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# An Originalist Approach to Prospective Overruling

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ARTICLES

# AN ORIGINALIST APPROACH TO PROSPECTIVE OVERRULING

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*Originalism has become a dominant jurisprudential theory on the Supreme Court. But a large number of precedents are inconsistent with the Constitution's original meaning and overturning them risks creating enormous disruption to the legal order. This article defends a prospective overruling approach that would harmonize precedent with originalism's rise and reduce the disruption from overrulings. Under prospective overruling, the Court declares that an existing statute violates the original meaning but will continue to be enforced because declaring it unconstitutional would produce enormous costs; however, future statutes of this type will be voided as unconstitutional. Under our approach, the Court would employ a rule-based doctrine for gradually returning our constitutional law to the original meaning without upsetting the reliance interests that stare decisis rightly protects.*

*While originalists, like Justice Scalia, have been extremely critical of the prospective overruling that the Warren Court used to implement its constitutional revolution, we here defend an approach to prospective overruling that would avoid these originalist criticisms. We show that prospective overruling is a legitimate form of the common law of precedent and thus encompassed by the judicial power. We also show that prospective overruling is not dictum that runs afoul of the Constitution's case-or-controversy requirement. In many cases, the substantive constitutional question is so intertwined with the question of precedent that a decision on a provision's original meaning is necessary to decide the stare decisis issue. In other cases, the resolution of the substantive question should be treated as a holding, even if not strictly necessary to the result, because the question was answered using a method that appears designed to resolve the*



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*case. We then illustrate how and when prospective overruling should be applied by reference to cases involving the Commerce Clause and the nondelegation doctrine.*

## INTRODUCTION

Originalism is now the leading judicial philosophy on the Supreme Court. While originalism significantly shapes some Supreme Court doctrine, the many nonoriginalist precedents that continue to exist create a dilemma for an originalist Court. Overturning such precedents would often impose substantial disruption because of reliance. Yet simply leaving them in place would make it hard to restore the Constitution's original meaning and would allow courts to build on such precedents, further departing from originalism. Some Justices on the Court are wrestling with the problem of nonoriginalist precedent, but none have found a plausible way to address this fundamental problem.[1]

Prospective overruling provides a solution to the dilemma. Prospective overruling is the practice by which the Court declines to invalidate an unconstitutional statute or action retrospectively, but announces it will do so when confronted with similar statutes and actions in the future. Prospective overruling has the advantage of making it easier to return to the *correct interpretation* of the law by reducing the reliance of both individuals and governments. Under prospective overruling, both individuals and governments are less adversely affected by an overruling because they have notice that the statute passed after prospective overruling is likely to be found unconstitutional. Moreover, while retrospective overrulings often apply to a large number of existing statutes, a prospective overruling likely applies only to a single new statute. Furthermore, because governments have notice that a type of statute is likely to be unconstitutional, they are more likely to be able to adapt to the new regime and pass new statutes that avoid the constitutional infirmities noted by the Court's new analysis.

Prospective overruling helps put the Constitution on a glide path toward the recovery of original meaning because it provides a disciplined mechanism for the gradual replacement of nonoriginalist precedents with originalist readings of constitutional provisions. Its gradualism restores the Constitution's original meaning without creating a radical break with the past. New statutes will follow the original meaning, even as people can rely on past precedents to do business without the need for immediate and disruptive change. Such prospective overruling might apply to the replacement of current precedents, like the lenient nondelegation doctrine.[2]

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1 *Compare* Gamble v. United States, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring) (arguing that precedents should be overruled when they are clearly erroneous), *with* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring in part) (providing a three-factor test for overruling).

2 *See infra* notes 219–31 and accompanying text.

To be sure, some originalists have argued that a reconciliation of precedent and originalism is not possible, because the original meaning should always displace precedent. But that stance is impractical, because overruling all nonoriginalist cases, however much people have come to rely on them, would plunge society into chaos. That view is also not sound under originalism. The Constitution's original meaning contemplated precedent because that was a recognized aspect of judicial power. Mostly, the Constitution treated precedent rules as common-law rules that were potentially revisable by Congress.

The salient question for originalists today is the content of these precedent rules. Optimally, these rules should balance the benefits of returning to the original meaning with the reliance costs produced by overrulings. The benefits of original meaning are substantial because that meaning emerges from a national consensus created by a supermajoritarian process that is likely to result in good provisions. Those good provisions are very likely better than rules made up by a simple majority of nine Justices. Moreover, maintaining the original meaning energizes the constitutional amendment process and thus protects the rights of the people to change their Constitution, because in an originalist world where the Court cannot invent new constitutional provisions, people will be forced to put their energy into passing constitutional amendments rather than securing Supreme Court Justices who mirror their values.

On the other hand, the reliance costs of overruling precedent can also be considerable. Until recently, the Supreme Court had not taken originalism seriously as an approach to constitutional interpretation and therefore had decided numerous cases in ways that violated the Constitution's original meaning. Consequently, returning immediately to the original meaning may sometimes be quite disruptive.

Whatever the balance struck between the benefits of originalism and the costs of reliance, that balance can be improved by permitting prospective overruling. The reason is straightforward. Prospective overruling allows the Court to return to the original meaning while incurring smaller reliance costs.

Take the example of the nondelegation doctrine.[3] Some originalists contend that the current nondelegation doctrine, which upholds delegations so long as they follow an "intelligible principle," is too permissive.[4] Instead, the Constitution requires Congress to make the key policy choices in a delegation, leaving the executive branch to fill in only the details.[5] If we assume without deciding that this view best

3 *See infra* notes 219–31 and accompanying text.

4 *See infra* note 222 and accompanying text.

5 *See infra* note 226 and accompanying text.

captures the original meaning, an originalist Court should not declare past delegations unconstitutional under the new rule, but apply the correct rule only to future delegations. Voiding past delegations and the regulations promulgated under them would create enormous costs, upending a huge number of regulations on which companies and individuals have come to rely. Congress would be put under enormous pressure to enact the past regulations into law immediately, but it would likely lack the capacity to do so, because of both the sheer quantity of regulations to be reviewed, and the strategic behavior of representatives in opposing the reauthorization of some of the regulations or in demanding new ones in return for retaining the old.

But prospective overruling of the current nondelegation doctrine would not upend the existing regulatory regime. Congress would not be under enormous time pressure to reinvent it. Instead, administrators could continue to enforce the existing regulatory provisions in place. And, as new regulations and statutes were needed, Congress could pass them individually—perhaps under new institutional procedures designed to streamline passage.

But the catch is that today such prospective overruling has not received support from originalists. The Supreme Court has retreated from the Warren Court's enthusiasm for the practice that began in criminal cases like *Miranda*.[6] Justice Scalia in fact contended that prospective overruling exceeded the judicial power of federal courts, because courts must decide cases based on the law as it exists, not as it will be in the future.[7] Other commentators argue that prospective overruling is impermissible under the original meaning because the declaration of a prospective change in the law is dictum that does not decide any current case or controversy.[8]

Nevertheless, some originalist justices are beginning to debate the issue of prospectivity. Justice Kavanaugh seemed to embrace prospective overruling in one case, triggering an expression of concern from Justice Gorsuch.[9] Moreover, scholars have been discussing the degree to which contemporary cases, like *Obergefell v. Hodges*[10] and *Janus v.*

6 *See* Johnson v. New Jersey, 384 U.S. 719, 721 (1966) (refusing retroactive effect to Miranda v. Arizona, 384 U.S. 436 (1966)).

7 Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment) (arguing that the prospective ruling is unconstitutional).

8 *See, e.g.*, Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 855, 895–921 (2005).

9 *Compare* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2355 n.12 (2020) (opinion of Kavanaugh, J.), *with id.* at 2366 (Gorsuch, J., concurring in judgment in part and dissenting in part).

10 576 U.S. 644 (2015).

*AFSCME, Council 31*,[11] should be limited in their retroactive effect, making their rules prospective only in some respects.[12]

In this Article, we defend and explicate for the first time an originalist version of prospective overruling, arguing it is both a constitutional and effective tool for originalists.[13] While the originalist version of prospective overruling has some similarities to the Warren Court version, it differs in important respects. Most significantly, the originalist version employs prospective overruling only to return to the original meaning, and it justifies this practice with originalist interpretations of judicial power and the Article III case-or-controversy requirement. While our approach to overruling is originalist, the kind of prospective overruling we defend has relevance for any precedent rules that consider reliance costs.

In Part I, we provide the background for analyzing precedent and originalism. We maintain that the Constitution treats precedent rules as a matter of common law and that it is constitutional for the judiciary to rely on precedent, even when it is contrary to the original meaning. We argue that the most important normative consideration for precedent rules is the trade-off between the benefits of restoring the Constitution's original meaning and the reliance costs of overruling nonoriginalist precedent. The attraction of prospective overruling is that it often improves that trade-off by offering a method to reduce reliance costs.

In Part II, we describe the doctrinal evolution of prospective overruling. While state courts prospectively overruled precedents from the mid-nineteenth century, the Supreme Court overruled only retroactively until the middle of the last century. Then the Warren Court began to overrule prospectively to smooth the way for the constitutional changes that it adopted. But by the time of the Rehnquist Court, a majority of the Court had begun to significantly cut back on prospective overruling.

In Part III, we show that prospective overruling is well within the scope of the judicial power. While Justice Scalia argued that judges

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11 138 S. Ct. 2448 (2018).

12 Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 279–81 (2020) (discussing this literature).

13 Prospective overruling continues to be a significant area of scholarly interest. *See, e.g.*, *id.*; Elizabeth Earle Beske, *Backdoor Balancing and the Consequences of Legal Change*, 94 WASH. L. REV. 645 (2019); Peter Bozzo, *What We Talk About when We Talk About Retroactivity*, 46 AM. J. CRIM. L. 13, 13 (2019); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Nonretroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999). But this piece reorients the question in terms of originalism—both in addressing originalist objections and in situating prospective overruling as part of the originalist toolkit.

must always say what the law is, the rules of precedent are themselves law. If that were not true, then it is not clear how an originalist like Justice Scalia could ever apply precedents that departed from the original meaning. But if precedent rules can allow judges to apply precedents that depart from the original meaning, then Justice Scalia could have no principled objection on this basis to precedent rules that allow judges to apply the original meaning prospectively but not retroactively. Prospective overruling may not have been known at the time of the Framing, but there was little need for such prospective overruling, given the paucity of constitutional precedents. Moreover, even if the common law forbade prospective overruling, that does not mean the Constitution's original meaning prohibits it. Most common-law restrictions, especially concerning precedent, were not incorporated into the Constitution.

In Part IV, we respond to the argument that prospective overruling relies upon dicta and runs afoul of the case-or-controversy requirement. Here the concern involves the two decisions that are part of prospective overruling. In the first decision, the Supreme Court holds that a precedent is inconsistent with the original meaning but that the precedent should not be overruled as to existing statutes because holding those statutes unconstitutional would create too much disruption. In the second decision, the Supreme Court applies its prior conclusion that the precedent violates the original meaning to a newly passed statute, since doing so would not cause significant disruption.

We first show that in the many cases when the original meaning is not clear, the Court in its first decision will have to determine the original meaning to measure the reliance interests and to assess whether the precedent must be retained. Thus, the consideration of overruling requires a holding on original meaning. And since it is a holding, it is not an advisory opinion.

Second, we show that even in cases where the original meaning is clear, the first decision's ruling about original meaning is not dicta because it is part of a logical method of resolving the case. The stricter "necessary-to-the-result" test is not appropriate for determining whether a conclusion is dictum or an advisory opinion. For example, this test would treat alternative holdings—neither of which is strictly necessary to the decision—as dicta and advisory opinions. The better rule, more in keeping with judicial practice, is to treat statements as part of the holding whenever they appear to be designed to resolve the case.

Third, we explore the relationship between dicta and advisory opinions, arguing that the two categories are governed by different law and have partially different content. The question of what is an advisory opinion has a constitutional dimension, but a limited one that

rules out only statements in cases that are extrinsic to the process of decisionmaking. The question of what constitutes dicta is, in contrast, an issue of the common law and may take account of various factors that improve judicial decisionmaking, such as assuring that original meaning remains an important consideration in our constitutional law.

Finally, even if one decided that the original meaning conclusion in the first decision was dictum, it does not follow that the two decisions could not function as a system of prospective overruling. When the Court engages in the second decision and reviews a newly enacted statute, it is quite likely that this second decision will not impose enormous costs. Here, the original meaning would be applied to a single statute rather than to a large number of statutes enacted over a long period of time. Second, the new statute is likely to be recently enacted and therefore the public is unlikely to have had time to incur significant reliance on it. The Court's previously announced decision would have provided both Congress and the public notice that this new statute would be likely to be held unconstitutional. Even though the first decision would have been dictum as to the original-meaning issue, it is a traditional function of dicta to make compliance with the law smoother and simpler by making the law easier to predict.

Having addressed the constitutional arguments, in Part V we discuss how a normatively attractive originalist approach to prospective overruling would operate. We give paradigmatic examples of precedents that should be only prospectively overruled (the nondelegation doctrine), precedents that should still be retroactively overruled (the insulation of agency heads from presidential removal), and precedents that should not be overruled even prospectively (the hypothetical case of a precedent that strongly protected regulatory takings).

We also consider the interaction of prospective overruling with another method of overruling that cuts back on but does not eliminate a precedent. Under cutting back, the Court would partially overrule a nonoriginalist precedent by narrowing the scope of its nonoriginalist holding. This narrowing would not fully return the law to its original meaning but would move it closer to that original meaning.

Like prospective overruling, cutting back also helps protect reliance interests while permitting a closer approximation of the Constitution's original meaning. Even if replacing a nonoriginalist precedent with the original meaning would impose enormous costs, sometimes the Court can cut back the nonoriginalist precedent to move the law closer but not all the way to the original meaning without generating enormous costs.

We illustrate this possibility by discussing the Commerce Clause. The Court could overrule the precedents that give Congress broad

authority under the Commerce Clause to regulate noneconomic matters, even if these matters had economic effects. This partial overruling would be similar to the Court's action in *United States v. Lopez*[14] but would be both broader and more persuasive. Under this overruling, the Court would define economic matters to exclude activities that did not involve a sale on the market, such as the actions at issue in *Wickard v. Filburn*[15] and *Gonzales v. Raich*.[16] Such a decision would be unlikely to create enormous costs. Overruling the precedents that permitted regulation of noneconomic matters would cut back on the scope of the Commerce Clause under modern doctrine, although it would not return the Clause to what many originalists consider its original meaning. This retrospective cutting back could be combined with applying the full original meaning of the Clause prospectively.

