nonparty's opportunity to be heard. In other words, stare decisis is different because a litigant can make arguments on the merits, which she could not do if issue preclusion applied, and arguments that are good enough will convince a court to go the other way.[126]

Although the flexibility rationale works in theory, it does not account for current judicial practice. The persuasiveness of this rationale turns on a litigant's ability to escape precedent by demonstrating error in it. As already discussed, however, courts almost never overrule precedent simply on the basis of error.[127] Indeed, one would be hard-pressed to describe stare

123. *See, e.g.*, RESTATEMENT, *supra* note 89, at § 29 cmt. i; MOORE'S FEDERAL PRACTICE, *supra* note 13, at § 130.04[2]; CASAD & CLERMONT, *supra* note 107; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4425.

124. *See* 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4426 (limited exception to preclusion for situations in which preclusion would work an injustice); RESTATEMENT, *supra* note 89, at § 28 (identifying exceptions).

125. FED. R. CIV. P. 11.

126. CASAD & CLERMONT, *supra* note 107, at 15 (explaining that stare decisis is different than res judicata because it is flexible; "the rendering court can overrule [prior decisions] when clearly convinced they are wrong").

127. This proposition is firm in the courts of appeals. One panel cannot overrule another on the basis of error, *see, e.g.*, *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) ("[O]ne panel cannot overturn another

decisis doctrine in the federal courts as "flexible." As Part I discussed, the federal courts, particularly the courts of appeals, are by their own admission quite inflexible in the application of precedent.[128] The "no panel overruling" rules set most circuit law in relative stone, and the presumptions and "super strong" presumptions that otherwise apply usually foreordain the result.[129] Overruling is a "special occasion" event. Courts do it sparingly, and when they do it, they often spark charges of illegitimacy. One does not hear judges or commentators praise overruling as a sign of the law's flexibility; rather, they more often condemn it as a sign of judicial willfulness.[130]

Nor does the ability to distinguish cases give stare decisis a flexibility that issue preclusion lacks. As Part I discussed, distinguishing does not always avert precedent's preclusive effect, because many cases simply cannot be distinguished.[131] Moreover, distinguishing does not logically separate stare decisis from issue preclusion; distinguishing occurs in both contexts. As Part II discussed, in issue preclusion, as in stare decisis, litigants wrangle over whether the issue in the prior

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panel, regardless of how wrong the earlier panel decision may seem to be."), and error in a panel decision is not a basis for granting en banc review. *See infra* note 137. The Supreme Court is also reluctant to overrule its precedent on the basis of error. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (arguing that stare decisis "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation."). Caleb Nelson has argued that earlier courts accepted error as a legitimate basis for overruling. Nelson, *supra* note 69, at 1, n. 1, 16–21.

128. *See supra* note 19 and accompanying text.

129. *See supra* notes 20–32 and accompanying text.

130. *See, e.g.*, Hohn v. United States, 524 U.S. 236, 254 (1998) (Scalia, J., dissenting); Agostini v. Felton, 521 U.S. 203, 255 (1997) (Ginsburg, J., dissenting); Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); United States v. Humphrey, 287 F.3d 422, 452 (6th Cir. 2002) (majority criticizing dissent); Silicon Graphics Inc. v. McCracken, 195 F.3d 521, 521 (9th Cir. 1999) (Reinhardt, J., dissenting from denial of reh'g en banc); *In re* Sealed Case No. 97-3112, 181 F.3d 128, 145 (D.C. Cir. 1999) (Henderson, J., concurring); English v. United States, 42 F.3d 473, 485 (9th Cir. 1994) (Browning, J., concurring); Estate of Maxwell v. Comm'r, 3 F.3d 591, 602 (2d Cir. 1993) (Walker, J., dissenting); *see also* HAROLD SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992 (1995); Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262 (1992).

131. *See supra* Part I.A.2.

suit is close enough to control, as well as over whether the issue decided in the first suit was "necessary" to its resolution or merely "dicta."[132]

One might argue, however, that the possibility of appeal softens the rigidity of binding horizontal precedent, sufficiently distinguishing it from issue preclusion. Issue preclusion applies across courts. If a district court decided an issue in one case, that determination would bind the parties even before a court of appeals in a subsequent case. Or, if a state court decided an issue in one case, that determination later would bind even in a federal court.[133] For purposes of stare decisis, by contrast, a lower-court determination does not bind a higher court. The ability to appeal might serve as an escape hatch; even if a lower court refused to listen to a litigant's arguments, a higher court might listen.[134] This possibility might create enough flexibility to make stare decisis different.

This argument only works, of course, if a higher court exists. The possibility of appeal obviously cannot soften any rigidity in the Supreme Court's observance of horizontal stare decisis because there is no higher court to which a litigant can appeal. The possibility of appeal could ease rigidity, however, in the courts of appeals. If rigid horizontal stare decisis deprived a litigant of a hearing before a three-judge panel, that litigant theoretically could seek relief from the full court of appeals, sitting en banc, or from the Supreme Court.[135] A higher court could give the litigant a hearing on the merits of her legal argument.

En banc review, however, is unlikely.[136] First, the en banc court is unlikely to take the case if the only ground urged is

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132. *See supra* note 92 and accompanying text.

133. The way in which preclusion should apply across jurisdictions, however, is not always clear. *See generally* Robert C. Casad, *Preclusion in a Federal System*, 70 CORNELL L. REV. 599 (1985).

134. John McCoid has also made this suggestion. McCoid, *supra* note 60, at 513.

135. Because district courts do not observe horizontal stare decisis, *see supra* note 13, it is unnecessary to discuss appeal as a means of easing horizontal rigidity. Horizontal rigidity is necessarily absent in a system without binding horizontal stare decisis.

136. The difficulty of securing en banc review is mitigated in some circuits by a practice that permits overruling by a panel so long as the opinion is circulated to the full court. In some circuits, consent of the full court is required for overruling; in other circuits, only the consent of a majority of the court is required. *See, e.g.*, 7th CIR. R. 40(e); United States v. Meyers, 200 F.3d 715, 721 (10th Cir. 2000); United States v. Coffin, 76 F.3d 494, 496 n.1 (2d Cir. 1996); Irons

error-correction. The standards for granting en banc review resemble those for certiorari—review is granted on "important" questions or questions on which panels within the circuit have disagreed.[137] Cases where the panel merely got it wrong do not satisfy the standard. Second, numerous judges have candidly admitted that they are not disposed to grant en banc review because they regard it as burdensome and inefficient.[138] Given these factors, it is unsurprising that the courts of appeals resolve fewer than one percent of their cases en banc.[139]

The chances that the Supreme Court will grant certiorari are similarly low. The Court rejects over ninety-seven percent of petitions for certiorari.[140] The Court's rules explicitly state

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v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981); *In re* Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377, 378 n.2 (8th Cir. 1980); Bell v. United States, 521 F.2d 713, 715 n.3 (4th Cir. 1975). I have been unable to find any studies tracking how often this informal mechanism for overruling is used. My sense from reading a substantial portion of appellate case law on stare decisis, however, is that courts use it infrequently.

137. FED. R. APP. P. 35(a) provides: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance;" *see also* EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 529 (7th Cir. 2001) (en banc) (Posner, J. concurring) ("[W]e do not take cases en banc merely because of disagreement with a panel's decision . . . . We take cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a 'runaway' panel—but not just to review a panel opinion for error, even in cases that particularly agitate judges . . . .").

138. Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 37 (2001); Irving R. Kaufman, *Do the Costs of the En banc Proceeding Outweigh Its Advantages?*, 69 JUDICATURE 7 (1985); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 393 (1995); Pamela Ann Rymer, *How Big is Too Big?*, 15 J. L. & POL. 383, 392 (1999); Joseph T. Sneed, *The Judging Cycle: Federal Circuit Court Style*, 57 OHIO STATE L.J. 939, 942 (1996); Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO STATE L. J. 585, 590 (1995); *see also* J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 217 (1981).

139. DONALD R. SONGER, ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 12 (2000); *see also* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 549 (1989) (giving same statistic with respect to en bancs granted in the Ninth Circuit from 1981-1986).

140. SONGER, *supra* note 139, at 8. As Jeffrey O. Cooper and Douglas A. Berman have recently noted, the federal courts of appeals are, in practice, "courts of last resort." Cooper & Berman, *supra* note 46, at 718. Cooper and Berman note that in 1998, "the federal courts of appeals resolved nearly 25,000 cases on the merits . . ., while the Supreme Court in its 1998-1999 term chose to review only seventy cases from the federal circuit courts." *Id.*; *see also* Wald, *supra* note 55, at

that it will not grant review simply to correct error in the lower court's decision.[141] To warrant review, a petition must present a question of national importance, or one on which the courts of appeals have divided.[142] In addition, the record must be clean and the case must be well-lawyered.[143] The Court's stringent certiorari standards render the possibility of Supreme Court review too remote to cure a lack of an opportunity to be heard at the circuit level.[144]

At least on the current state of affairs, the flexibility rationale cannot account for why courts treat nonparties differently for purposes of precedent than for purposes of issue preclusion. A litigant facing unfavorable precedent in a court of appeals will have no opportunity to argue for a different rule. The panel lacks the authority to overrule and review by either the court sitting en banc or the Supreme Court is a remote possibility. From the perspective of the litigant, stare decisis is no more flexible than preclusion.