In this last Part, we also describe and reject one other possible objection to our originalist approach to prospective overruling—that it gives too much discretion to judges. We acknowledge that deciding whether overruling should be prospective or retrospective requires judgment and cannot easily be reduced to mechanical rules. But the need for judgment is inherent in all precedent rules. Replacing the current precedent doctrine's multifactor balancing test with a focus on whether overruling should be prospective or retrospective would be beneficial. In particular, it would make the judgments more disciplined and more targeted on the essential trade-off between the benefits of originalism and the costs to disrupting the world.

## I. PRECEDENT AS A COMMON-LAW RULE AND THE TRADE-OFF BETWEEN ORIGINALISM AND RELIANCE

In this first Part, we describe the nature of the problem that precedent presents for originalism. We then show that many past discussions of the relation of precedent to originalism are not only wrong as a matter of original meaning but also normatively undesirable in that they require the judiciary to overturn decisions whose overruling will create large costs to society. We finally describe a solution to the problem of precedent that respects the original meaning and is both practical and beneficial.

The Constitution's original meaning contemplates that precedent rules are mainly common-law rules that are revisable by Congress. Thus, an important question is what the rules for overruling erroneous decisions should be. We suggest that those rules should balance two considerations—the benefits of returning to the original meaning and

14 514 U.S. 549 (1995).
15 317 U.S. 111 (1942).
16 545 U.S. 1 (2005).

the costs that overruling would pose to reliance interests. Another cost of precedent rules is the administrative cost of untethered judicial discretion. To avoid those costs, we stress that courts should not make precedent decisions on an ad hoc basis but through rules. Overall, then, the best approach makes use of rules that reach the optimal trade-off between following originalism and protecting reliance interests.

We briefly describe some precedent rules that we have advocated, including protecting precedent when overruling it would create enormous costs to reliance interests. But the size of those costs depends on how much of the precedent is overruled. For instance, if a portion of a precedent which has created few reliance interests can be overruled in a principled manner, while another portion which has created enormous reliance costs can be retained, that decision would be better than either leaving the precedent unmodified or overruling it entirely. Similarly, if a precedent can be overruled prospectively when only its retrospective overruling would create enormous costs, that too would be better than either leaving the precedent in place or overruling it with both retrospective and prospective effect. While the benefits of prospective overruling seem clear, the harder question is whether prospective overruling is itself consistent with originalism—an issue we address later in the article.

### *A. The Problem of Precedent*

Precedent poses a problem that originalism has never fully solved. For many years, this failure was academic. Until originalism became once again a respectable theory of interpretation and gained substantial adherents on the Court, there was little reason to face the question of overruling nonoriginalist precedents. In that era precedents were very unlikely to be overturned simply because they conflicted with originalism.

But even now when the Court is far more originalist, overruling prior precedent still seems a daunting enterprise for originalism. Part of the reason is theoretical: It is challenging to integrate precedent and originalism. They seem to operate on different planes—one focuses on the meaning of a provision[17] and the other on how the judiciary should proceed in adjudication.[18] Finally, part of the reason is

17 *See* Lawrence B. Solum, *Semantic Originalism* 26 (Univ. of Ill. Coll. of L., Illinois Public Law and Legal Theory Research Paper No. 07-24, 2008), https://ssrn.com/abstract=1120244 [https://perma.cc/P8XU-TBZ5] (putting originalism in context of the philosophy of language).

18 *See* Peter Wesley-Smith, *Theories of Adjudication and the Status of* Stare Decisis, *in* PRECEDENT IN LAW 73 (Laurence Goldstein ed., 1987).

practical—overruling very established precedents, even if nonoriginalist, seems to threaten chaos.[19]

But as originalism gains adherents in academia and on the Court, precedent now haunts originalism and appears to impede its transformation from an academic theory to a governing jurisprudence. Hundreds of established precedents may be nonoriginalist.[20] This large number of nonoriginalist decisions is not surprising, because for much of its modern history the Court often ignored the Constitution's original meaning.

But the world has changed. A culture of originalism has developed among many academics.[21] Litigators can use the fruits of this scholarship to challenge nonoriginalist precedents at the Court. But if these originalist interpretations are accepted, a central question of constitutional adjudication becomes when and how to overrule a precedent that conflicts with that interpretation. Indeed, this question is the most important practical issue for the judicial success of originalism.

But the problem of precedent poses not only a practical challenge to originalism but also a theoretical one. Opponents of originalism have argued that originalists are selective in its application, choosing on result-oriented grounds whether to follow precedent or the original meaning.[22] To be sure, some of these objections may not be well taken: Justices can sometimes ignore the original meaning in a principled manner if no party asks for precedent to be overruled.[23] But when a party asks that precedent be overruled on originalist grounds, originalists do need a framework for such decisions that is both principled and consistent with originalism.[24]

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19 *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1930 (2017) ("If a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject the precedent to scrutiny.").

20 *See* H. Jefferson Powell, *On Not Being "Not an Originalist,"* 7 U. ST. THOMAS L.J. 259, 272–75 (2010) (discussing many nonoriginalist cases that originalism faces).

21 *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 959–71 (2021) (describing recent rise of originalist scholarship).

22 *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 17 (2010).

23 *See* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 787 (2012) (noting that Justice Alito demands a request, full briefing, and oral argument before precedent is overruled).

24 In this Article, we address the Court's precedent analysis only on the assumption that it has taken a case with a question presented of whether to overrule the relevant precedent. We do not address the question of when the Court should decide on certiorari to take such a case and present such a question. The question of how disruptive too many overrulings done quickly would be for society is not unique to originalism, but faces any jurisprudence that permits overruling. One Justice on the Court has argued that the

Many past theories for relating originalism to precedent have failed to provide a beneficial solution to the problem. Some originalists believe that precedent has no role to play whatsoever in constitutional law.[25] But disregarding precedent, however much people are relying on it, is neither required by originalism nor desirable. Moreover, the notion that the Supreme Court will follow a simple rule of overruling all nonoriginalist precedents, whatever the social costs, is unrealistic.

Justice Thomas recently offered a theory in which only precedents that were "demonstrably erroneous" needed to be overruled.[26] But there are important precedents that scholars have demonstrated are very wrong, but which are undesirable to overrule because of the reliance interests they have engendered.[27]

Happily, these theories that require the reckless overruling of precedent are not compelled by originalism. As we have shown elsewhere, the Constitution treats precedent as a matter of federal common law that it is revisable by congressional statute.[28] Thus, the courts in the first instance and Congress ultimately determine what precedent rules should be adopted. Importantly, this power allows for the consideration of reliance, freeing the Court from the obligation to overrule even clearly erroneous precedents when doing so would cause great damage to society.

To be sure, Justice Thomas himself recognizes that judges in England at the time of the Constitution's enactment applied a more robust common-law doctrine of stare decisis than the much more limited one he suggests the Constitution mandates.[29] He nevertheless rejects the notion that federal judges have authority to follow a similar doctrine today in statutory and constitutional cases. For Justice Thomas, the difference is that English common law was judge-made, but our constitutional law is a written text adopted by the people themselves.[30] But the flaw in Justice Thomas's historical argument is that judges in England, including some of the most famous, also applied stare decisis to

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decision on certiorari to take a case that raises questions of overruling precedent is essentially a matter of prudence. Barrett, *supra* note 19, at 1929–33.

25 *See* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) (arguing that following precedent is inconsistent with the Supremacy Clause); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 6 (2007) (same).

26 Gamble v. United States, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring).

27 Again, the Commerce Clause is a good example. *See infra* subsection V.B.1.

28 John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 823–29 (2009).

29 *Gamble*, 139 S. Ct. at 1982–83.

30 *Id.* at 1982.

decisions interpreting written law in the form of statutes.[31] And since parliamentary supremacy prohibited judges from overriding or rewriting those statutes, precedent rules were not uniformly tied to decisions made under the common law.[32]

This practice of applying stare decisis to decisions interpreting statutes also existed in the United States both before and after the enactment of the Constitution.[33] It is therefore not true that stare decisis can be rejected for the Constitution because the Constitution is written law. Moreover, courts in both England[34] and the United States[35] particularly valued precedent that protected reliance interests in certain areas, such as property and contract. Thus, it appears clear that judges possess the constitutional authority to apply precedent rules that take reliance into account.

### *B. The Trade-Off Between Originalism and Reliance Interests*

The harder question is what rules will maximize overall the benefits of following originalism and precedent. We begin by briefly summarizing what the benefits of originalism are and then focusing on what we believe is the most important benefit.

Originalists have argued there are various advantages of following the original meaning. Some have argued that originalism protects popular sovereignty.[36] Others have noted that it advances rule-of-law

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31 *See, e.g.*, Lloyd v. Tench (1750) 28 Eng. Rep. 541; Ves. Sen. Supp. 326 (interpreting a statute on inheritance on the basis of precedent without considering question anew); Parker v. Drew (1754) 96 Eng. Rep. 935; 1 Keny. 114 (deciding interpretation of habeas statute on the basis of precedent without considering question anew). Moreover, judges yielded to prior precedent in statutory interpretation even when they thought the *previous cases wrong*. *See, e.g.*, Ellis v. Smith (1754) 30 Eng. Rep. 205, 207; 1 Ves. Jun. 11, 14–15 (Sir John Strange MR) (interpreting statute of frauds on the basis of precedent although that interpretation was "a dangerous determination, and destructive of those barriers the statute erected against perjury and frauds"); Bishop of London v. Fytch (1782) 99 Eng. Rep. 581, 583; 3 Dougl. 142, 146 (Lord Mansfield CJ). In *Bishop of London*, Lord Mansfield acquiesced in an interpretation of a statute about simony while recognizing that much could be said against it. He concluded "it cannot now be argued. We are bound by the d[e]cisions, if we thought them *ever so wrong*." *Id.* (emphasis added).

32 *See* F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 254 (1965) (describing "the absolute supremacy of a statute" in English law).

33 *See* McGinnis & Rappaport, *supra* note 28, at 813–23.

34 *See, e.g.*, Morecock v. Dickins (1768) 27 Eng. Rep. 440, 441; Amb. 678, 680–81; Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 687–90 (1999) (describing cases).

35 *See, e.g.*, Somerville v. Johnson, 1 H. & McH. 348 (Md. Ch. 1770) (following precedent and stating that it otherwise would have reached the opposite result). And the key reason was reliance. *Id.* at 353.

36 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 111 (1999).

values, particularly the clarity of rules.[37] Still others have argued that following the original meaning promotes the legitimacy of the Constitution, assuring that the government will stay within its allotted compass.[38] A variety of other justifications have been advanced as well.[39] These advantages are not mutually exclusive but taken together strengthen the case for originalism's beneficence.

We accept these advantages, but believe that the primary advantage of following the original meaning is that it is likely to yield good decisions. First, as we have discussed in other work, constitutional provisions must secure supermajoritarian support.[40] That measure of support is likely to make for desirable provisions, because it promotes provisions that have the support of a consensus.[41] Such a consensus is a positive good because it builds an allegiance to the nation's framework for governance.[42] It also discourages partisan provisions that alienate many citizens from their constitution, because partisan provisions cannot secure the needed supermajority support.[43]

Second, the supermajority requirement also leads to high-quality provisions. A supermajority requirement limits the number of proposed constitutional amendments that are seriously debated, because so few can be passed under a supermajority rule.[44] Those proposals that are debated thus receive greater scrutiny than ordinary legislative proposals.[45] The more substantial deliberation likely results in a better decision whether to adopt the constitutional provision.[46]

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37 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989).

38 *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 640–43 (1999).

39 *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2353 (2015) (describing his theory as a "positive account" of originalism); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO L.J. 97 (2016) (justifying originalism on natural-law grounds).

40 *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 62–80 (2013).

41 *Id.* at 38.

42 *Id.* at 38–39.

43 *Id.* at 39–41.

44 *Id.* at 54.

45 *Id.*

46 We argue that the U.S. Constitution has in the main followed beneficial supermajority rules. *Id.* at 62–80. We acknowledge that there are two glaring defects of the process for ratifying the original Constitution and many of its subsequent amendments—the exclusion of Black people and women. *Id.* at 100–01. We argue that such supermajoritarian failures have been substantially corrected by amendments that give those excluded the rights of white men. *Id.* at 108–09, 111–12. While these corrections are not perfect, further judicial correction would have more costs than benefits, because it would be hard for judges to agree on what those corrections would be, and they would lack demonstrated consensus support. *Id.* at 104–12.

Moreover, given that it is difficult to repeal constitutional provisions, they will be evaluated based on their long-run effects.[47] Because it is often difficult to know how a provision will affect the interests of oneself and one's family in the more distant future, supermajority requirements prompt citizens to evaluate constitutional provisions based on their long-run effect on the public generally.[48] Intense deliberation and greater disinterest combine to make it likely that the constitutional provisions that survive are likely good ones.

Following the original meaning also energizes the constitutional amendment process. Under a regime of originalism, citizens know that they cannot change the Constitution through judicial appointments, which encourages citizens to participate in the intense deliberative process that is likely to add sound constitutional provisions to our fundamental law.[49] The supermajority requirement also promotes compromise across partisan divides.[50] Moreover, citizens know that if they succeed their handiwork cannot as easily be disregarded by a subsequent generation of judges. In contrast, nonoriginalist decisionmaking encourages citizens to change the Constitution through judicial appointments without the need to compromise with their opponents.[51] And even if they succeed in amending the Constitution, they cannot be confident that a nonoriginalist judicial regime would stick with the changes.[52]

It does not follow from these arguments that all supermajoritarian-enacted constitutional provisions are good, only that the provisions are likely to be good. But while this virtue of supermajority-enacted provisions might seem limited, its power is shown by the fact that constitutional provisions written by a mere majority of the Supreme Court lack this virtue.[53]

Finally, originalism overall is more likely to lead to clarity, predictability, and judicial constraint—all social goods.[54] While the original meaning of the text does not always yield clear rules that lead to

47 *See id.* at 42–43.

48 *Id.* For example, because people cannot predict who will be the President many years in the future, they will not evaluate presidential power based on whether their party will occupy the presidency but instead based on whether the public interest justifies a presidential power.

49 *Id.* at 201–03.

50 *Id.* at 202.

51 *Id.*

52 *Id.* at 92–93.

53 *Id.* at 85–87.

54 *See, e.g.*, Scalia, *supra* note 37, at 863.

predictable results and constrain judges, it usually yields clearer guidance than an approach that allows judges to inject their policy views.[55]

On the precedent side of the ledger, the most important consideration is reliance. Individuals may have planned their lives around Supreme Court precedent.[56] Moreover, political institutions, like the administrative state and national regulation, have grown up based on the Court's validation.[57] These reliance interests can be individually and cumulatively weighty.