B. The Distinction between Fact and Law

A rationale other than flexibility, however, may justify the different ways that stare decisis and issue preclusion treat nonparties. Perhaps, as a colleague has suggested to me, stare decisis and issue preclusion are apples and oranges, applying to fundamentally different kinds of determinations. Issue preclusion applies to factual determinations, the argument

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1375–76 ("[F]ederal courts of appeals are the courts of last resort for almost forty-nine thousand appeals every year . . . . Indisputably, the thirteen courts of appeals declare more federal law affecting far more citizens than the Supreme Court does.").

141. SUP. CT. R. 10; *see also* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 221 (6th ed. 1986) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.").

142. SUP. CT. R. 10; STERN, *supra* note 141, at 221.

143. SUP. CT. R. 10; STERN, *supra* note 141, at 221.

144. *See also* McCoid, *supra* note 60, at 513–14 (arguing that because certiorari petitions are often denied for nonmerits reasons, it cannot necessarily be said that the right to petition for certiorari in the Supreme Court gives a litigant the hearing she lacked in the lower courts). A litigant's opportunity to be heard in district court on an issue on which circuit precedent exists is obviously limited by vertical stare decisis; *see also In re* Davenport, 147 F.3d 605, 611 (7th Cir. 1998) (noting that where circuit precedent exists adverse to an appellant, the appellant has no way of getting a judge at either the district, circuit, or supreme court level to listen to her, even if her argument is sound).

goes, and stare decisis applies to legal determinations. Perhaps the Due Process Clause requires notice and a hearing in the former context but not the latter, making it permissible for a court to bind nonparties to precedent.

This argument has some intuitive appeal, largely because lawyers tend to think of issue preclusion as a doctrine dealing exclusively with fact-bound determinations. And this impression of issue preclusion has historical support. Historically, courts drew a line between facts and law for purposes of issue preclusion. They restricted issue preclusion to questions of fact or "mixed" questions, reserving questions of "pure" law for stare decisis.[145] Courts only applied issue preclusion's due process analysis, therefore, in the context of fact-bound determinations. It would be easy to assume that that is the only context in which this due process analysis governs.

At least as traditionally articulated, however, the rationale for excepting legal questions from preclusion's reach does not support the notion that a court can bind nonparties on matters of law but not matters of fact. The rationale for this exception, according to both courts and commentators, is the injustice of binding a party to a legal determination that nonparties can challenge through the more "flexible" doctrine of stare decisis.[146] In other words, courts do not bind nonparties on

145. *See, e.g.*, Comm'r v. Sunnen, 333 U.S. 591 (1948); United States v. Moser, 266 U.S. 236, 242 (1924) (holding that preclusion does not apply to "unmixed questions of law"). Some commentators urge that this still should be the proper standard. CASAD & CLERMONT, *supra* note 107, at 130–32; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, § 4425. The Restatement (Second) of Judgments takes a different approach. Rather than distinguishing between "mixed" and "pure" questions of law, it recommends that preclusive effect should be given to all determinations of law unless "the two actions involve claims that are substantially unrelated" or "a new determination [of the issue] is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." RESTATEMENT, *supra* note 89, at § 28(2). The Supreme Court has adopted the Restatement's view. *See infra* notes 150–54 and accompanying text.

146. Nat'l Org of Veterans' Advocates v. Sec'y of Veterans' Affairs, 260 F.3d 1365, 1373 (Fed Cir 2001); RESTATEMENT, *supra* note 89, § 28; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, § 4425, at 244 (among the reasons most commonly advanced against applying issue preclusion to questions of law is that "it is particularly unjust to preclude reargument of questions of law that would be open to challenge by other litigants"); Austin Wakeman Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 7 (1942) ("It would be manifestly unjust to apply one rule of law forever as between the parties and to apply a different rule as to all other persons.").

questions of law, so neither should they bind parties. Rather than justifying judicial inflexibility on legal matters, the traditional fact/law distinction assumes that flexibility exists.[147] Indeed, if stare decisis were rigid, the stated reason for the "pure law" exception—to give parties the same flexibility as nonparties—would evaporate.

Perhaps, though, one could articulate a different reason why issue preclusion should not apply to questions of law, one that echoes my colleague's instinct: Preclusion should not attach to questions of so-called "pure" law because courts should have the ability to be *inflexible* on matters of law if they so wish. The negative implication of permitting preclusion of parties on questions of law is that nonparties cannot be so precluded.[148] And one might take the position that courts should be able to preclude everyone, parties and nonparties alike, on questions of law. On this view, the development of the law through judicial opinions is the exclusive prerogative of the courts, and the Due Process Clause guarantees no one notice or a hearing on the merits of the purely legal issues at stake in her case. If the notice and hearing requirements do not apply in this context, then issue-preclusion analysis is inapposite.[149] Courts need not worry whether the litigant to be bound to the prior determination was a party to the earlier litigation, or, if so, whether she had a "full and fair opportunity to litigate" the merits of her claims and defenses.

1. Preclusion Applies to Legal Questions

An initial difficulty with the claim that the Due Process Clause does not apply to legal determinations is that the federal courts have put purely legal determinations into the category of rulings to which preclusion can attach. Following the lead of the Restatement (Second) of Judgments, the courts

147. In this sense, the traditional reason for excepting legal issues from the reach of issue preclusion dovetails with the traditional "flexibility" rationale justifying different treatment of nonparties for purposes of stare decisis and issue preclusion. *See generally* Part III.A.

148. *See infra* notes 155–57 and accompanying text.

149. It is conceivable that a litigant could claim an entitlement to preclusion on a legal question even if the court were not inclined to preclude. In such a case, issue preclusion might apply, even though the notice and hearing requirements might not. This is not, however, the way that preclusion on questions of law has played out in the cases. *See infra* notes 155–57 and accompanying text.

have withdrawn the broad exception for unmixed questions of law.[150] In *Montana v. United States*, the Supreme Court precluded the federal government from relitigating the constitutionality of a Montana tax statute.[151] It held that preclusion could apply to unmixed questions of law so long as the subject matter of the successive actions is "substantially related."[152] Five years later, in *United States v. Stauffer Chemical Co.*, the Court again applied preclusion to a question best characterized as one of "pure law."[153] There, the Tenth Circuit had held that private contractors did not qualify as "authorized representatives" eligible to conduct inspections of plants under the Clean Air Act. The Supreme Court held the government precluded from relitigating this issue against the same party in the Sixth Circuit.[154] Under the Court's (and the Restatement's) approach, the "purely legal" nature of a determination does not disqualify it from issue preclusion.

The negative implication of permitting preclusion of parties on questions of law is that nonparties cannot be so precluded. For example, in *Montana v. United States*, before the Supreme Court held the United States precluded from relitigating a legal question, it analyzed whether the United States' participation in the first suit justified binding it to the court's conclusions in that suit.[155] That analysis would be unnecessary if nonparties could be bound. In *Richards v. Jefferson County*, the due process protection for nonparties is more explicit. There, a group of plaintiffs challenged the constitutionality of a county occupational tax, and the state court upheld it.[156] The Supreme Court held it a violation of due process for state courts to preclude later plaintiffs, who were

150. *See, e.g.*, Carr v. District of Columbia, 646 F.2d 599, 608 (D.C. Cir. 1980) ("The 'fact/law' characterization of the issue we have before us is not critical; it is today well accepted that issue preclusion applies to questions of law and law application as well as to questions of fact."). *Cf.* RESTATEMENT, *supra* note 89, at § 27; *id.* at § 28 cmt. b and at Rep. Note to § 28 subsection (2) ("Such a change in formulation rests in part on the ambiguity of the terms "fact" and "law."); JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 669 (2d ed. 1993) ("The line between issues of fact and issues of law is hard to draw because courts do not concern themselves either with fact or law issues in isolation but with the application of the one to the other.").

151. 440 U.S. 147 (1979).

152. *Id.* at 162–63.

153. 464 U.S. 165, 171 (1984).

154. *Id.* at 168, 171–72.

155. 440 U.S. at 154–55.

156. 517 U.S. 793 (1996).

neither parties nor privies to the first suit, from litigating the same legal question.[157] Parties could be precluded, but nonparties could not. In extending issue preclusion to questions of law, the federal courts have acknowledged, inevitably if indirectly, that due process notice and hearing requirements apply to the judicial resolution of questions of law.

The elimination of the fact/law distinction in issue preclusion has made it difficult to argue that the kinds of determinations to which stare decisis and issue preclusion apply distinguish the two doctrines. Instead, the two doctrines apply to the very same determinations.[158] Stare decisis has always overlapped with issue preclusion with respect to "mixed questions." For example, a determination that particular behavior violates securities law would not only constitute a "mixed" question to which preclusion would apply, but it would also set a legal standard to be used for purposes of stare decisis in later cases involving similar behavior.[159] Now, however, the

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157. *Id.* at 802. It is unclear whether *Richards* rests on both claim and issue preclusion, or only on claim preclusion. The Alabama Supreme Court barred the petitioners on the ground of claim preclusion; before the United States Supreme Court, the county urged affirmance on the basis of issue preclusion. Brief for Respondent, at 32 ("Due process would be better served by using issue preclusion, rather than claim preclusion, to bar further litigation of the Petitioners' equal protection claims."). The United States Supreme Court discusses "res judicata" and "binding the petitioners to a judgment," terminology that is broad enough to include issue preclusion, but could also be used to mean claim preclusion alone. The broader reading seems to be the better one. *See, e.g.*, 517 U.S. at 805 ("A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party.").

158. One commentator has suggested that the collapse of the fact/law distinction has rendered stare decisis and issue preclusion functionally the same, so much so that the two could be collapsed into one doctrine. Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction, and Legal History*, 24 HOUS. L. REV. 875, 881 n.28 (1987).

159. For example, in *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477 (S.D.N.Y. 1976), a securities fraud case, the District Court found that the proxy statement "contain[ed] at least one misstatement and two omissions" and that the "omitted information would have had a substantial likelihood of affecting the price of the stock." *Id.* at 484–85. This determination served as the foundation for issue preclusion in a subsequent shareholder suit. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Later courts and litigants also relied on this same determination for purposes of stare decisis. *See, e.g.*, Gluck v. Agemian, 495 F. Supp. 1209, 1214–15 (S.D.N.Y. 1980) (relying on facts and application of facts to law in first *Parklane* action to make determination of materiality in another case); SEC v. Everest Mgmt. Corp., 466 F. Supp. 167, 175 (S.D.N.Y. 1979) (relying on

two overlap with respect to "pure" questions as well. Stare decisis would clearly apply to an issue of statutory interpretation like the one at stake in *Stauffer Chemical*;[160] it would also apply to an issue of judicial review like the one at stake in *Montana*.[161]

Because the very same act can serve as the foundation for either issue preclusion or stare decisis in a later case, it is impossible to tell at the time a judicial determination is made whether it should be analyzed in terms of preclusion or precedent. The choice of analysis is made after the fact, and it is based on the context in which the issue recurs, rather than on the nature of the determination at stake. If the issue recurs in a situation in which the litigant adversely affected by the determination was a party to the prior suit, the rules of preclusion determine whether the prior holding controls. If the litigant adversely affected was not a party to the prior suit, the rules of stare decisis determine the effect of the prior holding. Under current doctrine, the nature of a determination does not explain the doctrines' different treatment of nonparties.

2. Legislation and Adjudication

But one could draw a narrower conclusion from the extension of issue preclusion to questions of law. In a sense, *Montana* and *Stauffer Chemical*, the cases extending issue preclusion to questions of law,[162] dovetail with *Dombeck* and *Colby*, the cases flagging a due process problem in the rigid application of precedent.[163] Neither *Montana* and *Stauffer*

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facts and application of law to facts in first *Parklane* action in determining appropriateness of issuing injunction against further securities fraud).

160. Indeed, in a later case, courts and litigants did consider *Stauffer Chemical*'s interpretation of "authorized representatives" for purposes of stare decisis. *See, e.g.*, Bunker Hill Co. Lead & Zinc Smelter v. EPA, 658 F.2d 1280, 1283 (9th Cir. 1981). Of course, since this case arose in another circuit, it relied on *Stauffer Chemical* as merely persuasive authority.

161. *See, e.g.*, Gregory Constr. Co. v. Blanchard, 1989 WL 78201, at *4 (6th Cir. July 17, 1989) (applying both nonmutual collateral estoppel and stare decisis to the question of a statute's constitutionality that had been determined in an earlier suit).

162. Montana v. United States, 440 U.S. 147 (1979); United States v. Stauffer Chemical Co., 464 U.S. 165 (1984). *See supra* notes 151–154 and accompanying text.

163. Northwest Forest Res. Council v. Dombeck, 107 F.3d 897 (D.C. Cir. 1997); Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987). Dombeck

Chemical on the one hand, nor *Dombeck* and *Colby* on the other, speak to the impact of the Due Process Clause on the development of case law within a single jurisdiction. *Montana* and *Stauffer Chemical* both apply issue preclusion across jurisdictional lines. In *Montana*, a state court decided the first case and a federal court the second; in *Stauffer Chemical*, the Sixth Circuit decided the first case and the Tenth Circuit the second. Thus, in both cases, the court applied issue preclusion to a question of law only where precedent was not authoritative under stare decisis. Similarly, both *Dombeck* and *Colby* reversed district courts for treating case law from other jurisdictions as authoritative. *Montana*, *Stauffer Chemical*, *Dombeck*, and *Colby* seem to assume that federal courts can bind both parties and nonparties to precedent originating in that jurisdiction, but that the Due Process Clause prohibits binding nonparties to precedent that originates in another jurisdiction.[164]

One could read these cases, therefore, for a proposition narrower than that the Due Process Clause guarantees a hearing on questions of law generally. One could read these cases as standing for the proposition that the Due Process Clause guarantees litigants notice and a hearing only on matters of first impression within a jurisdiction. Due process requires that a court give its independent judgment at least once. Matters that the jurisdiction has already considered, however, bind everyone litigating in that jurisdiction on what is presumably a virtual-representation theory, with the first litigant representing the interests of everyone else to be

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flags the problem explicitly and Colby flags it implicitly. See supra notes 61–66 and accompanying text.

164. *Richards v. Jefferson County*, 517 U.S. 793 (1996), on the other hand, can be read to support the application of due process notice and hearing requirements to precedent from the same jurisdiction. The Alabama Supreme Court decided both the first and second cases, and the United States Supreme Court noted that "[a] state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party." *Id.* at 805. Admittedly, this case can also be read as one addressing claim preclusion, *see supra* note 157, in which case it would not support this point. In *Richards*, the later case raised some issues that the earlier case had not; the Alabama Supreme Court barred both the previously raised and unraised claims on a claim preclusion theory. Precluding the new claims—which were federal constitutional claims—is even more troubling than precluding the claims that the earlier litigants had actually litigated. Arguably, the Supreme Court may have viewed matters differently if only issue preclusion were at stake.

bound.[165] This view vests a court with the power to develop generally binding principles within a jurisdiction; in other words, within its own jurisdictional lines, a court functions in a quasi-legislative capacity. A legislature has the ability to promulgate law without affording individual notice and a hearing. Why should a different standard bind courts?

The nature of adjudication thwarts this argument. The exercise of the judicial power requires notice and an opportunity to be heard, while the exercise of the legislative power, as Justice Kennedy puts it, "raises no due process concerns."[166] Legislation, by definition, binds groups.[167] The focus of a "legislative" act cannot be an *individual* deprivation of life, liberty, or property; if that were its focus, the act would properly be characterized as "adjudication."[168] Because no *individual* life, liberty, or property is at stake, legislative action does not trigger the Due Process Clause.[169] When the

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165. For a discussion of virtual representation, see *supra* notes 102–12 and accompanying text. *See also* Peters, *supra* note 68 (using virtual-representation theory to justify the way judicial "lawmaking" binds nonparties); Brilmayer, *supra* note 22 (arguing that the case and controversy requirement ensures better virtual representation, and therefore better justifies binding nonparties to precedent through stare decisis). *Cf.* Rubenstein, *supra* note 68 (arguing for *actual* representation of absentees in civil-rights litigation because virtual representation inadequately protects their interests in the development of precedent that will bind them).

166. Missouri v. Jenkins, 495 U.S. 33, 66 (1990) (Kennedy, J., concurring).

167. Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445–46 (1915); Londoner v. Denver, 210 U.S. 373, 385–86 (1908). *Cf.* U.S. CONST. art. I, § 9, cl. 3 (prohibiting bills of attainder).

168. There are cases in which legislative action and adjudicative action are hard to distinguish, because sometimes generally applicable laws affect only a few. *See, e.g.*, *Bi-Metallic,* 239 U.S. at 441; Club Misty, Inc. v. Laski, 208 F.3d 615 (7th Cir. 2000); 37712, Inc. v. Ohio Dep't of Liquor Control, 113 F.3d 614 (6th Cir. 1997); Philly's v. Byrne, 732 F.2d 87 (7th Cir. 1984). So long as the law is generally applicable, and not focused on an individual, however, it still constitutes "legislation" to which no notice and hearing requirements apply. *Id.* If the administrative or legislative act has an individual focus, however, it is adjudication, and notice and hearing requirements apply. *Id.*

169. *See Missouri*, 495 U.S. at 66–67 (Kennedy, J., concurring) (asserting that the exercise of the judicial power requires notice and a hearing, while the exercise of the legislative power "raises no due process concerns"); *Philly's*, 732 F.2d at 92 ("Notice and opportunity for a hearing are not constitutionally required safeguards of legislative action."); OTTO J. HETZEL, ET AL., LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 729 (2d ed., The Michie Co. 1993) (1980) ("[I]t is settled law that the trappings of procedural due process, e.g., notice and an opportunity to be heard, are inapplicable to 'legislative' decisions."). It may be an overstatement to assert that the Due Process Clause has *no* applicability to legislation; while it certainly does not require notice and a hearing, it may impose other requirements. *See generally* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY,

government acts at that level of generality, the electoral process is sufficient to protect individual interests.[170] Notice and a hearing are not required.