A second consideration in some instances can be the clarity of rules and judicial constraint. Some precedents make the law clearer by giving more particularized guidance than the Constitution provides.[58] This advantage, however, is far from universal. Precedents often make the law less clear because they are handed down by courts at various times. These courts may have had different views of the law, thereby generating inconsistent precedents. Even a court with constant membership has trouble being consistent because social choice theory suggests that it is difficult for a multimember institution to be consistent.[59]

Our focus here is on maximizing the trade-off between the benefits of originalism and the benefits of respecting precedent, principally protecting reliance interests. We should adopt rules that follow the original meaning or precedent depending on what creates the greater net benefits.[60] We have in previous work identified some rules that help make this trade-off. For instance, we have argued that entrenched precedent should be protected from overruling.[61] By entrenched precedent, we mean precedent that is so universally accepted that it would garner the supermajoritarian support equivalent to that needed for a constitutional amendment.[62] Entrenched precedent thus has many of the virtues of the original meaning.[63] Accordingly, the argument for

55 *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 415 (2013) (emphasizing that the originalist inquiry eschews normative considerations and focuses on empirical inquiry).

56 *See* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1185 (1999).

57 For further discussion, see *infra* subsections V.A.1, V.B.1, V.B.2.

58 Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 278 (2005) (noting that precedent can provide guidance on specific points of law).

59 Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813–14 (1982).

60 McGinnis & Rappaport, *supra* note 28, at 834–35.

61 *Id.* at 837–41.

62 *Id.* at 837.

63 *Id.* at 837–38.

overruling such precedent is weak, because the benefits of the original meaning would not tend to outweigh the costs of the overruling.

Another rule we have advocated is to maintain precedents that, if overruled, would create enormous costs.[64] Here the argument is straightforward that enormous reliance costs outweigh even the real advantages of respecting the beneficial original meaning.[65] Enormous costs do not involve simply an ordinary or moderate amount of disruption but a much larger amount. They would typically occur if a large number of statutes were held unconstitutional at the same time, as would be the case if the Commerce Clause were suddenly returned to its original meaning.[66] Enormous costs also occur if a single large program were declared unconstitutional, as would be the case if Social Security were declared unconstitutional.[67] In general, one can identify enormous costs because their occurrence forces the legislature to take immediate action to address them rather than simply waiting for an opportune time to do so. Such costs will play an important part in this Article.

### *C. The Scope of Precedent in the Trade-Off*

While we argue for retaining nonoriginalist precedents if overturning them would produce enormous costs, the amount of costs that are produced depends on the scope of the precedent that is overturned.[68] Sometimes the bulk of reliance costs come from the retrospective nature of the overruling. If the ruling applies only prospectively, individuals and institutions have more time to adapt, substantially decreasing the harm to reliance interests.

For instance, consider the example of the nondelegation doctrine. Some scholars and Supreme Court Justices believe the current nondelegation doctrine does not reflect the original meaning of the Constitution, because it allows Congress to delegate such broad discretion to the executive that it amounts to the delegation of legislative power.[69] Assuming this view is accurate, overruling the currently

64 *Id.* at 836–37.

65 *Id.* at 836.

66 *Id.* at 836–37.

67 *Id.* at 836.

68 As our discussion below of "cutting back" argues, one can reduce the costs of overruling a nonoriginalist precedent by not fully restoring the original meaning but instead by taking the more moderate action of merely moving closer to the original meaning. In this way, the rule that replaces the overruled precedent would involve less of a change than it would if the original meaning were fully restored. *See infra* notes 252–53 and accompanying text.

69 Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting). For further discussion, see *infra* notes 219–31 and accompanying text.

permissive precedent would result in the invalidation of many statutes—statutes which administrative agencies have used to create many regulations that themselves have generated substantial reliance interests. For instance, Congress has directed agencies instead to make rules in "the public interest" without further defining that term.[70] And Congress has directed the Environmental Protection Agency (EPA) to promote the public health, without indicating how much harm is consistent with protecting the public health.[71] If an overruling had to be retrospective as well as prospective, the costs might be sufficiently large as to justify retaining the erroneous precedent.

But if the overruling were prospective only—if it applied only to future statutes that delegated discretion—past regulation and reliance would not be disrupted. For the future, Congress could plan to abide by an originalist nondelegation doctrine and thus much of the reliance cost of overruling would be avoided. A new originalist nondelegation regime for the future would thereby become more attractive. Thus, prospective overruling could be another crucial tool in the toolbox of originalist-friendly methods of overturning nonoriginalist precedent.[72]

The hurdles for originalists are the serious arguments that prospective overruling is itself unconstitutional under the original meaning, including by one of the most prominent exponents of originalism on the modern Supreme Court—Justice Scalia. However important a precedent rule might be in promoting originalism, it must itself comport with the original meaning. But before turning to this original meaning issue, we consider the modern Court's doctrine on prospective overruling.

## II. THE SUPREME COURT'S CHANGING DOCTRINE ON PROSPECTIVE OVERRULING

Before the modern era, the Supreme Court overruled cases only retroactively. But as early as the mid-nineteenth century, state courts

70 For instance, the Federal Communications Commission has authority to regulate wireless communications in the "public interest" or "public convenience, interest, or necessity" in Title III of the Communications Act of 1934. *See, e.g.*, 47 U.S.C. §§ 302a(a), 303, 307(a), 309(a), 310(d), 311(b)–(c)(3), 315(a), 319(c) (2018).

71 *See* 42 U.S.C. § 4321 (2018); *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1420 (2004) (noting that many delegations are broad enough to allow agencies to reach a wide range of results depending on the trade-offs they make).

72 We should note that one does need to accept our substantive precedent rule to find prospective overruling beneficial. So long as a precedent rule considers reliance as a factor, prospective overruling can be beneficial because it allows for the reduction of reliance costs while returning to the correct interpretation of the Constitution.

on occasion overruled state-law precedents prospectively.[73] For instance, when the Ohio Supreme Court ruled that legislatively granted divorces were unconstitutional under the Ohio Constitution, it did not disturb past second marriages that were premised on those divorces.[74] In the earlier part of the twentieth century, the Supreme Court in an opinion by Justice Cardozo dismissed a constitutional challenge to prospective overruling under state law, saying that "[t]he choice [between retrospective and prospective overruling] may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature."[75] He observed that nothing in the Constitution "thrust[s] upon [Montana state] courts a different conception . . . of the meaning of the judicial process."[76]

The Warren Court injected prospective overruling into federal law as part of its criminal procedure revolution.[77] The form of prospective overruling the Court generally adopted was termed selective prospective overruling, which allows the litigant who brings the case the advantage of the overruling while denying the benefit to similarly situated plaintiffs not before the Court in cases that are in various stages of litigation and thus not yet final.[78] The Court had made major reforms to criminal procedure, such as requiring an exclusionary rule for evidence seized in violation of the Fourth Amendment[79] and requiring the famous *Miranda* warning for custodial interrogations.[80] Notably, the Court's analysis in these cases was not originalist in the modern sense of originalism.[81] It did not closely consider, for instance, whether statements made without a warning by police were

73 The most comprehensive discussion of doctrine on prospectivity and retroactivity is that of Richard Kay on which we rely. *See* Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMPAR. L. (SUPP.) 37 (2014).

74 *See* Bingham v. Miller, 17 Ohio 445, 448–49 (1848).

75 Great N. Ry. Co. v. Sunburst Oil & Refin. Co., 287 U.S. 358, 365 (1932).

76 *Id.* at 366.

77 The Warren Court had previously applied a doctrine of preclusion prospectively in one civil case without any substantial discussion. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 422–23 (1964). But its serious discussion of the issue occurred in criminal cases. For a general discussion of the Court's criminal procedure revolution, see Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT: A RETROSPECTIVE 116 (Bernard Schwartz ed., 1996).

78 *See* Kay, *supra* note 73, at 44.

79 *See* Mapp v. Ohio, 367 U.S. 643 (1961).

80 Miranda v. Arizona, 384 U.S. 436 (1966).

81 *See* Gerard V. Bradley, *Slaying the Dragon of Politics with the Sword of Law: Bork's* Tempting of America, 1990 U. ILL. L. REV. 243, 271 ("[C]riminal procedure was the scene of the worst Warren Court depredations upon originalism. Elementary historical recovery reveals *Gideon* and *Miranda* as complete judicial inventions; the appellate counsel cases are an almost comic jumble of judicial policy making; the right to self-representation case is a caricature of history . . . ." (footnotes omitted)).

"compelled" as understood at the enactment of the Fifth Amendment. The Court and commentators recognized that these were newly minted rules of criminal procedure.[82]

It is thus not surprising that the Warren Court did not fully address the constitutionality of prospective overruling under the original meaning. Just as its substantive criminal procedure rulings responded to its perception of real-world policy problems, its prospective overruling jurisprudence responded to the real-world problems that its own solutions created.[83] Applying these wide-ranging new rulings even to cases still on appellate review might have created substantial disruption as many convicted criminals would have been entitled to new trials.[84]

In *Stovall v. Denno*, a case about whether counsel was required at a police-arranged lineup, the Court was willing to apply its new rule only to the litigant in the case and then prospectively to cases that had not begun.[85] The Court provided no clear framework for when to apply such selective prospectivity. Indeed, the Court's analysis of prospectivity has been characterized as unreflective.[86] Nevertheless, the Court did state that "[t]he criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[87]

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82 *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719, 732 (1966) (recognizing that *Miranda* was a "new standard[]"); James R. McCall, *A Basic Concern for Process: Commentary on* Quo Vadis, Prospective Overruling, 50 HASTINGS L.J. 805, 809 (1999) (noting that many Warren Court opinions made "new law").

83 *See* Roosevelt, *supra* note 13, at 1089 (noting that the Warren Court criminal procedure revolution sparked the need for retroactivity).

84 In *Linkletter v. Walker*, the Court had already declined automatically to apply such rulings to those seeking review on habeas, providing wide discretion for the Court to consider whether to endorse such application. *See* 381 U.S. 618, 629 (1965) ("[W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.").

85 388 U.S. 293, 300 (1967). The *Stovall* Court did cast some doubt on pure prospectivity, stating that "[s]ound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies . . . militate against" pure prospectivity. *Id.* at 301. But the Court made purely prospective decisions both before and after *Stovall*, showing that this statement did not establish a constitutional rule. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 422–23 (1964); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (per curiam).

86 Kay, *supra* note 73, at 45.

87 *Stovall*, 388 U.S. at 297.

Subsequently, the Court limited retrospective application of its rulings on direct review to a variety of its new rules, including *Miranda* and the rule that electronic surveillance could constitute a search.[88]

By the time of the early Burger Court, prospective application had become further solidified. It was extended to civil cases, as when the Court declined to apply a new rule about elections to the election before it, because those running the election had relied on the old rule.[89] These cases also were examples of pure prospectivity, because the new rule was not even applied to the plaintiffs who brought the cases complaining of the elections' illegality.

In 1971 the Court provided a test for deciding whether to limit a new rule to being applied prospectively. In *Chevron Oil Co. v. Huson*, the Court for the first time did provide clear description of three factors:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second . . . "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application . . . .[90]

While *Chevron Oil Co.* concerned the application of civil law (the question of a statute of limitations applied to a tort suit), the Court's analysis was stated in general terms and would presumably apply to criminal matters as well.

But by 1993 the Justices retreated from prospective overruling.[91] In *Harper v. Virginia Department of Taxation*, a five-Justice majority abandoned selective prospectivity altogether:

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88 *See* Johnson v. New Jersey, 384 U.S. 719, 721 (1966) (opining on *Miranda*'s retroactivity); Desist v. United States, 394 U.S. 244, 246 (1969) (opining on the retroactivity of Katz v. United States, 389 U.S. 347 (1967)).

89 *See, e.g.*, *Cipriano*, 395 U.S. at 706; Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969).

90 404 U.S. 97, 106–07 (1971) (second omission in original) (citations omitted) (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)) (first citing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 496 (1968); and then citing *Allen*, 393 U.S. at 572).

91 In *American Trucking Ass'ns v. Smith*, four Justices dissented from a plurality opinion that applied *Chevron Oil*, arguing that they could not apply different law to identical controversies. *See Am. Trucking Ass'ns*, 496 U.S. 167, 205–06 (1990) (Stevens, J., dissenting). Justice Scalia also agreed with the dissent that rules could not be applied only prospectively, but argued he was not bound by the flexible doctrine of stare decisis to do so in this case. *Id.* at 201–05 (Scalia, J., concurring in judgment).

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[92]

While this statement may appear to rule out any kind of prospectivity, *Harper*'s holding, as the Court itself has subsequently recognized, only ruled out selective prospectivity.[93] The *Harper* majority included Justices who appeared to object to selective prospectivity only on due process grounds—that it did not treat like cases alike.[94] Full prospectivity is not as subject to this critique, because it drew a distinction based on a common principle—that some people had notice of the new interpretation and some did not.

As with debates about precedent more generally,[95] there may be ferment in the Roberts Court about prospective overruling. In a recent case imposing the liability on government debt collectors under laws penalizing robocalls, Justice Kavanaugh wrote:

> As the Government acknowledges, although our decision means the end of the government-debt exception, no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception and before the entry of final judgment by the District Court on remand in this case, or such date that the lower courts determine is appropriate.[96]

Justice Kavanaugh seems to suggest that the judgment should not apply retroactively to government debt collectors but only prospectively.[97] Justice Gorsuch, in contrast, expressed concern that "prospective decisionmaking has never been easy to square with the judicial power."[98] But, importantly, he did not say as starkly as Justice Scalia

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92 509 U.S. 86, 97 (1993).

93 Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995) ("*Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law."); *see also* Kay, *supra* note 73, at 48.

94 *See, e.g.*, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 537, 543–44 (1991) (opinion of Souter, J.) ("But selective prospectivity also breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *Id.* at 537.). Justice Souter, who wrote the lead opinion in *Beam*, also joined the *Harper* majority. *See Harper*, 509 U.S. at 88.

95 *See supra* Section I.A.

96 Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2355 n.12 (2020) (opinion of Kavanaugh, J.). Justice Kavanaugh was joined by Chief Justice Roberts and Justice Alito. *Id.* at 2343.

97 Another possibility is that perhaps Justice Kavanaugh believes that the debt collector has a good-faith defense, but that kind of defense is not expressed in the statute.

98 *Barr*, 140 S. Ct. at 2366 (Gorsuch, J., concurring in judgment in part and dissenting in part). Justice Thomas joined this part of Justice Gorsuch's dissent. *Id.* at 2342.

did that prospectivity is unconstitutional.[99] Thus, there appear to be Justices open to pure prospectivity of the kind we advocate here. But the more relevant question for originalism is the degree to which originalist objections against any form of prospectivity are sound. It is to that question we now turn.[100]

## III. THE JUDICIAL POWER OBJECTION

The most visible opponent of prospective overruling in recent years was the originalist Justice Scalia. In a series of opinions, Justice Scalia argued forcefully against prospective overruling on a variety of grounds.[101] In particular, he appeared to argue that prospective

99 *See infra* notes 101–02 and accompanying text.