Federal courts, however, act against litigants specifically and concretely. The "case or controversy" requirement ensures that life, liberty, or property is at stake every time a federal court acts.[171] And, in the context of federal court adjudication, the Supreme Court has been clear that due process requires notice and a hearing. As the Court put it in *Mullane v. Central Hanover Bank & Trust Co.*, "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing . . . ."[172] The individualized nature of adjudication and the due process protections this nature entails are what distinguishes legislation from adjudication.[173] The *Bi-Metallic* line of cases constrains legislators and administrators from evading the requirements of due process by disguising adjudication as legislation. Similarly, cases limiting the reach of judgments constrain judges from evading the requirements of due process by treating adjudication like legislation. A court, unlike a legislature, must give affected parties notice and a hearing before it acts.

CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 381–497 (2d ed. 1995); Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

170. "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Investment*, 239 U.S. at 443; *see also Philly's*, 732 F.2d at 92 ("The fact that a statute (or statute-like regulation) applies across the board provides a substitute safeguard [for the notice and hearing requirement].").

171. U.S. CONST. art. III, § 2; Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Muskrat v. United States, 219 U.S. 346 (1911).

172. 339 U.S. 306, 313 (1950); *see also* Richards v. Jefferson County, 517 U.S. 793, 797 n.4 (1996) (citations omitted):

> The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

173. *See supra* notes 167–70 and accompanying text.

This notice-and-hearing requirement applies whether or not judicial opinions are understood to be "law."[174] The federal courts indisputably make law (although the scope of their ability to do so is much disputed).[175] The applicability of the Due Process Clause does not turn on the *source* of a law; rather, it turns on what the government does with a law. Regardless whether a rule of law derives from Congress, the Executive, or the Judiciary, it cannot be applied to deprive an individual of life, liberty, or property without notice and a hearing.[176] Thus, the *application* of a generally applicable rule to an individual triggers due process even though the *promulgation* of that rule does not. For example, the Due Process Clause did not guarantee any individual notice and a hearing before Congress passed the Americans with Disabilities Act.[177] It does, however, guarantee notice and a hearing before any individual can be held liable for violating that Act. Similarly, even though a federal court may have the power to announce a generally binding standard, it may not apply that standard against any individual without first giving that individual notice and a hearing.

The degree to which opinions are "lawlike," however, may well affect the scope of the hearing that the court must give. A hearing with respect to a statute—or, for that matter, a regulation—does not throw open for debate the policy choices underlying the statute or regulation. Rather, where the right to a hearing exists, litigants have the right to press the "merits" of their claims. Arguments on the merits of statutory and regulatory claims traditionally include arguments about (1) what the statute or regulation means, (2) whether the statute or regulation applies to the situation at hand, and (3) whether the statute or regulation was promulgated without authority.[178] Thus, for example, a litigant tried for possessing

174. For an insightful analysis of competing understandings of judicial opinions, see Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

175. *See generally* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

176. The nature and timing of the hearing due is context-specific. *See* Matthews v. Eldridge, 424 U.S. 319 (1976).

177. 42 U.S.C. § 12101–12213 (2000).

178. Considering the scope of the hearing that due process requires brushes up against the jurisdiction-stripping debate. If Congress can close all fora to legal arguments, one cannot say that the Due Process Clause guarantees the opportunity to make them. (For a general discussion of the jurisdiction-stripping

cocaine can argue at her hearing about (1) whether the statute under which she is charged forbids cocaine possession, (2) whether she possessed cocaine, and (3) whether forbidding cocaine possession is constitutional, either generally or as applied to her situation. But no one believes that the Due Process Clause requires that the litigant receive an individual hearing with respect to whether forbidding cocaine possession is a poor legislative policy choice.[179] To the extent that either the Constitution or Congress entrusts the courts with policymaking authority on a particular matter, the courts might be able to similarly limit the scope of the hearing due: A

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debate, see RICHARD H. FALLON ET AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 373–79 (4th ed. 1996)). The Due Process Clause does not guarantee that these arguments, even arguments about constitutional or statutory excess, can be pressed as an initial matter in *federal* court. Most presume, however, that at least with respect to constitutional claims, due process requires that the state courts remain open. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988) (avoiding the "'serious constitutional question' that would arise if a federal statute were construed to deny *any* judicial forum for a colorable constitutional claim") (emphasis added); Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987) (holding that the preclusion of both state and federal jurisdiction to hear constitutional claims violates the Due Process Clause); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948) (same). Courts are less hospitable to the argument that due process requires a judicial forum for claims that official action exceeded statutory authority, *see* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.8 (4th ed. 2002), though they more willingly interpret door-closing provisions to preclude review of agency applications of law to fact than review of the general lawfulness of agency regulations. Richard H. Fallon, Jr., *Some Confusions About Judicial Review, Due Process, and Constitutional Remedies*, 93 COLUM L. REV. 309, 334–35 (1993); Richard H. Fallon Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 982 (1988). In any event, even assuming that Congress may close all judicial fora to select constitutional or statutory claims, the Due Process Clause would presumably entitle a litigant to press these kinds of arguments before an agency or executive official. Indeed, a litigant's ability—or lack thereof—to make legal arguments before an agency often influences the way courts interpret door-closing provisions. *See, e.g.*, Johnson v. Robison, 415 U.S. 366, 368 (1974) (interpreting door-closing provision to permit review of constitutional claims where agency had disclaimed the authority to judge such claims); Traynor v. Walters, 791 F.2d 226, 229 (2d Cir. 1986) (interpreting door-closing provision to preclude review of statutory questions when the agency had "never disclaimed its authority to determine whether its own regulations comply with federal statutes or whether they are properly applied to a particular case"), *rev'd*, Traynor v. Turnage, 485 U.S. 535 (1988).

179. Citizens do not have the right to make these kinds of policy arguments in the first stage, when the statute or regulation is promulgated. *See supra* notes 166–70 and accompanying text. There is no reason to permit them to raise such arguments at the second stage, when the statute or regulation is applied. Moreover, to the extent that the hearing occurs in a judicial forum, such arguments are misplaced because courts cannot disrupt legislative policy choices.

hearing may be unnecessary with respect to whether a particular judicially created rule is a poor policy choice.

The federal courts' power to engage in policymaking includes at least the traditional areas of federal common law.[180] One could argue that it also includes the authority to choose among reasonable interpretations of ambiguous statutory and constitutional provisions. Recent scholarship by Caleb Nelson illuminates the latter point.[181] Nelson analogizes stare decisis to the *Chevron* doctrine, under which courts interpret ambiguity in a statute as delegating to an agency the authority to choose among reasonable interpretations of it.[182] A court cannot substitute its preferred interpretation for that of an agency; so long as the agency's interpretation is reasonable, a court must defer to it.[183] Courts do not defer, however, to administrative interpretations that exceed statutory terms.[184] So, Nelson argues, should it be with stare decisis.[185] According to Nelson, one might think of textual ambiguity as delegating the authority to earlier-in-time courts to flesh out the ambiguity.[186] If a precedent reasonably interprets a constitutional or statutory provision, a successor court should not substitute its judgment for that of the predecessor court.[187] If, however, a precedent is a "demonstrably erroneous" interpretation, a court need not—and should not—defer to it.[188] The former is within what we might think of as the predecessor court's "policymaking" authority; the latter is not.

Analogizing judicial opinions to legislation, one might argue that at least with respect to federal common law and reasonable interpretations of ambiguous texts, a court need not grant a litigant a hearing with respect to the wisdom of choosing one common law rule rather than another, or one reasonable interpretation of a text rather than another.

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180. *See* Clark, *supra* note 175, at 126–66 (identifying traditional areas of federal-common law).

181. Nelson, *supra* note 69.

182. *Id.* at 6–7. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 844–45 (1984).

183. *Chevron*, 467 U.S at 843–44.

184. *Id.* at 842–43.

185. Nelson, *supra* note 69, at 6–8.

186. *Id.*; *see also* Brilmayer, *supra* note 22, at 304 ("Stare decisis in effect subordinates the opinions and policy choices of later courts to those of the present court.").

187. *Id.* at 7.

188. *Id.* at 8.

Instead, as with a statute or regulation, arguments on the "merits" might include only arguments about (1) what the precedent means, (2) whether it applies in this case, and (3) whether it conflicts with statutory or constitutional norms.

Whether the Due Process Clause requires a court to grant a litigant a hearing with respect to the wisdom of its policy choices, as opposed to simply their consistency with statutory or constitutional law, is a difficult problem. On balance, I think the best answer is that it does. Although the Due Process Clause does not guarantee a hearing with respect to the wisdom of legislative and administrative policy choices, the electoral process gives individuals a voice in congressional or administrative lawmaking. Citizens elect both legislators and the Executive based on judgments about the policies particular candidates would implement. If they dislike the policy choices made, they can vote for different candidates in the next election. In addition, an opportunity exists for interested parties to express their views before either Congress or an agency. The process is generally formal (notice and comment)[189] with respect to agency action and informal (lobbying) with respect to congressional action.[190]

Before a court, nonparties are protected by neither the electoral process nor the opportunity to press their views.[191] The only opportunity that a litigant has to express her views to a court is during the adjudicative process; thus, in the adjudicative process, a court ought to protect that opportunity. The idea that any organ of government could close itself

189. 5 U.S.C. § 553 (2000).

190. Bill Kelley has suggested to me that even though the Due Process Clause does not apply to legislative action, the legislature would provoke due process-like concerns if it refused interested parties any opportunity to express opinions to it. In addition to First Amendment problems, the closing of any organ of government to its citizens raises concerns that sound in procedural fairness. *Cf.* Linde, *supra* note 169.

191. Amicus briefs do allow some interested nonparties to express their views to a court. Nonparties, however, do not have a right to file amicus briefs. *See* SUP. CT. R. 37(2)(a) (providing that an amicus brief "*may* be filed" with written consent of the parties or by leave of the Court) (emphasis added); FED. R. APP. P. 29(a) (An "amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing."); Nat'l Org. of Women v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000) ("Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace.") (citations omitted); 9A WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 3975 ("There is no right of nonparties generally to submit an amicus curiae brief.").

completely to citizen input is a troubling one, and one that, with respect to the judiciary, a more flexible approach to stare decisis could avoid.

Even if, however, the Due Process Clause does not protect a litigant's opportunity to advance arguments regarding the wisdom of judicial policy choices, it presumably at least guarantees the opportunity to make the same kinds of arguments on the merits that a litigant can make with respect to a legislative or administrative standard: arguments about (1) what the precedent means, (2) whether it applies in this case, and (3) whether the precedent conflicts with the statutory or constitutional norms it purports to implement. It is fair to say that courts are in the habit of considering the first two kinds of arguments. It is the third kind of argument—which amounts to an argument that precedent is wrong—that a strict approach to stare decisis is likely to preclude. It is ironic that courts do not flinch at using strict stare decisis to bar this kind of argument. Courts balk at congressional attempts to strip their jurisdiction largely because of the risk that a litigant will be left with no forum hospitable to claims that one of the political branches has exceeded its constitutional authority (and, to a lesser extent, to claims that the Executive has exceeded statutory authority).[192] But courts seem to have no problem figuratively stripping their jurisdiction to entertain claims about their own excesses.

IV. THE IMPLICATIONS OF DUE PROCESS FOR STARE DECISIS

It is telling that flexibility is the standard justification for the different ways that issue preclusion and stare decisis treat nonparties.[193] In advancing flexibility as a rationale, courts and commentators have recognized, at least implicitly, that stare decisis raises the same due process concerns as issue preclusion. Because, however, the due process reason for flexibility in stare decisis has received little attention, it has been easy for flexibility to slip out of the doctrine.

Without flexibility, stare decisis functions as a doctrine of preclusion, and its application to nonparty litigants poses the same due process problem as the application of issue preclusion

192. *See supra* note 178.

193. *See supra* Part III.A (discussing traditional rationale of flexibility).

to nonparty litigants. Issue preclusion handles its due process problem by exempting nonparties from the reach of judicial determinations—an option not available to stare decisis, a doctrine whose primary purpose is to provide jurisdiction-wide stability. Flexibility is the price for precedent's wider reach.

What, however, does "flexibility" mean? At a minimum, it requires that the courts remove the structural barriers to error-correction that currently exist. The courts of appeals should either eliminate the rule that prohibits one panel from overruling another, or change the en banc rules to add error-correction as a basis for review.[194] But even once the structural impediments to error-correction are gone, the question of how a court should approach the problem of error-correction remains. Must a court correct every error? Must a court treat every aspect of precedent as open to question?

A. Flexibility and Reliance

The first question that a suggestion of flexibility prompts is whether the Due Process Clause requires a court to correct error at the expense of well-settled reliance interests. Reliance has always counted as an important consideration in the overruling calculus; indeed, the protection of reliance interests from judicial flip-flops is the doctrine's animating force. One might wonder whether I am suggesting that an individual's right to a hearing necessarily trumps societal reliance interests, no matter how deep they run.

1. Errors within Judicial Discretion

The importance of reliance depends on what kind of "error" a litigant demonstrates. I argued in Part III that a litigant ought to get a hearing with respect to the wisdom of judicial policy choices.[195] If, however, a litigant alleges an error that falls within what we might think of as the courts' "policymaking" authority, reliance interests ought to weigh heavily in a court's decision regarding whether to change

194. Another means of providing flexibility would be for the Supreme Court to adopt a practice of granting review to correct error. *See supra* notes 133–44 and accompanying text. The burdens this would place on the Supreme Court's docket, however, make this course unlikely.

195. *See supra* notes 189–91 and accompanying text.

course. Thus, reliance ought to weigh heavily if the issue is whether the previous court should have chosen one reasonable interpretation of a text rather than another, or decided differently a matter within its federal common law authority. A court possesses discretion in these matters, and frank considerations of policy appropriately guide its exercise of discretion. Where the precedent is a permissible choice, reliance interests should clip a successor court's freedom to change course.[196]

2. Demonstrable Errors

If, however, a litigant demonstrates that precedent demonstrably conflicts with the statutory or constitutional provision it purports to interpret, the role of reliance is significantly diminished, and possibly eliminated.

On the one hand, the situation is analogous to judicial review of a statute or administrative regulation. If a statute conflicts with the Constitution, or if a regulation conflicts with either its enabling statute or the Constitution, the court will hold the statute or regulation invalid without regard to anyone's reliance on it.[197] It is difficult to explain why a court should treat its own *ultra vires* acts differently, and indeed, scholars have struggled mightily to explain where a court might derive the authority to do so.[198] The Constitution does not clearly grant the judicial department such power, and, as some scholars have pointed out, the judicial oath, Article V, and separation-of-powers principles cut against it.[199]

On the other hand, because even clear errors sometimes inspire reliance that would be costly to upset, even those who convincingly challenge the courts' power to adhere to clear

196. Giving reliance a role primarily when the error relates to a matter within judicial discretion is consistent with the role stare decisis historically has played. Caleb Nelson has argued that stare decisis developed to constrain judicial discretion on matters lying within the courts' policymaking authority. Nelson, *supra* note 69, at 5. If the force of precedent is at its apex, so to speak, when a court has policymaking authority, it makes sense that reliance interests are at their apex in this circumstance as well.

197. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983) (invalidating one-House legislative veto even though numerous statutes contained similar legislative veto provisions, and may not have been passed without them).

198. *See, e.g.*, Amar, *supra* note 69; Fallon, *supra* note 3; Lawson, *supra* note 69; Paulsen, *supra* note 2.

199. *See, e.g.*, Lawson *supra* note 69; Paulsen, *supra* note 2.

error do not expect the practice to cease altogether.[200] We live with the occasional assertion of such power even in the absence of a wholly satisfying justification for it.

Whether the federal courts possess the power to adhere to plainly erroneous interpretations of constitutional and statutory texts is a complicated question that I will not attempt to resolve here. Instead, assuming that such power exists, I add the Due Process Clause to the list of factors—including the judicial oath, Article V, and separation-of-powers principles—counseling in favor of its narrow exercise. Even if, for the sake of reliance, we are willing to tolerate a narrow incursion into these principles, a broad incursion would intolerably shift the balance between the judicial power and its counterweights. A broad power to trump constitutional text with erroneous gloss would remove the line between judicial interpretation and constitutional amendment. A broad power to trump statutory text with erroneous gloss would remove the line between judicial interpretation and legislation. And, importantly, broad power in either circumstance would remove the due process limit on the judiciary's exercise of power over an individual. To the extent that courts are willing to claim the power to adhere to clear error, they ought to at least be cognizant of the due process effect on individual litigants before they do so. The costs of overruling ought to be particularly high before a court acts in this circumstance.

In any event, the phenomenon of courts' adhering to demonstrable error should have a limited effect on this theory of flexibility. A shift toward flexibility would have the largest impact in the courts of appeals, and circuit precedent rarely inspires the kind of reliance that justifies adherence to plain error. The authority of the courts of appeals is geographically confined, which limits the number of people likely to rely on an opinion. Other courts of appeals may go different ways on an issue, which undercuts the reasonableness of reliance. Also undercutting the reasonableness of reliance is the knowledge that the Supreme Court could always reverse the course of the

200. *See, e.g.*, Lawson *supra* note 69, at 33 (noting that the Legal Tender cases, even if wrong, are in no danger of being overruled because of stare decisis theories like Lawson's; the real-world costs are too high).

circuit's jurisprudence on the point.[201] For these reasons, the problem of adhering to clear error should be of greatest concern to the Supreme Court. Its opinions—which apply nationwide and are incapable of reversal by another court—are the ones most likely to induce deep-seated reliance.[202]

It is also worth nothing that a flexible system of stare decisis would make it more difficult for clear errors to become embedded in doctrine. For one thing, it would be easier for later courts to purge errors from case law. For another, because nonparties would be on notice of stare decisis's flexibility, it would be less reasonable for them to rely on precedent—at least to the extent that precedent is untested.[203]

In sum, while reliance should figure heavily in the overruling calculus when a litigant convinces a court that precedent is unwise, it should count much less, if at all, when a litigant convinces a court that precedent conflicts with the statutory or constitutional provision that it purports to interpret.