100 It might be argued that even if prospective overruling is desirable, the Court does not have power to apply this doctrine. Instead, the Court is bound by the common law of precedent, which allows cases to be overruled only retroactively. We disagree for two reasons. First, it is not true that the Supreme Court has laid down a clear rule on the question of prospective overruling. As shown in Part II, the Warren Court engaged in prospective overruling of various kinds. While the Court did subsequently reverse itself to the extent of prohibiting selective prospective overruling, the Court has never repudiated the cases that allowed pure prospective overruling—the type that we recommend. Consequently, the best view of the existing caselaw allows the type of prospective overruling we recommend. While one might argue instead that it is unclear as to whether pure prospective overruling is allowed, even if true, that would still permit the Court to choose to adopt such prospective overruling.

Second, the prospective overruling that we recommend can also be justified as being required by new circumstances. Even under a classical understanding of the common law, courts can apply what appears to be a new rule to meet new circumstances. In the case of prospective overruling, two new circumstances justify such overruling. One circumstance is that the Supreme Court (and the law more generally) now places a high value on the Constitution's original meaning. A second circumstance is that there are now so many nonoriginalist precedents on the books. Together these circumstances mean that the law places a high value on returning to the original meaning but doing so would impose high costs if only retroactive overruling were permitted. Hence prospective overruling represents a natural evolution of the common law for our time.

These two arguments are mutually reinforcing. For prospective overruling to be lawful, it is sufficient that either of these two arguments hold. Even if it is clear that the existing common law forbade prospective overruling of the type we recommend, such overruling could still be pursued if justified by new circumstances. Conversely, even if no new circumstances had arisen, prospective overruling will still be lawful if common-law precedent clearly allows it or is unclear as to its legality. Thus, to conclude that prospective overruling is unlawful, one must conclude both that existing precedent clearly prohibits it and that new circumstances have not arisen.

101 *See* Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 102–03 (1993) (Scalia, J., concurring); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 548 (1991) (Scalia, J., concurring in judgment); Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in judgment).

overruling was unconstitutional as exceeding the judicial power of the federal courts.[102]

While we disagree with Justice Scalia's position, it is not entirely clear what he would say about the position we take here. The position that Justice Scalia criticized is different from the one we take. The position he criticized grew out of nonoriginalist judicial updating during the Warren Court.[103] If the Court engaged in living constitutionalism to make "new law," that development might create problems because the government applying the old law could not have known about the law that the Supreme Court had not yet created. As a result, without prospective overruling, the government might have violated the law in a large number of cases without knowing about it, thereby requiring dismissals of those cases.[104] That kind of retroactive rewriting of the law would be disruptive.[105] This situation, which involves nonoriginalist updating, is obviously different than the situation we discuss where the Supreme Court would be applying prospective overruling to *return* to the original meaning of the Constitution.[106]

### *A. Justice Scalia's Arguments*

As we interpret him, Justice Scalia appears to have three main arguments against prospective overruling. First, Justice Scalia appears to argue that it is unconstitutional for judges to change the content of the Constitution—that is, to engage in nonoriginalist judicial updating.[107] On this point, we most emphatically agree with Justice Scalia. The judicial power involves the power to say what the law is, and the law is, initially at least, the Constitution's original meaning. Thus, judges act

102 *See Harper*, 509 U.S. at 106–07 (Scalia, J., concurring); *James Beam*, 501 U.S. at 548–49 (Scalia, J., concurring in judgment); *Am. Trucking Ass'ns*, 496 U.S. at 201 (Scalia, J., concurring in judgment).

103 For discussion of this point, *see infra* notes 107–10 and accompanying text.

104 McCall, *supra* note 82, at 809 ("If . . . new law was to be applied on collateral review as well as direct review, the potential number of reversals of past state convictions seemed a daunting prospect.").

105 *See* G. Gregory Fahlund, *Retroactivity and the Warren Court: The Strategy of a Revolution*, 35 J. POL. 570, 572 (1973).

106 In a recent article, Professor Samuel Beswick argues that the concept of judicial precedent is necessarily retroactive. *See* Beswick, *supra* note 12, at 283. But his conceptual arguments are not directly relevant to the originalist questions we focus upon. *See, e.g.*, *id.* at 311 (arguing that the issue of retroactive adjudication cannot be resolved by "hew[ing]" to the declaratory theory of law favored by Justice Scalia). Moreover, his principal normative argument—that reliance costs are "overwrought" because no change in law is ever entirely unexpected, *id.* at 282—is not applicable to our proposal, because the changes we are discussing have "enormous costs," McGinnis & Rappaport, *supra* note 28, at 836.

107 *Harper*, 509 U.S. at 106–07 (Scalia, J., concurring).

unconstitutionally by purporting to legislate new constitutional meanings.

Second, Justice Scalia argues that prospective overruling is an engine for judicial activism.[108] He seems to contend that prospective overruling will lead to more changes in the law, because it reduces the costs of overruling precedents.[109] While we agree that prospective overruling, as compared to retroactive overruling, will lead to more changes in the law, we do not understand this complaint to be a constitutional objection for two reasons. First, for Justice Scalia's argument to work, it appears to require that all changes in the law are constitutionally objectionable. But this is obviously not the case for an originalist like Justice Scalia. If the Supreme Court were to overturn, in accordance with precedent rules, a nonoriginalist precedent, then this would not be constitutionally objectionable. In fact, Justice Scalia certainly supported the overturning of some such precedents.[110]

Moreover, Justice Scalia's argument here is more of a policy argument than a constitutional argument. The fact that prospective overruling makes it easier to change the law, without more, is not enough to show its unconstitutionality, although it might be relevant to its desirability. Even if the Constitution placed a value on stability, it would not follow that all laws that lead to less stability are unconstitutional, because there are relevant values other than stability.

It is Justice Scalia's third argument that is the important one. Justice Scalia seems to argue that prospective overruling is simply not part of the judicial power.[111] Justice Scalia claims that historically judges exercised authority based on the existing law rather than what the law should be prospectively.[112] But, as we show below, this argument does not provide the support for the argument that prospective overruling is beyond judicial authority.[113]

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108 *See, e.g.*, *id.* at 105 ("Prospective decisionmaking is the handmaid of judicial activism . . . .").

109 *Id.*

110 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in judgment in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

111 *Harper*, 509 U.S. at 107 (Scalia, J., concurring).

112 *Id.* ("Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power . . . .").

113 Justice Scalia also argues that prospective overruling involves the legislative power rather than the judicial power. He says that legislatures make prospective decisions as to what rules society should follow whereas courts simply decide cases based on the existing law. *Id.* But our version of prospective overruling does not involve the judicial exercise of the legislative power. Judges changing the meaning of the Constitution based on their policy views would involve legislative power. But that violation occurs even if judges apply that new meaning retroactively. The constitutional problem is the changing of the law without authorization. By contrast, when a judge returns to the original meaning of the

### *B. Precedent and Following the Law*

Before exploring these arguments, we note that Justice Scalia's position seems inconsistent with how originalists treat precedent. It is widely acknowledged, except for a small number of originalists who reject precedent, that some nonoriginalist precedents, especially those that have been followed for extended periods and would create significant disruption if overturned, should be followed in the future.[114] Certainly, Justice Scalia accepted this view.[115]

The question is how Justice Scalia or any originalist can accept this view. If the original meaning of the Constitution is the proper law, as originalists and Justice Scalia believe, and if judges are supposed to say what the law is, then how can Justice Scalia or any other originalist advocate following nonoriginalist precedent? The only way for Justice Scalia to follow nonoriginalist precedent is for him to conclude that he is following the law by doing so. In other words, it is not merely the Constitution that is the law, but also precedent rules,[116] and therefore judges who follow precedent rules follow the law. Without this principle, an originalist judge following nonoriginalist precedent would not be following the law but would be departing from the law to avoid the bad policy results from overturning a precedent. Clearly, Justice Scalia would not endorse this position. But with the principle that precedent rules are also the law, sometimes following nonoriginalist precedent is entirely appropriate.

But if precedent rules are the law, then a precedent rule that allowed for prospective overruling in specified circumstances would also be the law. While Justice Scalia signed on to precedent rules that allowed nonoriginalist precedents to be followed indefinitely, a precedent rule that allowed some nonoriginalist precedents to be followed, but then to be overturned through prospective overruling would be superior from his own perspective. Under a rule that only allowed nonoriginalist precedent to be followed indefinitely, such precedents would continue to be followed because of the disruption that overturning them would cause. But under a rule that allowed nonoriginalist precedents to be prospectively overruled, more—perhaps many

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Constitution, he is not legislating, even if he does so prospectively (based on a lawful precedent rule). Instead, he is applying the correct law based on the Constitution and applicable precedent rules.

114 *See supra* notes 64–67 and accompanying text.

115 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138 (Amy Gutmann ed., new ed. 2018) (suggesting that where "the Court has developed long-standing and well-accepted principles . . . that are effectively irreversible," he will not reverse them).

116 *See* McGinnis & Rappaport, *supra* note 28, at 826 (defending proposition that precedent rules are a category of common-law rules).

more—nonoriginalist precedents could be overturned for the future. Thus, a precedent rule that allowed prospective overruling would result in more cases following the Constitution's original meaning. If one is an originalist, this effect seems like a significant advantage.

Given that Justice Scalia appears to be committed to the position that nonoriginalist precedent can be followed because precedent rules are part of the law, this concession limits the arguments that he can use against prospective overruling. Justice Scalia could still argue, however, that there is an important distinction between following nonoriginalist precedents and engaging in prospective overruling. While judges around the time of the Constitution's enactment followed nonoriginalist precedents, they did not engage in prospective overruling.[117] In fact, Justice Scalia appears to make something like this argument, claiming that retroactive judicial decisionmaking was historically the only type of decisionmaking by judges.[118] Thus, Justice Scalia might claim that following nonoriginalist precedents was constitutional, but engaging in prospective overruling was not.

But, as we show below, this argument does not work. First, the evidence does not show that the traditional system rejected prospective overruling. Second, even if there were good evidence that the traditional system rejected prospective overruling, Justice Scalia would need to show that this was not merely the law at the time but was also incorporated into the Constitution.

### *C. The Common Law at the Time of the Constitution's Enactment*

We first explore what precedent rules look like around the time of the Constitution's enactment. We show that while prospective overruling did not emerge until the nineteenth century, the circumstances where prospective overruling would have made sense did not exist until that time. And therefore, one cannot draw an inference that the law rejected prospective overruling.

Justice Scalia relies on the claim that prospective overruling did not occur at the time of the Constitution's enactment.[119] While he does not provide any evidence for this claim, we have not uncovered any cases of prospective overruling. But even if prospective overruling did not occur at the time, one cannot move from that fact to the claim that the law rejected such overruling in all circumstances. The law may not have engaged in prospective overruling because the circumstances where it would make sense did not exist.

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117 *See infra* Section III.C.

118 *See* Harper, 509 U.S. at 107 (Scalia, J., concurring).

119 *See id.*

In our view, the circumstances where prospective overruling makes sense did not exist either during the period in England prior to the adoption of the Constitution or in the early years after the Constitution's adoption. For prospective overruling of the kind we propose to make sense, certain circumstances need to hold. First, there needs to be a mistaken decision that is followed for a lengthy period so that significant reliance occurs. Then, a court must face a decision whether to overrule the precedent, where the court could significantly reduce reliance costs by applying the decision only prospectively. It is also probably the case that the mistaken decision will usually involve a constitution, because mistakes as to statutes and the common law are easier for the legislature to correct.[120]

These circumstances were unlikely to hold until the mid-nineteenth century. Under the common-law system that prevailed in England[121] and in the colonies prior to independence,[122] most of the law was common law, with statutes playing a small part. And, of course, there were no constitutions.[123] Under the common-law system, judicial decisions mainly became respected precedents only when they were followed by a series of decisions.[124] This requirement for precedent reduced the likelihood of any single decision being significantly relied upon. And decisions tended to be justified based on following the existing practices of the people and of the courts.[125] Thus, if correct

120 *See* Daniel N. Boger, Note, *Constitutional Avoidance: The Single Subject Rule as an Interpretive Principle*, 103 VA. L. REV. 1247, 1287 (2017) ("Erroneous interpretations of the constitution, as compared to statutes, are seen as more damaging because of the relative difficulty of amending the constitution.").

121 *See* John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849, 864 (2015) (describing how the cause of action was part of the common law, which dominated England from 1066 to the eighteenth century).

122 *See* Richard P. Cole, *Law and Community in the New Nation: Three Visions for Michigan, 1788-1831*, 4 S. CAL. INTERDISC. L.J. 161, 163 (1995) (stating that common law was the primary source of law in the colonies in the eighteenth century).

123 Before the American Revolution, there were colonial charters and the Privy Council decided whether colonial legislation was repugnant to the laws of England, including these charters. *See* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 475–77 (2003). But these decisions tended to be political, *see* Damen Ward, *Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and* Lloyd's Case *(1844)*, 41 VICTORIA U. WELLINGTON L. REV. 381, 382 (2010), and did not generate coherent doctrine. Hulsebosch, *supra*, at 477. Thus, they were unlikely to raise questions of overruling precedent, which depends on a sense that previous decisions are settled law.

124 Theodore Plucknett showed that during the Middle Ages, a single case would have only limited authority, but a series of cases was "a well-established custom" and was entitled to significant weight. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 347 (5th ed. 1956).

125 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *74 ("[I]t is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this

decisions followed existing practices, it would be much less likely that a later court would overturn a decision that was being widely followed, as being legally mistaken. Overall, then, it seems unlikely that a court would face a circumstance where it sought to overrule a widely followed decision that would involve significant reliance costs.

Similar results obtain for the early years of the American republic.[126] During this period, the American legal system resembled the English system in most important respects, including using few statutes,[127] requiring that precedents be supported by a series of decisions,[128] and justifying the common law based on existing practices.[129] Furthermore, since the precedent rule required that a series of reasonable interpretations of the law should be followed, this rule meant there were many fewer precedents to be followed and fewer to be overturned.

It is true that in the American republic, there were constitutions at both the federal and state levels.[130] But in the early years, it is unlikely that judges would have interpreted these constitutions in a nonoriginalist manner. The judges would tend to have similar values as the enactors of these constitutions.[131] And since they were closer in time to the enactment, they could better understand the original meaning. Moreover, even if some of these cases did interpret a constitutional provision incorrectly, there might not have been enough time in this initial period for significant reliance to be incurred.[132]

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internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.").

126 *See* Cole, *supra* note 122, at 164–65 (explaining that in the early republic with few exceptions a common-law order prevailed over one structured by statutes).

127 *Id.*

128 *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 18–19 (1975). This practice carried over from the colonial period. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 8 (1977) (quoting Watts v. Hasey, Quincy 194, 195 (Mass. 1765)).

129 *See* R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in* Anastasoff v. United States, 3 J. APP. PRAC. & PROCESS 355, 368 (2001) (detailing use of customary practice as source for common law in early republic).

130 Eleven of the original states had constitutions before the enactment of the Federal Constitution. *See* Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 373 (2016).