B. Flexibility in Stare Decisis is Consistent with History

One might wonder whether the flexibility to correct errors is consistent with the history of stare decisis. If courts historically have refused to entertain seriously arguments for overruling, one should rightly regard with suspicion the argument that the practice is unconstitutional.

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201. Interestingly, neither the courts of appeals nor the Supreme Court explicitly take reliance interests into account when considering whether to overrule or adhere to a line of precedent from an inferior court.

202. The exception might be a circuit that decides issues that neither other courts nor the Supreme Court often decide. For example, it is conceivable that a D.C. Circuit opinion on administrative law, or a Federal Circuit opinion on patents, could induce this kind of reliance.

203. *See* Fried, *supra* note 67, at 1143 (asserting that if it were known that courts could overrule more easily, people would adjust their expectations accordingly). Caleb Nelson has also noted that it is not necessarily true that a "weaker" system of stare decisis will impose greater costs of change than a "stronger" one. According to Nelson, the costs that come from the fine distinctions that courts draw to chip away at an erroneous precedent over time might create more uncertainty and cost in the end than a single dramatic change. Nelson, *supra* note 69, at 64–65.

Historical work done by scholars of stare decisis suggests that stare decisis doctrine is a relatively modern doctrine.[204] While lawyers and courts were reasoning from precedent as early as the time of Coke, the notion that courts have any sort of obligation to follow precedent did not surface until the time of Blackstone,[205] and even Blackstone's concept of precedent was relatively soft.[206] At the time of the Founding, the concept of precedent was in a state of flux.[207] As Henry Monaghan puts it, "The Framers were familiar with the idea of precedent. But . . . . [t]he whole idea of just what precedent entailed was unclear."[208]

The years between 1800 and 1850 have been described as the "critical years" for stare decisis's development.[209] It was not until the early 1800s that the practice of a court majority speaking in one voice took hold.[210] Before the nineteenth century, each judge on an appellate court generally wrote a separate opinion, a practice that would have made it difficult for any one opinion to control later cases.[211] Another development during this period was the emergence of reliable case-reporting systems, which are a prerequisite to a more rigid version of stare decisis.[212] For these reasons and others, American lawyers did not conceive of precedent as a binding force until the 1850s.[213]

Even after the 1850s, stare decisis was not as rigid as the version of stare decisis employed today. The rules that give modern stare decisis doctrine much of its rigor are decidedly

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204. Lee & Lehnhof, *supra* note 1, at 154 ("The general consensus among legal historians is that the doctrine of stare decisis is of 'relatively recent origin.'") (quoting Lee, *Historical Perspective*, *supra* note 30, at 659).

205. Lee, *Historical Perspective*, *supra* note 30, at 661.

206. Radin, *supra* note 67, at 155.

207. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 50 (1959) ("American cases, up to the year 1800, had no firm doctrine of stare decisis."); Lee, *Historical Perspective*, *supra* note 30, at 666 (noting that in the antebellum period, stare decisis was in an "uneasy state of internal conflict"); Price, *supra* note 1, at 90–91 (asserting that there is no clear evidence as to what Framers thought about precedent).

208. Monaghan, *supra* note 67, at 770 n.267 (citations omitted).

209. Kempin, *supra* note 207.

210. Hart v. Massanari, 266 F.3d 1155, 1162 (9th Cir. 2001) (citing George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-15*, *in* 2 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 382–89 (Paul A. Freund ed., 1981)).

211. *Hart*, 266 F.3d at 1162 n.6.

212. Kempin, *supra* note 207, at 34–36.

213. *Id.* at 50; *see also* Nelson, *supra* note 69, at 45 & nn.163–164.

modern. Although some variance exists from circuit to circuit, no-panel-overruling rules appear to have surfaced only in the last fifty years.[214] Similarly, the presumption against overruling cases interpreting statutes did not appear until the twentieth century.[215] In addition, Caleb Nelson has argued that until the last half-century, courts usually felt free to overrule precedent that demonstrably conflicted with a text it purported to interpret.[216] Nelson persuasively argues that requiring courts to adhere to even demonstrably erroneous precedents through the operation of stare decisis is a relatively recent phenomenon.[217]

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214. The earliest cases citing the "no panel overruling" rule in each circuit appear to be Lacy v. Gardino, 791 F.2d 980, 984–85 (1st Cir. 1986); Mother's Rest. v. Mama's Pizza, Inc., 723 F.2d 1566, 1573 (Fed. Cir. 1983); Bonner v. City of Prichard, 661 F.2d 1206, 1211 (11th Cir. 1981); Timmreck v. United States, 577 F.2d 372, 376 n.15 (6th Cir. 1978), *rev'd*, 441 U.S. 780 (1979); United States v. Kasto, 584 F.2d 268, 272 n.4 (8th Cir. 1978); U.S. Dep't of Labor v. Peabody Coal Co., 554 F.2d 310, 333 (7th Cir. 1977); Of Course, Inc. v. Comm'r, 499 F.2d 754, 760 (4th Cir. 1974); Charleston v. United States, 444 F.2d 504, 506 (9th Cir. 1971); Pierce v. Elk Towing Co., 364 F.2d 504, 504 (3d Cir. 1966); Sanchez v. United States, 417 F.2d 494, 496–97 (5th Cir. 1969); O'Malley v. United States, 340 F.2d 930, 933 (7th Cir. 1964) (Kiley, J., concurring), *rev'd*, 383 U.S. 627 (1966); American-Foreign Steamship Corp. v. United States, 265 F.2d 136, 142 (2d Cir. 1958), *vacated on other grounds*, 363 U.S. 685 (1960); United States v. U.S. Vanadium Corp., 230 F.2d 646, 649 (10th Cir. 1956); Thompson v. Thompson, 244 F.2d 374, 375 (D.C. Cir. 1957).

215. Thomas Lee has identified the presumption against overruling statutory cases as a twentieth-century development, crystallized in opinions of the Hughes Court. Lee, *Historical Perspective*, *supra* note 30, at 731–32.

216. Nelson distinguishes between kinds of error: "errors" on which reasonable people could disagree and "demonstrable errors." He argues that stare decisis developed to protect only the former kind of "errors" from overruling. Nelson, *supra* note 69; *see also* Lee & Lehnhof, *supra* note 1, at 152 n.80 (observing that the Framers' view that "judicial decisions were merely evidence of the law and as such could be disregarded" is in contrast with "current circuit rules [that] require . . . published opinions [to] be treated as binding precedent and only disregarded following an en banc overruling"); Cooper & Berman, *supra* note 46, at 749–51 (arguing that at the Founding and beyond, courts did not consider themselves strictly bound by precedent, but thought themselves free to depart when precedent was erroneous); Emery G. Lee, III, *supra* note 24 (arguing that the Court's historical approach to constitutional stare decisis was to give constitutional precedent little weight).

217. Nelson, *supra* note 69. Thomas Lee claims that the Supreme Court has never been consistent in its treatment of error. The doctrine has been, as Lee puts it, in an "uneasy state of internal conflict" about error since the Founding. Lee, *Historical Perspective*, *supra* note 30, at 666. *See id.* at 681–87 (concluding that posture of Marshall Court towards error-correction was roughly the same as that of the modern Court).

C. *Following Correct Precedent*

It is evident how flexibility would play out when the existence of precedent keeps a court from its preferred resolution.[218] In this situation, flexibility frees the court to do what it wants to do. But what about when a court does not want to overrule precedent? It is one thing to consider whether a judge *must* follow precedent; it is another to consider whether she *can* do so. One of the most common criticisms of a "weaker" system of stare decisis is that it would push the burden of judges to "the breaking point" by forcing them to reconsider every issue anew, even those issues that do not appear to be wrongly decided.[219] Often, judges want to follow precedent because they do not want the work of rethinking issues from scratch; they want the option of occasional inflexibility because perpetual flexibility is burdensome. As Walter Murphy has put it, stare decisis provides "harried judges who face difficult choices with a welcome decision-making crutch."[220]

To the extent that this criticism presumes that a flexible approach to stare decisis would force a judge to consider every issue "anew," however, it sets up a straw man. This view assumes that a court can gauge the merit of an argument only by analyzing the litigant's arguments and any relevant constitutional or statutory text as if the issue raised were a matter of first impression. And in this view, the litigant should win if the current court, in its exercise of wholly independent legal reasoning, is persuaded by the litigant's arguments. A civil-law system generally works this way; in a civil-law system, the court's only real tools for gauging the persuasiveness of an argument are the litigants' arguments and the original text.[221]

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218. *See, e.g.*, *supra* notes 48–49 and accompanying text (discussing cases in which courts follow precedent despite their disagreement with it).

219. CARDOZO, *supra* note 67, at 149–52; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

220. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 22–23 (1964), *quoted in* BRENNER & SPAETH, *supra* note 130, at 3.

221. JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 48–49 (2d ed. 1985). It is well-known that civil-law systems do not observe the rule of stare decisis. Interestingly, while they do observe res judicata, they do not observe collateral estoppel. St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 436 (5th Cir. 2000) (noting that issue preclusion did not apply in Louisiana until 1991); B.E. Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156–57 (La. 1978)

In a precedent-based system, however, judges do not decide cases in a vacuum; rather, precedent always affects the way they view the merits. Some have argued that stare decisis's only power is its ability to constrain a court to follow erroneous precedent.[222] Stare decisis has tremendous power, however, even apart from holding judges to error. Precedent influences a judge's perception of what the right result should be.[223] On a general level, precedent might give a judge an analytical framework—like, for example, the tiers of judicial review or the First Amendment framework of limited and public fora—through which to approach a problem. More narrowly, the analysis in a prior case of a particular issue might persuade the court of its correctness—for example, precedent might persuade a judge that "disability" in the ADA does not include correctible vision impairments.[224] Flexibility does not mean that a judge must pretend that precedent does not exist. On the contrary, precedent can both inform and persuade.

Flexibility, moreover, is consistent with treating some principles as water under the bridge. Sometimes a judge wants more than guidance from precedent; she wants to treat some principles as correct without thinking independently about

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(holding that collateral estoppel does not apply in Louisiana); LA. REV. STAT. ANN. § 13:4231 (1991), cmt (b) ("R.S. 13:4231 also changes the law by adopting the principle of issue preclusion."). While the reasons for this are probably historical, *see* Note, *Developments in the Law of Res Judicata*, 65 HARV. L. REV. 818, 820–21 (1952) (res judicata derives from Roman law and collateral estoppel from Germanic), the absence of issue preclusion in civil systems also suggests a conceptual link between the two doctrines.

222. *See, e.g.*, United States *ex rel.* Fong Foo v. Shaughnessy, 234 F.2d 715, 718–19 (2d Cir. 1955); BRENNER & SPAETH, *supra* note 130, at 8; Alexander, *supra* note 67, at 4; Fallon, *supra* note 3, at 570 (2001) ("The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.") (citations omitted); Max Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 200–01 (1933).

223. Michael Paulsen calls this stare decisis's "information" function, as opposed to its "disposition" function, which controls how a court disposes of a case. Paulsen, *supra* note 2, at 1544. *Cf.* Schauer, *Giving Reasons*, *supra* note 46, at 655.

224. *Cf.* Sutton v. United Airlines, 527 U.S. 471 (1999). No conflict exists between adherence to precedent and flexibility in this circumstance. Flexibility permits a judge to reject precedent when a litigant's arguments on the merits persuade her to do so. It frees the judge and litigants from *non-merits-related* constraints that would otherwise hold the judge and litigants to the prior case. For example, flexibility frees judges and litigants of a rule that requires following precedent for its own sake, whether or not it is persuasive. When the merits themselves rather than a non-merits constraint cause a judge to choose precedent, no conflict exists. The litigant has the right to be heard, not the right to be right.

them. For example, without so much as reading *Marbury v. Madison*,[225] a judge might decide to treat as correct the assertion that the Constitution permits judicial review. In this circumstance, the judge does not necessarily agree with the analysis in prior cases; for all she knows, she might have decided *Marbury* differently if the question of judicial review had been put to her as an initial matter. But she wants to treat at least some principles as beyond question.

Flexibility in stare decisis means that a litigant must have the chance to persuade the court on the merits of the issues important to her case. The question, then, is what it means to resolve a case on its merits. The view that treating some principles as water under the bridge offends fairness rests on the assumption that independent analysis of a legal proposition is the only acceptable way of testing its merit. Considering the pedigree of a legal proposition, however, also can serve as a reasonable way to gauge its merit. The fact that a long line of predecessor courts has affirmed and reaffirmed a proposition is a valid indication that the proposition is sound. Indeed, some humility inheres in a judge's substituting the judgment of her predecessors for her own. A judge inclined to buck a long line of opposing precedent could reasonably wonder whether her view is idiosyncratic.[226] Where a proposition is well-established, its pedigree is as acceptable a reason to follow it as a judge's own analysis. A well-worn path can serve as a shortcut to the resolution.

One way of thinking about this problem is by analogy to the civil law. Civil-law systems, as a formal matter, eschew reliance on precedent because they consider legislative enactments to be the only legitimate source of law.[227] Albeit for a reason other than due process, civilian judges would also face a conflict in relying on a long line of precedent rather than thinking independently through an issue of textual interpretation. In such a circumstance, reliance on the precedent might offend separation of powers if the judge might

225. 5 U.S. 137 (1803).

226. *Cf.* Monaghan, *supra* note 67, at 755–56 n.184 (expressing "grave doubt that a judge should cast a deciding vote on the basis of a theory, however historically correct, that is unacceptable to his own colleagues, has long been unacceptable to his colleagues, and that has no reasonable likelihood of being acceptable to any future justice").

227. MERRYMAN, *supra* note 221, at 29.

have come out a different way based on independent analysis of the text.[228]

A concept called *jurisprudence constante*, however, permits the civilian judge to take the shortcut of relying on a stream of precedent.[229] Although a judge cannot legitimately rely on a single case, or even a handful of cases, as a basis for a judgment, she may rely on *jurisprudence constante*, a long line of cases. The consistent stream of decisions does not compel the judge to reach a particular result. Rather, it gives her a legitimate way of thinking about the merits, despite the normal injunction in civil law that she rely on text rather than gloss.

So here. A stream of consistent case law does not require a judge to reach a certain result, but it gives her a valid way of resolving the merits if she chooses to rely on it.

Deferring to a stream of cases is not merely a civilian concept; the common law has a similar practice. Even in the eighteenth century, when it was relatively uncommon for a judge to treat one opinion as binding, it was relatively common for a judge to rely on "the accumulated experience of the courts."[230] According to Caleb Nelson, the reason that common-law judges deferred to a line of cases is that they understood that earlier judges in the line would have scrutinized the logic of the first several decisions and overruled those decisions if they were incorrect.[231] As Nelson notes:

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228. *Id.* at 29, 44.

229. John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1257 (1997) (book review) ("[T]he civilian approach typically gives greater weight to a line of authority (*la jurisprudence constante*) than to an individual decision. It is the cumulation of authority in a particular direction that is seen as persuasive.") (citations omitted); James L. Dennis, *The 21st John M. Tucker, Jr. Lecture in Civil Law: Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 15 (1993) ("When a series of decisions forms a constant stream of uniform and homogeneous rulings having the same reasoning, [*jurisprudence constante*] accords the cases considerable persuasive authority and justifies, without requiring, the court in abstaining from new inquiry because of its faith in the precedents.") (citations omitted); Francesco G. Mazzotta, *Precedents in Italian Law*, 9 MSU-DCL J. INT'L L. 121, 142 (2000) (explaining that not one decision, but "a coherent group of decisions," established "*'giurisprudenza costante'*" in Italian law); Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369, 1372 (1988).

230. Nelson, *supra* note 69, at 35–36 n.124 (*quoting* Kempin, *supra* note 207, at 30); *see also* Lee & Lehnhof, *supra* note 1, at 172 (under the "custom of the realm," a line of decisions carried more force than any one decision (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *70)).

231. Nelson, *supra* note 69, at 35–36.

> [I]f each judge in the series had felt bound by the first decision on the issue, then there would have been no difference between a series of decisions and an isolated precedent; the chance that the series was correct would be identical to the chance that the first decision was correct.[232]

It is not only the participation of many judges over time that gives value to a settled line of precedent; the participation of many litigants over time adds value as well. One reason that we value litigant participation in the context of preclusion law is the recognition that different litigants might get different outcomes on the same set of facts.[233] This is not to say that results are always arbitrary—that there is never a right answer and that each litigant is entitled to her own shot at convincing the decisionmaker to buy into a relative view of correctness. But this is to say that the process of legal decisionmaking is complicated, no less in matters of law than in matters of fact. The first framing of an issue may not present the full picture. Certain arguments may be overlooked or poorly made. Overly attractive or unattractive aspects of a particular litigant or lawyer's personality, circumstances, or demeanor might push a decisionmaker one way or another.

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232. *Id.* at 36.

233. Roger Trangsrud has observed that:

> [O]ur civil justice system has traditionally and correctly aimed to give each individual . . . a fair and equal opportunity to try his case, knowing that similarly situated plaintiffs will sometimes obtain widely different outcomes. The value of insuring absolute consistency has for centuries been regarded as not worth the compromised due process and diminishment of individual claim autonomy . . . .

Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 77; *see also* Johnson, *supra* note 102, at 1323–24; 18 WRIGHT ET AL., FEDERAL PRACTICE, *supra* note 86, at § 4416:

> Considerations of sympathy, prejudice, distaste for the substantive rules, and even ignorance or incapacity may control the outcome . . . . Determinations of who was negligent, for example, may be affected by the apparent attractiveness of the parties, the extent of their injuries, speculation as to insurance coverage, and many other factors that legal rules hold irrelevant. To transport an apparent finding of negligence from one trial setting to another may turn upside down the real purposes and actual determinations of the first tribunal.

Lawrence George claims that it is the possibility of different litigants getting different results, not the "abstract constitutional assurance" of a "day in court," that drives preclusion doctrine. George, *supra* note 102, at 679. *But see* Bone, *supra* note 102, at 233–34 (disputing the idea that litigant participation affects outcomes).