131 For instance, George Washington appointed only Justices who were staunch supporters of the Constitution and the federal government. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 71–72 (2d ed. 1985).

132 Consistent with this view, after state constitutions had been in place for many years, situations arose where state supreme courts did in fact overrule precedent prospectively. Ohio adopted its constitution in 1802. OHIO CONST. of 1802, *reprinted in* ISAAC FRANKLIN PATTERSON, THE CONSTITUTIONS OF OHIO 73 (1912). By 1848 the Ohio Supreme Court

In sum, it appears that in the years before and after the Constitution was enacted, it is unlikely that there were often circumstances when prospective overruling would have been desirable. Thus, if it is true that prospective overruling did not occur in this period, this absence would not indicate that the law at the time rejected prospective overruling. It might simply be the result of the fact that such overruling would not have been appropriate.

It is only if cases at the time rejected prospective overruling when it was appropriate or raised that there would be convincing evidence that such overruling was rejected. But we are not aware of any cases or circumstances where this occurred. Nor does Justice Scalia identify any.

It is also possible that general formulations at the time of the Constitution's adoption about the judicial power might be understood to reject prospective overruling, even though no court or commentary specifically rejected such overruling. Justice Scalia points to a statement from Blackstone for this argument.[133] In his *Commentaries*, Blackstone notes that judges are often required to follow precedents, since the judge is "not delegated to pronounce a new law, but to maintain and expound the old one."[134]

But Blackstone noted that "this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be [clearly] contrary to the divine law."[135] But in these cases,

> the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined.[136]

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had overruled the practice by which the legislature granted divorces. Bingham v. Miller, 17 Ohio 445, 448–49 (1848). But it ruled only prospectively and did not invalidate second marriages that had relied on those divorces. *Id.* Montana adopted its original constitution in 1889. MONT. CONST. of 1889. By 1932 the Montana Supreme Court reversed its previous ruling that shippers could recover overpayments when a commission changed rates, concluding that its previous interpretation of a state statute was erroneous. Sunburst Oil & Refin. Co. v. Great N. Ry. Co., 7 P.2d 927, 929 (Mont.), *aff'd on other grounds*, 287 U.S. 358 (1932). But it applied its ruling only prospectively. *Id.* Thus, as legal regimes aged, giving rise to circumstances where prospective overruling would both make the law correct and protect reliance interests, some courts were willing to embrace the concept.

133 Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (quoting BLACKSTONE, *supra* note 125, at *69).

134 BLACKSTONE, *supra* note 125, at *69.

135 *Id.* at *69–70.

136 *Id.* at *70 (emphasis omitted).

From this single statement Justice Scalia infers that prospective overruling is impermissible, because judges are not entitled to decide a case not in accordance with the law, as he would if he overruled the case only prospectively.[137] Instead, if the judge decides the former decisions were mistaken, then he must decide the immediate case on that basis, not wait for future cases to do so. It may be that Blackstone intended something like Justice Scalia says, but it is not clear that he does.

Assume first that he does intend something of this sort. This reading is problematic for Justice Scalia, because it suggests that following wrong nonoriginalist precedents, as Justice Scalia himself sometimes recommended doing,[138] is prohibited. After all, if the precedent is plainly not the law, we should not follow it on Justice Scalia's description of Blackstone's analysis.[139] If we took Justice Scalia's interpretation of Blackstone seriously, we would never follow precedent where we were convinced the earlier decision was plainly mistaken.

But it is not at all clear that Blackstone considered the situation we are addressing. Blackstone appears to be talking only about precedent and the common law, as it is the common law that is proved, according to the words of the passage that Justice Scalia quotes, by "established custom."[140] Thus, he was not thinking of interpretations of the written law, like statutes or, of course, a written constitution—a type of legal document that did not exist in England at time. Blackstone's position makes some sense as applied to common law in a world where the common law followed the customs and judicial decisions in existence at the time. Thus, if a decision did not comport with those customs and decisions, returning to it immediately would not upset settled expectations and might instead further those expectations. And one might even plausibly claim that the aberrant decision was not the law all along. By contrast, past decisions that interpret written law have distinctive characteristics. Such decisions could be mistaken, because the proper interpretation of the law would depend on its meaning rather than how widely that interpretation was followed. Thus, Blackstone's statement neither refers to precedents involving written laws nor seems applicable to them.

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137 *See Harper*, 509 U.S. at 107 (Scalia, J., concurring).

138 *See supra* note 116 and accompanying text.

139 Blackstone's understanding of precedent is also inconsistent with some judicial decisions in England even in his own era that found an obligation to follow decisions that were clearly wrong, because of reliance interests. *See supra* notes 31, 34, and accompanying text.

140 BLACKSTONE, *supra* note 125, at *70.

### *D. Constitutional Limits on Judicial Power*

But even if it did turn out that the common law at the time had considered and rejected prospective overruling, that would not mean that the Constitution's vesting of judicial power in the courts would prohibit it. Most aspects of the common law were not incorporated into the Constitution. Rather, they were simply ordinary rules of law that were free to be adjusted as circumstances changed either by the legislature or the courts. For instance, in England,[141] and in the colonies,[142] and in the early republic,[143] courts applied common-law hearsay rules of evidence, but no one would think that these common-law rules, let alone the details of the hearsay rules at the time of the Framing, are constitutionally obligatory rules today.[144]

To conclude that a common-law rule was incorporated into a general term like judicial power, one would need reasons to believe that the Constitution's enactors would have sought to prohibit changing this rule. One reason might be that this rule was deeply embedded in the common law, such that the constitutional enactors would have opposed such a change as undermining a traditional and valued rule. But one cannot conclude that the enactors had any fixed views about all prospective overruling for two reasons we have already mentioned. First, the common law at the time had not confronted the circumstances where prospective overruling would make sense.[145] Second, prospective overruling does a better job of returning to the original meaning while also protecting reliance interests than alternative precedent rules.[146] It seems highly unlikely that the constitutional enactors, who constitutionalized so little of precedent, would have precluded use of a method that has these virtues.[147]

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141 The English common law of hearsay developed in the late seventeenth century. *See* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 28 (James H. Chadbourn rev. 1974).

142 *See* Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 816 n.402 (2000).

143 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 152–53 (2d ed. 1985).

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

145 *See supra* Section III.C.

146 *See supra* Section I.C.

147 In our own work, we have identified one feature of precedent that *might* be incorporated into the judicial power. While we believe that the precedent rules are generally a matter of general or common law, we think it is possible that eliminating any consideration of precedent might have been unconstitutional. McGinnis & Rappaport, *supra* note 28, at 823–25. Thus, if a series of cases all reached the same result, we believe a system that would tell judges to entirely ignore this series would be unconstitutional. *Id.* at 824.

Thus, while we understand Justice Scalia's concerns that judges could use prospective overruling to advance nonoriginalist decisions, we believe that there is nothing about prospective overruling itself inconsistent with the original meaning of the judicial power.

## IV. THE CASE-OR-CONTROVERSY ISSUE

A second constitutional argument against our originalist approach to prospective overruling is that it does not involve a case or controversy and therefore constitutes an advisory opinion. A related objection is that our approach to prospective overruling impermissibly treats dictum as if it constitutes a holding. While these objections have often been made against prospective overruling,[148] a system of prospective overruling can be devised that would avoid the charge that the Court's decision is not a case or controversy or that it is dictum. But even if aspects of the system involve dicta rather than holdings, it would still be constitutional and would operate as a workable system of prospective overruling.

Our originalist approach to prospective overruling involves a process of two decisions by the Supreme Court. The first is a Supreme Court holding that certain existing statutes, which have been held to be constitutional under current precedent, are actually unconstitutional under the original meaning. But the first decision would also hold that overruling these precedents as to existing statutes should not occur, because overturning them would cause too much disruption. However, it would also hold that new statutes of this kind will in the future be held to be unconstitutional and likely not enforced because doing so would not cause as much disruption. The second decision would follow through on this holding of the first, voiding a new statute enacted in conflict with the original meaning.

In short, in the first decision, the Supreme Court holds that existing statutes are unconstitutional but should be enforced to avoid significant disruption. In the second decision, the Supreme Court holds that a new statute is unconstitutional and should not be enforced.

The dicta and the case-or-controversy challenges to the originalist approach to prospective overruling raise questions primarily about the

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Significantly, this was a much weaker rule than the law of precedent that existed at the time. Under the common law at the time of the Constitution, a series of cases counted as a strong precedent. *Id.* at 812, 815. A single decision, in contrast, was very weak authority. *Id.* The constitutional rule we proposed, by contrast, merely said that a court could not entirely ignore a series of cases but would have to consider them. *Id.* at 824. Thus, the modesty of the rule makes it more likely to be a core feature of judicial decisionmaking that is constitutionally obligatory. *Id.*

148 *See, e.g.*, Fallon & Meltzer, *supra* note 13, at 1798–99.

first decision. While the Court in the first decision purports to hold that the statute violates the Constitution's original meaning, it might be argued that the Court's conclusion as to the original meaning is not holding but dictum, and not a case or controversy but an advisory opinion, because it is not necessary to the result in the case. Instead, the Court could have avoided the original-meaning discussion and simply determined that *even if the statute violated the original meaning*, the statute should still be enforced because overturning the nonoriginalist precedent would be too disruptive. If this "original-meaning conclusion" is dictum, treating it as a binding precedent might make it an unconstitutional advisory opinion and would be inconsistent with the law governing holdings and dicta.[149]

We respond to these challenges in this Part. Our main response is to argue that the first decision is neither an advisory opinion nor dictum. But we also argue that even if the first decision is dictum, the type of prospective overruling we discuss is constitutional and could still largely function.

### *A. A Defense of Prospective Overruling Based on the Claim that It Involves Neither an Advisory Opinion nor Dicta*

The challenge to the first decision is twofold. First, the challenge maintains that the decision is not a case or controversy but an advisory opinion. Second, it argues that the decision is not holding but only dictum.

The conventional understanding of the case-or-controversy provision of Article III requires an actual dispute between adverse litigants.[150] This requirement has sometimes been thought to apply not merely to lawsuits that do not involve an actual dispute but also to issues in a lawsuit that do not have an effect on the parties' interests.[151] Such lawsuits and issues are thought to be advisory opinions that are prohibited by the Constitution.[152] While judicial opinions often discuss dictum that does not resolve the dispute between the parties, such dictum will be unconstitutional only if it purports to be a binding decision of the court. Although we are concerned with the original meaning of

149 The concerns about the second decision mainly involve whether it is determined by the first decision. If the first decision is considered dictum, then the Court's second decision holding the new statute to be unconstitutional and unenforceable cannot be seen as resulting from the Court's first decision. Instead, the Court would be deciding the case as one of first impression, with no applicable precedent.

150 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 52–53 (5th ed. 2015).

151 *Id.* at 53–54.

152 *Id.* at 52–53.

the case-or-controversy requirement, we here employ the conventional understanding as a means of analyzing the objection.[153]

The dicta objection to prospective overruling is similar but distinct from the case-or-controversy requirement. The dicta objection claims that the first decision is merely dictum because it is not necessary to decide the issue in order to resolve the case. Since it is dictum, the Court's original meaning conclusion cannot bind the Supreme Court or the lower courts.

Because dicta involve issues that do not have an effect on the parties' interests, some commentators view dicta as not constituting a case

153 While this Article attempts to analyze the case-or-controversy requirement from an originalist perspective, this task is easier said than done. The originalist literature on case or controversy and advisory opinions is somewhat thin, and that which exists raises questions about the conventional view of the origins of the case-or-controversy requirement. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 12–14 (1985) (noting that is not clear that the correspondence of the Justices was based on an interpretation of the Constitution); Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621 (2021). An article on prospective overruling generally cannot devote the space to explore the original meaning of the case-or-controversy requirement. In addition, the term "advisory opinion" has been used in multiple ways. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 643–51 (1992) (discussing five uses of the term).

Our strategy in this Article is to explore the case-or-controversy requirement from a perspective that does not assume too lenient a requirement. In that way, we are unlikely to apply a requirement that is less restrictive than the original meaning. One narrow view of an advisory opinion that has some historical support is that it is limited to an opinion that is issued extrajudicially or that can be overruled by an institution other than a court. *See* Letter from Chief-Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488, 488–89 (Henry P. Johnston ed., New York, G.P. Putnam's Sons 1891); Hayburn's Case, 2 U.S. (2 Dall.) 409, 409–10 (1792). But we assume a broader understanding of an advisory opinion that allows for one even when it is issued as part of a judicial case that can be reviewed only by the judiciary.

We assume that a lawsuit that does not involve parties with adverse interests would not be a case or controversy. *But see* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-contentious Jurisdiction*, 124 YALE L.J. 1346, 1356–57 (2015). We further assume that each of the rulings in a case must involve parties with adverse interests. In other words, if two parties were adverse as to issue *A*, but not as to issue *B*, a binding ruling as to issue *B* would be an advisory opinion. Nonetheless, we do not believe that a nonbinding statement relating to issue *B* would be an advisory opinion. Such a statement would merely be dictum. One should not conclude that mere dictum is an unconstitutional advisory opinion, since that would render the traditional practice of engaging in dicta to be unconstitutional. Instead, we assume that a binding decision—one treated as a holding—would be an advisory opinion if it involved an issue about which the parties did not have adverse interests, even if it arose in a lawsuit in which the parties had adverse interests as to another issue.

or controversy.[154] For those commentators, the case-or-controversy objection largely overlaps with the dicta objection.

We respond to these objections in this Part. Our main response in this Section is that the first decision is neither an advisory opinion nor dictum. But we also argue in the next Section that even if the first decision is dictum, the type of prospective overruling we have in mind here could still largely function.

Our argument that the original meaning conclusion is neither an advisory opinion nor dictum is multifaceted. In the first three subsections, we assume that the case-or-controversy and dicta challenges entirely overlap—that the original-meaning conclusion violates the Constitution and the law of holdings and dicta if that conclusion is dictum but is treated as a holding. Then in the fourth subsection, we revise that assumption and argue that these two challenges may implicate different standards.

In the first subsection, we respond to the argument that the original meaning conclusion is dictum (and an advisory opinion). The argument that it is dictum turns on applying a strict version of what has been called the necessary-to-the-result test.[155] Our first subsection assumes that this test is correct but argues that even under this strict test, there will be many times when it is necessary to the result to decide the original-meaning question first.

Our second subsection then challenges the notion that the necessary-to-the-result test is the correct test for determining whether a judicial conclusion is dictum. We show that this test is too strict. While some conclusions that fail this test are appropriately regarded as dicta (those that do not appear to be designed to answer the question raised by the case), other conclusions that fail this test are not appropriately regarded as dicta (those that appear to be designed to answer the question raised by the case, such as alternative holdings or decisions that are part of a logical method for answering the question in the case). Since addressing the original-meaning question is part of a logical method for answering the question in the case, it is not appropriately regarded as dictum. In the third subsection, we show that the Supreme Court has treated decisions about qualified immunity through a logical method that leads to holdings that may nevertheless not be strictly necessary to the decision of the case. Its reasons are similar to those for using a method that makes a decision about original meaning in a case about constitutional precedent.

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154 *See, e.g.*, Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 228 (2010) (suggesting a relation between dicta and the absence of a case or controversy).

155 *See, e.g.*, Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (discussing the traditional opinion that statements not necessary to the holding are dicta).

The fourth subsection then relaxes the assumption that the test for whether a conclusion is dictum is the same as the one for whether it is an advisory opinion. Instead, we argue that the question whether a conclusion is an advisory opinion is governed by constitutional law while the question whether it is dictum is governed by general common law. We also argue that the content of these categories may differ, with advisory opinions likely being narrower than dicta. We then suggest that advisory opinions encompass only conclusions that are not part of a method for resolving the case but are used as a binding precedent.

We also believe that the original-meaning conclusion is not dictum under the general law for the reasons given in the previous subsections. While some readers may have the intuition that the general law adopts the necessary-to-the-result test, the fact that alternative holdings are not treated as dicta and that the Court has adopted standards that depart from this test suggests otherwise.[156] But even if one believed that the necessary-to-the-result test was the correct test for dicta in some cases, this conclusion might change as the general law was adopted to changing circumstances.

The fifth subsection then argues that another way that the original-meaning conclusion would be holding rather than dictum is if the Supreme Court were to adopt a decision rule that required that the Court decide the original-meaning question first. Such a decision rule would be both constitutional and desirable policy.

### 1. Some Original-Meaning Conclusions Are Necessary to the Decision

The first response to the argument that the original-meaning conclusion is dictum (and an advisory opinion) under the necessary-to-the-result test is that this is simply not true under many circumstances. In particular, it will often be necessary for the Court to decide the original-meaning issue when the original meaning is not clear. It will need to decide this question in order to intelligently make the determination whether the original meaning can be applied to existing statutes. Thus, the Court cannot decide the case simply by arguing that, even if the original meaning is inconsistent with the nonoriginalist precedent, the plaintiff loses because overturning the precedent would produce enormous costs.

For example, suppose that there are two plausible tests under the original meaning for determining whether a delegation is

156 *See infra* notes 164–71, 188–205, and accompanying text.

constitutional.[157] Both are stricter than the lenient intelligible-principle test, but one is stricter than the other. Suppose also that if the stricter test is the original meaning, then the original meaning would result in enormous costs. But if the less strict test is the original meaning, the original meaning would not result in enormous costs.

In this situation, it may turn out that the original meaning results in enormous costs and therefore cannot be enforced as to the existing statute, but deciding the original meaning is still necessary to the result in the case. Whether the plaintiff asks for the stricter or the less strict test, the Supreme Court will need to decide the original meaning to answer this question. It is true that if the stricter test is the original meaning, the original meaning cannot be enforced as to the existing statute. But if the less strict test is the original meaning, the original meaning can be enforced as to that statute. Thus, the Court needs to decide the original-meaning question before deciding whether the precedent should be overruled. This process will be required even if it turns out that the stricter test is the original meaning and cannot be enforced because it would cause enormous costs.[158]

This is an important point: any time the original meaning is not clear and one of the possibilities would cause enormous costs and another possibility would not, the Supreme Court will have to decide the original-meaning issue before addressing the precedent question. Thus, under the necessary-to-the-result test of a holding, the Court

157 *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 300 (2022) (noting many different versions of the nondelegation doctrine).

158 This situation is not the only one when it is necessary to decide the original meaning even though the original meaning leads to enormous costs. The Court might also need to decide the original-meaning issue in order to determine whether to cut back on an existing possibly nonoriginalist precedent. Imagine that the original meaning is not clear as to the nondelegation doctrine. The original meaning might be the existing lenient standard or it might be a very strict standard forbidding most delegations, which would result in enormous costs if it were applied to existing statutes. In this situation, one might assume that the Court could decide the case without resolving the original-meaning question.

But the Court might need to decide the original meaning for a different reason. As we discuss below, in this situation another option for the Court—which we call a cutback—is to apply to existing statutes a constitutional rule that is not the original meaning but is closer to the original meaning than the existing nonoriginalist rule. *See infra* subsection V.B.2. Since it is not as strict as the original meaning, this cutback would not result in enormous costs. Here, the Court would need to decide the original-meaning issue, since the cutback would be appropriate only if the original meaning conflicted with the existing precedent and the original meaning was stricter than the cutback. Thus, once again, it might be necessary for the Court to decide the original meaning under the necessary-to-the-result test even though applying the original meaning to existing statutes would result in enormous costs.

would sometimes have to decide the original-meaning issue, even if it turns out that the original meaning would produce enormous costs.[159]

### 2. The Necessary Test is Too Strict

Another argument for concluding that the original-meaning conclusion is a holding (and involves a case or controversy) turns on the classification of different types of judicial reasoning as dictum versus holding (and as an advisory opinion versus a case or controversy). Many commentators employ the necessary-to-the-result test to draw this distinction.[160] While the necessary-to-the-result test has intuitive appeal, upon examination it appears to employ too strict a test for determining what a holding is. In particular, it wrongly classifies conclusions that are part of the resolution of an issue but are not strictly necessary to the result as dicta even though they should be treated as holdings.[161]

The necessary-to-the-result test treats two types of judicial conclusions as dicta. First, the test treats as dicta conclusions that are not part of the resolution of the issue before the court. The clearest example of this type of conclusion is an opinion where the court addresses a matter unrelated to the subject of the case.[162] For example, if the case involved the question whether the First Amendment protected a certain type of speech, a court's conclusion about a totally unrelated matter involving what the Fourth Amendment protects would be dictum. Such a conclusion would be unnecessary to the decision as to the First Amendment issue.[163]

The same result would obtain for a case where the court addressed a matter involving the same general subject as the issue raised by the case but where the matter addressed is not part of the resolution of the issue. For example, if a case raised the question whether a private

159 Below, we also discuss a situation in which there is a decision rule that requires the Supreme Court to decide the original-meaning question first. Under this rule, addressing the original meaning is necessary to the result because the result cannot be reached without first answering the original meaning question. *See infra* subsection IV.A.5.

160 *E.g.*, Dorf, *supra* note 155, at 2000.

161 The necessary-to-the-result test is also unclear, as it is applied in very different ways. *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1556–65 (2020).

162 Dorf, *supra* note 155, at 2013 (distinguishing "completely unrelated speculation" from narrow statements tied to the facts of the case).

163 One can imagine how a discussion of the Fourth Amendment might be relevant to a First Amendment issue. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 579–81 (2008) (arguing that the right of the people in various amendments in the Bill of Rights showed that the Second Amendment protected an individual rather than a collective right). But the example we have in mind here involves where the First Amendment issue has no direct relationship to the Fourth Amendment issue.

citizen is entitled to First Amendment protection for speech about the government, then a discussion about whether a government employee is entitled to First Amendment protection for speech about his workplace is also likely to be dictum. While the discussion does involve the same general subject as the issue raised in the case, it nonetheless, like the previous example, involves a distinct issue that does not help to resolve the case.

The second type of court conclusion that fails the necessary-to-the-result test involves a different situation. In this second type, the court's conclusion actually is part of an attempt to resolve the issue in the case. But due to the answers that the court reaches, the court could have reached the result without answering this question.

One example of this type of case involves an opinion that provides alternative reasons for a resolution of a case. Each of the reasons would have been sufficient on its own to decide the case, but the court includes both reasons in its opinion. In this situation, neither of the alternative reasons for the resolution of the case were necessary to the result, because the alternative reason would have produced the same result.[164]

Although it fails the necessary-to-the-result test, there are strong reasons for treating these alternative reasons as holdings rather than as dicta.[165] First, and most importantly, these alternative reasons appear to be designed to actually decide the case.[166] They are addressing issues directly raised by the issue in the case. Moreover, these alternative reasons do not merely attempt to decide the case; they also make it more likely that the resolution will be correct.[167] By providing two or more reasons for a result, this method helps to ensure that the result is correct even if it turns out that one of the reasons is mistaken.[168] The parties do not know on which issue the court will rely to make its

164 The redundancy of alternative holdings means that neither is necessary to the result. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1057 (2005) (quoting United States v. Johnson, 256 F.3d 895, 915 n.8 (9th Cir. 2001) (en banc) (opinion of Kozinksi, J.)).

165 Dorf, *supra* note 155, at 2044 (rejecting the treatment of alternative holdings as dicta).

166 *See id.* The language of our test for whether a conclusion is dictum or an advisory opinion—whether the conclusion appears to be designed to decide the issue—is chosen advisedly. If the test simply asked whether the conclusion was designed to decide the issue, it would turn on the intent of the judge. But we do not believe the judge's intent is of primary importance. Rather, the question is whether the conclusion is objectively a method for resolving the issue in the case. That objective standard is captured by the language whether the conclusion "appears to be designed to decide the issue."

167 *Cf. id.* (noting that judicial accuracy is not undermined by treating both alternatives as holdings).

168 *See id.* at 2044–45 (noting that both holdings support the judgment).

decision and thus must argue both issues vigorously to win the case.[169] Finally, it appears that courts have traditionally offered alternative reasons for a holding without suggesting that this would render both reasons to be dicta.[170] Courts have then often treated an alternative holding as binding, even when challenged as dictum.[171]

There is also another type of court conclusion that fails the necessary-to-the-result test that should be classified as a holding. Under this type of court conclusion, the court decides several matters as part of a logical or natural order of resolving the issue presented by the case.[172] For example, imagine that a government action is challenged as an unreasonable search under the Fourth Amendment. The court that addresses the matter will naturally first ask whether the government action is a search under the Fourth Amendment. If the court concludes the action is a search, the court will then determine whether the search is unreasonable. After all, it seems odd to go in the opposite order, and first ask whether something is an unreasonable search before one even knows whether it is a search.

While the court will be following a logical order, this method will sometimes fail the necessary-to-the-result test. Suppose that the government action, if classified as a search, would be a reasonable one. Then, it would appear that the necessary-to-the-result test would classify the conclusion that the government action was a search to be dictum rather than holding. After all, that conclusion would not be necessary to the result. The court could have simply avoided deciding whether the action was a search. Instead, the court could have reasoned, that *even if* the government action was a search, it would still be a reasonable search.

Although it fails the necessary-to-the-result test, there are strong reasons for concluding that a judicial conclusion that is part of a logical order for deciding an issue is not dictum but holding. Most significantly, the conclusions that the court reaches are part of an order of decision that is a logical method for deciding the case. Thus, it is

169 *See* Healy, *supra* note 8, at 919.

170 If it did render alternative reasons to be dicta rather than holdings, that would require a change in practice. The court would have to either refrain from offering more than one reason, provide two reasons but specify only one of them was a holding (while the other one was dictum), or offer two reasons, recognizing that neither one would be a holding.

171 *See, e.g.*, United States *ex rel.* Caruso v. Zelinksy, 689 F.2d 435, 439–40 (3d Cir. 1982); Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 321–22, 321 n.116 (1999) (listing cases with alternative holdings).

172 Dorf, *supra* note 155, at 2045 (discussing statement that is "an essential ingredient in the *process* by which the court decides the case, even if, viewed from a post hoc perspective, it is not essential to the *result*" and rejecting notion that it resembles dictum that is an aside to the case).

sensible to treat these conclusions as reasonable methods to actually decide the case rather than to decide matters that are not needed for the decision.[173]

Moreover, there is no order of decision that is knowable in advance that will ensure that the court only decides issues that satisfy the necessary-to-the-result test.[174] For example, if the court chose to decide the search question first, that would lead it to satisfy the necessary-to-the-result test if the government action was not a search. But if the action was a search and that search was reasonable, then the court could satisfy the necessary-to-the-result test only by not deciding the search issue and instead holding that the government action—assuming it was a search—was a reasonable search. Thus, the court would need to use a different order of decision to satisfy the necessary-to-the-result test depending on the answers it reaches. There is no order that would always satisfy the necessary-to-the-result test.

Further, the court will often actually need to know how other issues are resolved in order to fully satisfy the necessary-to-the-result test. For example, assume that the court followed the logical order of decision by first deciding whether the government action was a search. And assume further that the government action was a search but the search was a reasonable one. In this situation, in order to satisfy the necessary-to-the-result test, the court would need to first decide that the government action was a search in order to know that it should not reach a holding on that search issue in its opinion. Instead, it should conclude that even if the government action was a search, the search was a reasonable one. As with alternative holdings,[175] a logical ordering would still necessitate each party arguing vigorously for his position. There thus is not as substantial danger as there is in more expansive views of dicta that the judicial statement will not have been carefully considered.[176]

Thus, the necessary-to-the-result test may not actually save the court time by having it decide fewer issues. Instead, the test will sometimes require the court to decide an issue, and then after the court resolves the issue, the test will instruct the court to avoid authoritatively

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173 This position accords with a general view of dicta taken by some commentators. RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 72 (4th ed. 1991) ("The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury." (footnote omitted)).

174 Dorf, *supra* note 155, at 2045 ("Whichever question the court considers first, until it actually decides the matter, it will not know whether choosing to consider that question first prevents the need to consider the other question.").

175 *See* Healy, *supra* note 8, at 919.

176 *See* Tyler, *supra* note 161, at 1556, 1588–90 (noting that there is danger in giving precedential force to whatever a court adjudicates).

resolving it as a holding. Thus, rather than save the court time or prevent it from reaching out to decide issues, the necessary-to-the-result test instead sometimes requires the court to decide an issue in order to avoid authoritatively resolving it in its opinion.

Overall, then, the conclusions that a court reaches while following a logical order of decision should not be regarded as dicta but as holdings.[177] The logical order allows the court to select a sensible order of decision that involves a reasonable method of actually deciding the case that is before the court.[178] In contrast to issues not genuinely raised by the case, the court appears to be actually attempting to resolve the case. And while this order may sometimes fail the necessary-to-the-result test, there is no alternative order knowable in advance that will always satisfy that test. Moreover, a court following the logical-order approach will not be reaching out to decide issues that are not genuinely raised. Instead, it will simply refrain from deciding issues informally in an effort to determine which issues not to include in the opinion.

This argument has important implications for the main question we are exploring—whether a court's decision that a precedent conflicts with the original meaning is holding if the court would not overturn that precedent because it results in enormous costs. A court that first decided whether the precedent conflicted with the original meaning before deciding whether it should be overruled would be following a logical order of decision in deciding the case. The question whether the precedent is mistaken is normally a prior question than whether it should be overruled. After all, if the precedent is not incorrectly decided, the question whether it should be overruled does not even arise.