Allowing an issue to be hashed out multiple times compensates for the imperfections—the very humanness—in the process of decisionmaking. It allows the courts to see a more complete picture before rushing to judgment.[234] All arguments may not have been aired, or aired well, the first time, but by the tenth, or twentieth time, chances are that they will have been made. An idiosyncrasy of personality or circumstance may have pushed one or even two decisions in a particular direction, but by the time a long line of decisions has been issued on a certain point, some trends should emerge that are independent of the personalities behind them. This is a phenomenon that some scholars have observed in the mass tort context: When litigation involving a particular mass tort is "immature," individual judgments are often aberrational; by the time it has evolved to a "mature" state, similarly situated plaintiffs tend to receive similar outcomes and damages.[235]

Of course, if a judge can substitute the judgment of a long line of predecessors for her own, one might wonder why she cannot substitute the judgment of a handful of her predecessors for her own. If it does not offend fairness for a judge to refuse to reconsider thick precedent, why does it offend fairness for a judge to refuse to rethink thin precedent? The difference is in degree rather than kind, but degree matters here. The question is when it becomes reasonable to use the pedigree of a legal proposition as a proxy for the proposition's

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234. *Cf.* Lee, *Economic Perspective*, *supra* note 76, at 652 (stating that stare decisis helps judges get it right, as they "check their results against those reached by other judges") (quotations omitted); Nelson, *supra* note 69, at 58 ("good arguments will tend to perpetuate themselves even under the weaker version of stare decisis, while bad arguments will have less staying power"). It is the Supreme Court's desire to see a more complete picture before rushing to judgment that leads it to allow issues to "percolate" in the lower courts before taking them up in the Supreme Court. *See* ROBERT L. STERN ET AL, SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES (7th ed., BNA 1993). Indeed, reluctance to "freez[e] the development of the law" by allowing the first determination of a legal issue to control all others is one reason why the Court refuses to allow nonmutual estoppel to be asserted against the United States. United States v. Mendoza, 464 U.S. 154, 164 (1984). The United States is often the only litigant against whom certain issues will be litigated; thus, to hold the United States to the results of a suit against one party could effectively stop, in all circuits, litigation of a particular issue. To be sure, the "freeze" that would accompany the application of nonmutual collateral estoppel would be more complete than that accompanying the application of rigorous stare decisis, because issue preclusion applies across jurisdictional lines. The problem, however, is nonetheless present in both circumstances.

235. TIDMARSH & TRANGSRUD, *supra* note 115, at 235–36.

merit; the longer the pedigree, the better a proxy it is. There is institutional value in airing an issue multiple times. But at some point, relitigation ceases to add value.[236] A point comes where all the arguments have been made and a variety of lawyers and litigants have made them.[237] Consistency emerges. One cannot say the same of a proposition that only a smattering of prior courts have considered. While it is permissible and indeed desirable for a judge to rely on thin precedent for its persuasive value, it is unreasonable for her to accept it as conclusive without any critical analysis. Again, the analogy to *jurisprudence constante* is helpful: It is the existence of the line of cases, not any one case, that gives a proposition its force.

It presumably would be a rare case where precedent was thin and a judge could truly say she wanted to rely on it uncritically. A judge need not test the strength of an opinion by reading all the cases it cites, or by working the problem through as if she were writing the opinion herself. In most cases, simply reading the opinion gives the judge enough information to evaluate it. A judge has to read a case to see whether its holding decides the question at hand; in most cases, reading an opinion closely enough to get its holding also gives the judge enough information to evaluate whether or not she agrees with the holding. Indeed, if a judge reads an opinion reasonably closely, it would likely take more effort for her to turn simultaneous critical assessment of the opinion "off" than to turn it "on."[238] As Earl Maltz observes, "[T]he degree to which reliance on precedent actually eases the rigors of judicial decision-making can easily be overstated."[239]

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236. Similarly, in the preclusion context, Jay Tidmarsh and Roger Trangsrud have argued that once mass-tort litigation has become "mature," "continued prosecution of individual suits serves no useful purpose." TIDMARSH & TRANGSRUD, *supra* note 115, at 236.

237. At this same point, the litigant's interest in individual participation becomes weaker as well. Individual participation is important because it is extremely difficult to say with any certainty that a litigant has been adequately represented by one similarly situated prior litigant. Once an issue has percolated through the legal system for a length of time, however, it is safer to say that at some point along the way (and maybe even in a combination of litigants along the way) the current litigant was adequately represented.

238. *Cf.* Paulsen, *supra* note 2, at 1545 (questioning how much efficiency is gained by the "disposition" function of stare decisis).

239. Maltz, *The Nature of Precedent*, *supra* note 67, at 370.

Reliance on thick horizontal precedent is also relatively rare. The kind of well-established precedent that judges accept almost unthinkingly is most likely to exist in the Supreme Court, and the Supreme Court is not likely to grant certiorari if the question presented challenges the well-established. Except with respect to matters of special expertise, like, perhaps, administrative law in the D.C. Circuit or patent law in the Federal Circuit, it is unlikely that a court of appeals would have the kind of precedent that is so absorbed into legal consciousness that lawyers and judges accept it as an article of faith. If the issue were that important, the Supreme Court would have addressed it, and the precedent would be vertical.[240]

To the extent, however, that precedent is well-established in a court of appeals, it is unlikely that many litigants would press for overruling it, even with a flexible system of stare decisis in place. Doing so would require them to expend resources on an argument with little chance of success. Precedent is the strongest predictor of what a court would do if faced with the same question again. The more cases that exist in the prior line, the stronger a predictor it is. A rational litigant will not invest legal fees in a sure loser. In addition, the courts of appeals limit the length of briefs; a rational lawyer will not advise a client to allocate precious brief space to a losing argument.

In sum, while a flexible approach to stare decisis would undoubtedly introduce some inefficiency into the system, it would not require the reconsideration of every case on the books.

CONCLUSION

We tend to think of stare decisis as an institutional doctrine. Viewed through the lens of issue preclusion, however, its impact on individual litigants comes into focus. The

240. Thomas Lee has noted that the efficiency argument works best as a justification for vertical stare decisis in district courts. Lee argues that district courts would have difficulty managing their workloads if, in addition to learning complex facts, they also had to devote a great deal of time to deciding legal questions. In district courts, vertical stare decisis streamlines the process. But in appellate courts, which have lighter dockets and deal primarily in legal principles, the efficiency rationale—particularly for horizontal stare decisis—is less compelling. Lee, *Economic Perspective*, *supra* note 76, at 648–49.

preclusive impact of stare decisis is real, and it can affect a litigant dramatically. Through the operation of stare decisis, litigants are bound to results obtained by those who have gone before them. They typically lack the opportunity to press their own arguments about whether precedent correctly interprets underlying statutory or constitutional provisions.

The comparison to issue preclusion also illuminates the due process limit on the courts' application of precedent. In issue preclusion, as in the application of precedent, adjudication is involved; adjudication triggers the Due Process Clause. Issue preclusion handles due process limits by restricting preclusion to parties and their privies. Stare decisis, at least as a formal matter, has chosen to handle the due process limit with flexibility. That flexibility, however, must be observed in substance as well as form. Flexibility requires that courts allow for the possibility of error-correction. Current stare decisis doctrine, however, does not generally allow for this possibility. Indeed, many aspects of current stare decisis doctrine—most notably, the combination of the no-panel-overruling rule and the stringent standards for en banc and Supreme Court review—affirmatively work *against* flexibility.

This Article urges the federal courts to restore flexibility to stare decisis doctrine. Generally speaking, if a litigant demonstrates that a prior decision clearly misinterprets the statutory or constitutional provision it purports to interpret, the court should overrule the precedent. Reliance interests count, but they count far less when precedent clearly exceeds a court's interpretive authority than they do when precedent, though perhaps not the ideal choice, was nonetheless within the court's discretion.

It is undeniable that attention to the participation rights of individual litigants would bring some inefficiency to stare decisis doctrine. It has done so for issue preclusion. But if due process indeed guarantees some opportunity to participate in judicial decisionmaking, we should start paying attention. Otherwise, the elaborate protections that we have in place for preclusion do not mean much.

Reliance on thick horizontal precedent is also relatively rare. The kind of well-established precedent that judges accept almost unthinkingly is most likely to exist in the Supreme Court, and the Supreme Court is not likely to grant certiorari if the question presented challenges the well-established. Except with respect to matters of special expertise, like, perhaps, administrative law in the D.C. Circuit or patent law in the Federal Circuit, it is unlikely that a court of appeals would have the kind of precedent that is so absorbed into legal consciousness that lawyers and judges accept it as an article of faith. If the issue were that important, the Supreme Court would have addressed it, and the precedent would be vertical.[240]

To the extent, however, that precedent is well-established in a court of appeals, it is unlikely that many litigants would press for overruling it, even with a flexible system of stare decisis in place. Doing so would require them to expend resources on an argument with little chance of success. Precedent is the strongest predictor of what a court would do if faced with the same question again. The more cases that exist in the prior line, the stronger a predictor it is. A rational litigant will not invest legal fees in a sure loser. In addition, the courts of appeals limit the length of briefs; a rational lawyer will not advise a client to allocate precious brief space to a losing argument.

In sum, while a flexible approach to stare decisis would undoubtedly introduce some inefficiency into the system, it would not require the reconsideration of every case on the books.

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