Confirmation that deciding the original meaning question first is part of the logical or natural order is provided by the fact that the alternative ordering—deciding the precedent question first—would require that the court reason, *even if* the original meaning differed from the precedent, the precedent should not be overturned. That the court must use "even if" reasoning suggests it is answering the question in midstream rather than from the beginning.

Thus, there is a strong argument for concluding that deciding the original-meaning issue first constitutes a case or controversy under the Constitution.

177 Dorf, *supra* note 155, at 2046 ("[S]urely a court should not be faulted for addressing issues in the order that they logically present themselves.").

178 *Cf. id.* ("[I]t simply makes more sense to resolve the question whether there was any error before deciding whether a putative error was harmless.").

### 3. Consistency with Modern Law

While modern decisions are not good evidence of the original meaning, it is nonetheless worthwhile for the perspective it provides to note that modern law sometimes treats the resolution of issues that follow a logical order but fail the necessary-to-the-result test as cases or controversies and as holdings. In particular, in cases involving qualified immunity, the resolution of the merits in harmless error cases, and Fourth Amendment good faith cases, the Supreme Court has endorsed treating as holding the resolution of an issue even though it fails the necessary-to-the-result test.[179] Thus, under existing law the Constitution does not appear to treat the resolutions of issues that follow a logical order as advisory opinions.

In particular, the Supreme Court's treatment of qualified immunity is especially instructive since it seems so analogous to the original-meaning-and-precedent question addressed here. Under qualified immunity law, a state official who enjoys qualified immunity would be liable in damages only if they violate clearly established constitutional rights of which the official "knew or reasonably should have known."[180] This standard could be divided into two parts: (1) a showing that the state official violated the plaintiff's constitutional rights and (2) a showing that the state official violated clearly established constitutional rights. Under this two-part standard, the necessary-to-the-result test often led the courts to decide that the state official had not violated clearly established rights, without deciding whether the plaintiff's actual constitutional rights had been violated.

In *Saucier v. Katz*, the Supreme Court changed the decision rule governing these cases, holding that lower courts must decide first whether the state official had violated the plaintiff's constitutional rights before addressing whether those rights were clearly established.[181] Permitting the lower courts to have discretion as to which issue to decide, given the necessary-to-the-result test, would lead to what the Court later called "constitutional stagnation."[182] In other words, if the Court merely decided whether the right was clearly established, it would never decide the actual constitutional questions and therefore the rights would never become clearly established.

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179 *See* Healy, *supra* note 8, at 872–82, 889–95. The Court has also been increasingly willing to decide cases that do not affect the parties bringing them. *Id.* at 866–68.

180 Wood v. Strickland, 420 U.S. 308, 322 (1975).

181 533 U.S. 194 (2001), *overruled in part by* Pearson v. Callahan, 555 U.S. 223 (2009).

182 *Pearson*, 555 U.S. at 232; *Saucier*, 533 U.S. at 201 (arguing that first deciding whether an officer's conduct violated a constitutional right is necessary to the law's "elaboration from case to case").

Thus, the Court required lower courts to issue dicta, as measured by the necessary-to-the-result test, in order to promote the development of constitutional law. And it appeared to expect that these conclusions, which violated the necessary-to-the-result test, not only be followed in the future but be used as holdings to establish that certain rights were clearly established.[183] Significantly Justice Scalia concluded in an opinion in another case that these conclusions that violated the necessary-to-the-result test were holdings, not dicta.[184]

Eventually in *Pearson v. Callahan*, the Court came to conclude that *Saucier* was problematic.[185] But its decision was not based on the view that it was inappropriate to treat a conclusion that was dictum under the necessary-to-the-result test, as a holding. Instead, it was based on a variety of pragmatic factors which do not apply to the original-meaning-and-precedent question with which we are concerned.[186] In fact, the Court noted that "[o]ur decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases."[187] Thus, *Pearson* continues to acknowledge that the necessary-to-the-result test should not be uniformly used as a method for determining whether an issue is dictum or an advisory opinion.

The qualified immunity cases are instructive here not merely because they permit a logical order to be followed that violates the necessary-to-the-result test but also because they do so based on the notion that the necessary-to-result-test would cause the constitutional law question to be neglected, which is very similar to our argument that the original-meaning argument might be neglected if the necessary-to-the-result test were applied to prevent the court from reaching the question of Constitution's original meaning.

### 4. The Constitutional Law of Cases and Controversies and the General Law of Holdings and Dicta

We have been assuming that the test for determining whether the original-meaning conclusion is dictum is the same as that for determining whether it is an advisory opinion. But there are strong reasons for

183 Interestingly, Justices Scalia and Thomas, the two most originalist Justices on the Court at the time, joined the majority opinion in *Saucier*. *Saucier*, 533 U.S. at 196.

184 Bunting v. Mellen, 541 U.S. 1019, 1024 (2004) (Scalia, J., dissenting from denial of certiorari) ("But the *Saucier* procedure gives rise to—*and is designed to give rise to*—constitutional rulings . . . with precedential effect.").

185 *Pearson*, 555 U.S. at 237–42.

186 *Id.*

187 *Id.* at 242.

questioning this assumption. The two standards differ as to the type of law involved and the likely content of that law. In this subsection, we argue that the standards may differ but that the original-meaning conclusion will still resolve a case or controversy and is unlikely to be dictum.

The case-or-controversy and holding categories differ first as to the type of law involved. The case-or-controversy category involves constitutional law, deriving from the words of Article III.[188] Under an originalist approach, this standard does not change over time unless the Constitution is amended. Moreover, as constitutional law, this standard takes priority over federal statutes and general common law.

By contrast, the distinction between holding and dictum is a question of common law[189]—in particular, of the general common law that governs precedent and related areas.[190] As general common law, the dicta category would exhibit different characteristics than constitutional law. First, the general common law might change as circumstances change.[191] Second, the general common law is more likely to employ policy considerations in its formulation than constitutional law.[192] Third, the general common law is less likely to involve a uniform

188 U.S. CONST. art. III.

189 *See* David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 724 (2007) (noting distinction between holdings and dicta made in the common law).

190 *The general law* or *the general common law* refers to a body of law that existed when the Constitution was enacted and that the Constitution assumed in various areas. While modern lawyers tend to view common law as mainly state law, the general law referred to a common law that existed not in one state or locality but across multiple jurisdictions. Thus, no single court or jurisdiction had the authority to control the general law. *See generally* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 518–19 (2006); Mike Rappaport, *The New Originalism: The Emergence of the General Common Law*, LAW & LIBERTY (Aug. 10, 2015), https://lawliberty.org/the-new-originalism-the-emergence-of-the-general-common-law/ [https://perma.cc/56BY-DVKH] (arguing that originalism is increasingly acknowledging the importance of the general law).

The general law, even when announced by federal courts, does not constitute supreme law of the land. Thus, it does not displace state law. But such law can nonetheless have effects if the states adopted the general law as their own or if federal preemption of state law, either by statute or the Constitution, leaves it room to operate. We have previously argued that certain internal rules that federal courts apply, such as precedent rules, are best understood as applying the general law. McGinnis & Rappaport, *supra* note 28, at 826–30 (defending this view). Here we assume that the rules governing holding and dicta in federal court are general law.

191 *See* John V. Orth, *Common Law*, *in* THE OXFORD COMPANION TO AMERICAN LAW 125, 126 (Kermit L. Hall et al. eds., 2002) (referring to common law's "flexibility" to change with circumstances).

192 *See* Hugh Collins, *Utility and Rights in Common Law Reasoning: Rebalancing Private Law Through Constitutionalization*, 30 DALHOUSIE L.J. 1, 13–14 (2007) (arguing that policy considerations are key to common-law reasoning).

standard. The words of a constitutional provision will usually employ a single standard, derivable from its meaning that applies uniformly.[193] The general common law, by contrast, may employ more deviations from such a standard based on a practice that is not fully written down.[194]

The existence of these two types of law raises the question of how they compare with one another. It seems clear that the Constitution establishes a minimum standard that the general law must conform to, but which it can depart from so long as it respects that minimum. In this respect, the relationship is similar to that of constitutional and statutory standing. The Constitution establishes a minimum beyond which statutory standing cannot go.[195] There must always be an injury in fact.[196] But so long as the statutory standing respects that requirement, it can select any standing requirement rule.[197] Thus, it can require that the plaintiff be within the zone of interest of the applicable statute or it can permit citizen-suit plaintiffs who are outside that zone to bring lawsuits.[198]

Similarly, the Constitution imposes a minimum requirement that the general law cannot violate. If a conclusion would constitute an advisory opinion, the general law could not authorize the courts to treat that advisory opinion as a binding holding. The Constitution would take priority. But so long as the Constitution's minimum requirement is respected, the general law could impose a stricter requirement as to what constituted a holding. Thus, if a conclusion would be eligible to be treated as a case or controversy, the general law could still choose to treat it as dictum. Moreover, the general-law requirements for determining what a holding is might change over time as circumstances change.

While we do not offer a full account of either the case-or-controversy requirement or the holding requirement here, we do

193 That is the view at least of those who think the Constitution should be interpreted according to its original meaning.

194 *See* Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 826, 829 (2004) (arguing that the policy considerations underlying common law lead to a certain arbitrariness).

195 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (outlining constitutional requirements for standing).

196 *Id.*

197 *See* Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 855–58 (2017) ("The doctrine of standing has long been thought to have both constitutional and nonconstitutional dimensions." *Id.* at 855.).

198 *See* Brannon P. Denning & Sarah F. Bothma, *Zone-of-Interests Standing in Constitutional Cases After* Lexmark, 21 LEWIS & CLARK L. REV. 97, 135 n.264 (2017) ("[T]here has been no suggestion that zone-of-interests standing is anything but a prudential standing rule or that it is tethered to larger constitutional concerns.").

believe that the following provides an accurate description of these requirements. The minimum requirement that the Constitution imposes for cases and controversies draws a distinction between conclusions that are part of a reasonable method for resolving a case and conclusions that are not. For example, an opinion that reached a conclusion as to a Fourth Amendment question that is unrelated to the First Amendment question raised by the case would not represent the resolution of a case or controversy. That conclusion could not be made a binding holding. One cannot exercise the judicial power to reach a binding determination simply by including it in a judicial opinion.

This minimum requirement, however, would not extend to judicial conclusions that are part of a reasonable method of resolving the issue in the case, but end up failing the necessary-to-the-result test, such as alternative holdings or conclusions reached as part of a logical method for resolving the issue in the case.[199] Such conclusions are connected to a resolution of the case, even if they are not necessary to the result.[200]

A thicker requirement, such as the necessary-to-the-result test, is unlikely to be the uniform and unchanging constitutional rule.[201] Judges have long followed a practice that allows alternative holdings or conclusions reached as part of a logical method. Interpreting the Constitution to treat such conclusions as advisory opinions would undermine significant aspects of Supreme Court practice.[202] It would also preclude such actions, even in situations where there are strong normative reasons for allowing them.

While the Constitution would impose this minimum requirement, the general common law might or might not impose a thicker requirement. Stating what the general common law is on this matter, either today or in the past, is more difficult since it requires a review of judicial practice. But given judicial practice it seems clear that the general

199 Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1805–06 (1998) (distinguishing advisory opinions from dicta); *see also supra* notes 164–76 and accompanying text.

200 *See* Tyler, *supra* note 161, at 1600 (coming to similar conclusion after analyzing Article III case-or-controversy requirement).

201 *See* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 508 (2001) ("[T]here is ample reason to believe that to the extent the Court has used the term 'advisory opinion' to refer to any opinion or portion thereof not strictly necessary to the result of a case, it has done so more as a matter of judicial discretion than constitutional imperative.").

202 *See* Tyler, *supra* note 161, at 1599–1600 (showing how a more stringent view of the case-or-controversy requirement as regards dicta would conflict with several aspects of settled practice).

common law does not adopt the necessary-to-the-result test as a uniform test for determining whether a conclusion is holding or dicta.[203]

One possibility is that the test for cases or controversies—that the judicial conclusion appears designed to answer the question in the case—also applies to distinguishing holdings from dicta. It is true that judges and commentators often mention the necessary-to-the-result test. But they also put forward conclusions as holdings that depart from that test. One way to understand the references to the necessary-to-the-result test is not as a test for whether something is a holding or not, but instead as a counsel to judges to avoid unnecessary issues that might not be generally desirable for them to reach. Given time and resource constraints, it will often make sense for judges to decide less rather than more.

Another possibility is that the necessary-to-the-result test sometimes applies and sometimes does not, depending on the specific circumstances or the subject matter of the dispute. As a statement of the general law in recent years, this seems to be obviously accurate. As the example of the decisional rules for the ordering of issues in qualified immunity cases discussed above shows, the Court was willing in *Saucier* to require that judges decide issues with precedential effect that would not have been holdings under the necessary-to-the-result test.[204] While *Saucier* has been modified, the Court still allows judges based on their discretion to decide issues with precedential effect that do not satisfy the necessary-to-the-result test.[205]

If the general law sometimes allows judicial conclusions that are part of a logical method for addressing an issue to be treated as holdings, even though they fail the necessary-to-the-result test, then there is a strong argument for concluding that this rule should extend to the original-meaning conclusion reached as part of the first decision in a case of prospective overruling. As we discuss below,[206] in a world where the original meaning is viewed as having great importance for the content of constitutional law, there are strong reasons to allow judges to reach questions of original meaning.

Finally, even if one somehow concluded that the necessary-to-the-result test was the appropriate test for most or even all areas under the general law at present, that rule would not preclude a change in the general law if the Supreme Court believed that the circumstances had changed. The same reasons that justify allowing judges to reach questions of original meaning during the first decision mentioned above

203 *See supra* notes 179–87 and accompanying text.
204 *See supra* notes 181–84 and accompanying text.
205 *See supra* notes 185–87 and accompanying text.
206 *See infra* subsection IV.A.5.

also suggest that the general law should allow them to reach it even if that is not the practice in most or even all areas under the general law at present.

5. A Decision Rule Requiring the Original Meaning First

There is yet another way that the Supreme Court's original-meaning conclusion might be a holding rather than dictum. The Court might adopt a decision rule that would render the original-meaning conclusion necessary to the result. Under this decisional rule, when a party calls for a precedent to be overruled based on the original meaning, the Court should decide the original-meaning issue before deciding the precedent issue. If this were the applicable rule of law, then deciding the original-meaning issue would be necessary to the result because the law would forbid the Court from deciding the precedent question first.

The Court often adopts decision rules of this type. The most familiar rule of this type is the one that requires a court to first decide questions of jurisdiction before deciding other questions.[207] But there are other decisional rules: as discussed above,[208] the Supreme Court for a time required that courts decide the constitutional question in qualified immunity cases before deciding whether that law was clearly established. Such decisional rules are probably best understood as general or common-law rules.

There are, moreover, strong reasons for adopting such a rule here. In a world where the Supreme Court has long adopted and followed nonoriginalist decisions, it is easy for judges and lawyers to lose sight of the Constitution's original meaning. But under a jurisprudence that greatly values originalism, there are significant ways that the original meaning can influence the law if it is known, even if it does not involve overruling nonoriginalist precedents. One of the most important ways is by not expanding nonoriginalist precedents beyond their existing limitations.[209] Instead, the Court should apply the original meaning to matters beyond the precedent's scope. But to do this, it is necessary for the Court to know the original meaning. Requiring that the original meaning be decided first when a nonoriginalist precedent is challenged helps to promote the visibility of the original meaning and to restore the influence of that original meaning.

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207 *See, e.g.*, Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94 (1998); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999).

208 *See supra* notes 181–84 and accompanying text.

209 *See* Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2030 (2012) (discussing the "good reasons" for limiting nonoriginalist precedent).

Of course, the Supreme Court does not have unlimited authority to use decision rules to make what would otherwise be dictum into holding. To take an extreme example, the Supreme Court could not render a conclusion unrelated to the issues in a case to be a holding by issuing a decision rule that required the unrelated matter to be decided before deciding issues raised by the case.

In our view, a general-law decision rule of this type would be constitutional so long as the matter it required to be decided first would be a case or controversy under the Constitution. If, as we suggest, an issue resolved as part of a logical order of the issues is a case or controversy, then the general law could adopt a decision rule that requires a court to decide an issue first so long as that issue was addressed as part of a logical ordering of issues. Since deciding the original meaning prior to addressing the viability of overturning a precedent would be part of a logical ordering of issues, such an original-meaning-first decision rule would be constitutional. And therefore the resolution of the original meaning would be holding, even if the Court subsequently determined that overturning the precedent retrospectively would involve enormous costs.

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In this Section, we have provided various arguments for concluding that a Supreme Court conclusion that a precedent violated the original meaning would be a case or controversy and a holding even though it did not overturn the precedent in that case on the ground that it would result in enormous costs. Some of the time this original-meaning conclusion would be a holding under the necessary-to-the-result test because it would be necessary for the Court to decide the original meaning to determine whether the precedent should be overruled. But even where the original-meaning conclusion would not satisfy the necessary-to-the-result test, there are strong arguments that it should not be regarded as an advisory opinion or dictum. Conclusions that are part of a logical process for deciding a case should be regarded as holdings. But even if such decisions are normally treated as dicta, the Supreme Court or Congress could adopt a decision rule that requires the original-meaning issue to be decided first and that renders the original-meaning conclusion a holding.

### *B. A Defense of Prospective Overruling Assuming that It Involves Dicta*

While we argue that the original-meaning conclusion in the first decision resolves a case or controversy and is a holding, the system of prospective overruling that we defend could still largely function even if that conclusion were deemed to be dictum. Under those circumstances, the original-meaning conclusion reached in the first decision

would not bind the Court in the second decision. Nonetheless, an original meaning conclusion that was dictum but was joined by a majority of the Supreme Court would nonetheless function as a form of prospective overruling and allow only new statutes to be declared unconstitutional.

Suppose that a majority of the Court signed an opinion with an extended discussion of the Constitution's original meaning, concluding that it conflicted with the existing nonoriginalist precedent, but then determined that this precedent could not be overridden for existing statutes because that would produce enormous costs. Suppose also that this conclusion was for some reason determined to be dictum.

Congress then passes a new statute that violates the original meaning as articulated by the Court in its first decision. While the Supreme Court would not be bound to follow the original meaning discussion in the first decision—it was dictum, after all—nothing would preclude the Court from following it in a new case. It would be entirely proper for the Court to follow its own dictum. Indeed, since the purpose of dicta is to provide guidance about what the judges believe the law is on a matter, unless a Justice had changed his mind on the issue, failing to follow that dictum would be peculiar.

In this second decision, the Court would hold not only that the existing precedent conflicted with the original meaning, but also that this new statute could be declared unconstitutional because applying the original meaning to new statutes would not create enormous costs. Thus, the Court could through a holding in the second decision allow the Constitution's original meaning to be given effect for new statutes, even though it is not applied to existing statutes.

Although the first decision would not be a holding that bound the Court and the government, the new statute would generally not produce enormous costs for several reasons. First, the original meaning would be applied to a single statute rather than to a large number of statutes enacted over a long period of time. Second, the new statute is likely to be recently enacted and therefore the public is unlikely to have had time to incur significant reliance on it. By contrast, existing statutes may have been in place for generations and therefore been relied on for long periods. Third, the Court's previously announced decision would have provided both Congress and the public notice that this new statute would be held to be unconstitutional. Although the decision was dictum, it would still provide useful guidance on the likely unconstitutionality of the statute.[210] While it might be objected

210 This effect of Supreme Court dicta is supported by the existing practice of treating Supreme Court dicta as being highly persuasive, as is followed in many circuit courts. Abramowicz & Stearns, *supra* note 164, at 1084. However this practice is characterized, it

that dicta cannot provide notice, this is not true.[211] One of the main purposes of dicta is to let the public and other judges know what the judges in the case believe the law requires.[212] Such notice is important.[213]

It is true that Supreme Court dicta would not have the identical effect of a holding. In addition to not binding the Supreme Court in the second decision, dicta would also not bind the lower courts.[214] Thus, if a new statute were challenged after the first decision by the Supreme Court, lower courts could not declare that statute unconstitutional based on the first decision. Lower courts are not allowed to anticipate Supreme Court overturnings of its own precedent.[215] But that divergence from an arrangement in which the original-meaning conclusion in the first decision involved a holding does not seem all that consequential.

One concern about relying on Supreme Court dicta is that it might require the Supreme Court to engage in an extended discussion on a complicated issue that was merely dictum. Such discussions might seem to conflict with judicial practice. But this concern seems to be

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appears that Supreme Court dicta is not all that uncommon, and it is given strong effect in the lower federal courts. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1252 (2006) (providing an example of influential Supreme Court dicta).

211 Interestingly, Judge Leval argues for something like the dicta approach as a resolution for dealing with a subclass of qualified immunity cases. Here he treats dicta as stating the established law in the area. *See* Leval, *supra* note 210, at 1281.

212 *See id.* at 1253 (mentioning dicta's notice-giving function as one of its valuable purposes). *See also* Katyal, *supra* note 199, at 1805–06. Lawyers regularly use dicta to predict what the content of the law will be. If a lawyer ignored dicta to the detriment of his client, then that could be malpractice. Circuit courts often follow dicta of the Supreme Court. *See, e.g.*, *In re* McDonald, 205 F.3d 606, 612–13 (3d Cir. 2000) (arguing that circuit courts should not ignore Supreme Court dicta).

213 Richard M. Re, *Second Thoughts on "One Last Chance"?*, 66 UCLA L. REV. 634, 644 (2019) ("When the Court gives notice that a precedent is on unstable ground, reliance interests are plausibly reduced, even if not eliminated."). Even if one believed that dicta could not provide notice that could be charged to the Congress and the public, it would still lead them to act differently because of their prediction that the Court would strike down the law. Thus, the law would be more likely to be challenged quickly, and people would be less likely to rely significantly on the law, since they know that it is likely to be held unconstitutional.

214 Leval, *supra* note 210, at 1274. *But see* McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (stating that Supreme Court dicta binds lower courts almost as "firmly" as holding).

215 *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

misplaced.[216] At present, the Supreme Court often engages in significant discussions that are merely dicta in an effort to guide the lower courts. For example, in *District of Columbia v. Heller*, the Supreme Court not only held that the Second Amendment protected the right to keep arms but also wrote extensive dicta on matters not raised by the case, such as "the possession of firearms by felons and the mentally ill" or "laws forbidding the carrying of firearms in sensitive places."[217] The Court, no doubt, included such dicta as a means of guiding the lower courts and instructing the public on the nature of the right it recognized.[218]

## V. PROSPECTIVE OVERRULING APPLIED

In this Part, we offer a framework for when prospective overruling is and is not appropriate. Prospective overruling dominates other options when the costs of applying the originalist interpretation to past legislation or judicial decisions are enormous but when the costs of applying it to the future are manageable.

We begin by offering a paradigm example of prospective overruling. If the Court believed that the Constitution required Congress to make the major policy decisions for its delegations, leaving the agencies to fill in only the details, the Court should apply the new rule on delegation only prospectively. Upending all past delegations that violated the new rule would have enormous costs. Individuals have relied on regulations promulgated under more open-ended delegations of the administrative state in the warp and woof of their daily lives.

We compare this paradigm case with one in which retrospective overruling should be employed and another in which no overruling of any kind should be employed. While some retrospective overrulings would produce enormous costs, many would not. For instance, if the

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216 While it would be constitutional for the Court to write an opinion containing extensive dicta, it would not be constitutional to issue an advisory opinion. But even if the original-meaning conclusion were dictum, it would not be an advisory opinion under our approach. First, since it would be dictum, it would not run afoul of the rule of treating as binding a conclusion reached in a case in which the parties did not have adverse interests. *See supra* note 153 (noting this rule). Second, while a nonbinding conclusion has sometimes been thought to be an advisory opinion, this is not true of an opinion issued by a court with final authority in a judicial case where the parties have adverse interests. *See* Burset, *supra* note 153, at 655; Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); Letter from Chief-Justice Jay and Associate Justices to President Washington, *supra* note 153. Nonbinding conclusions issued by a court with final authority in a judicial case where the parties have adverse interests are simple dicta. Such dicta have long been engaged in by courts and thus are not advisory opinions.

217 554 U.S. 570, 626 (2008).

218 Supreme Court dicta are said to be highly persuasive. Abramowicz & Stearns, *supra* note 164, at 1084.

Court believes as a matter of original meaning that the precedent that insulates the heads of so-called independent agencies from removal conflicts with the original meaning, this precedent could be overruled retrospectively. Regulatory activity by these agencies will not be much affected. When the costs of retrospective overruling are not enormous, retrospective overruling should be embraced to obtain the immediate benefits of following the original meaning.

By contrast, some overrulings produce such enormous costs that they should not occur even prospectively. A hypothetical example is provided by assuming (contrary to fact) that the Supreme Court had adopted a rule forbidding all regulatory takings and that a later Court had concluded that this rule violated the original meaning. Overturning this precedent even prospectively would impose enormous costs because many property owners would have bought and invested in property assuming the prior anti–regulatory taking rule. Permitting regulatory takings could significantly depress current property values.

We then consider two complications that arise with prospective overruling. The first involves whether prospective overruling should allow Congress to update but not expand existing statutes that have been allowed to continue to operate. If the Supreme Court came to believe that the Commerce Clause's original meaning was very narrow, applying that meaning retrospectively would generate enormous costs. But even if existing statutes were exempted from the ruling, one might argue that the ruling might still generate enormous costs if Congress were not allowed to revise those statutes to keep them up to date. Particularly in heavily regulated industries, citizens rely on Congress's ability to update these laws to make sure they do not become anachronistic. Thus, Congress might be allowed to update those statutes but not to expand them. By contrast, we argue that other prospective overrulings, such as applying a strict nondelegation doctrine prospectively, should not permit Congress to update the existing statutes.

We also consider the interaction of prospective overruling with another method of overruling that cuts back on, but does not eliminate, a precedent. Like prospective overruling, cutting back also helps protect reliance interests while permitting a closer approximation of the original meaning of the Constitution. It does so by overruling a nonoriginalist precedent not with the full original meaning but with a rule that is closer to the original meaning than the existing precedent. We illustrate this possibility again with the Commerce Clause, arguing that the Court could apply to existing statutes, without generating enormous costs, not the narrow original meaning but a meaning that is narrower than the Court's existing nonoriginalist doctrine. This retrospective cutting back could be combined with applying the even narrower original meaning of the Commerce Clause prospectively.

Prospective overruling and cutting back are important but underutilized tools in the toolbox for reconciling precedent and original meaning. The use of these tools, however, is not left open to the discretion of the Justices but instead is determined by the inquiry into enormous costs. They have the advantage of making the transition from nonoriginalism back to the original meaning of our fundamental law less disruptive and more gradual when necessary. They allow for the instantiation of a correct constitutional principle but in a way that recognizes that society is a living organism that may have grown up in disregard of that principle and may need time to be weaned back toward it.

Our purpose in this Part is *not* to definitively argue that any precedents are wrong under the original meaning: that analysis would entail a huge substantive undertaking. Instead, we explore the desirability of prospective overruling of precedents assuming they are inconsistent with the original meaning.

### *A. Prospective Overruling, Retrospective Overruling, and Retaining Precedent*

In this Section, we discuss three paradigm cases. The first is for overruling precedent only prospectively. The second is for overruling precedent completely and thus retrospectively. The third is for not overruling precedent at all, even though it is inconsistent with a constitutional provision's original meaning.

#### 1. Paradigm Case for Prospective Overruling

First, we examine not a remote hypothetical but a major change in constitutional law that may be on the agenda of a Supreme Court majority. Since the middle of the last century, the Court has upheld delegations of authority to the executive branch so long as there is an "intelligible principle" in the statute to guide the actions of the executive agency in carrying it out.[219] The Court has applied this test so leniently that it has not struck down a delegation since the New Deal.[220]

But a majority of Justices have now expressed openness to revisiting that doctrine. In *Gundy v. United States*, while a plurality upheld a

219 Gabriel Clark, Note, *The Weak Nondelegation Doctrine and* American Trucking Associations v. EPA, 2000 BYU L. REV. 627, 638, 635–38 (providing a history of the nondelegation doctrine used by the Supreme Court since the New Deal).

220 *See* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL E. HERZ, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 71 (8th ed. 2017) (stating that no statute has been invalidated on nondelegation grounds since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

statute that delegated significant discretion to the Attorney General,[221] three Justices dissented, arguing for a strict version of the nondelegation doctrine.[222] Justice Alito voted with the plurality, but indicated that he would be willing to reconsider the lenient nondelegation doctrine in an appropriate case.[223] Justice Kavanaugh later stated that he also would consider tightening the standard for delegation.[224] A sixth Justice, Justice Barrett, also seems open to a stronger nondelegation doctrine, having, while an academic, called for a stricter nondelegation test for statutes affecting fundamental rights.[225]

Assuming that the existing nondelegation doctrine violates the original meaning, an originalist Court could adopt a stricter doctrine. One common version offered by originalists is that Congress must make the rules for important matters, while delegating to the agencies only the authority to fill in the details.[226] Here the case for prospectively overruling the delegation is strong, as retrospective overruling would likely entail enormous costs. Some administrative delegations, like those that delegate the authority to the agency to act in the public interest or to advance public health without telling the agency how to trade off health against other values, would clearly fail almost any tightening of the standards.[227] Such invalidations would affect widespread reliance interests. For instance, people have moved to and invested in places in part because federal environmental standards have made them healthier and better places to live. Congress would certainly have to act immediately after a retrospective overruling to enact a wide range of detailed statutes to comply with the standard. In contrast, prospective overruling would generate no challenges to existing regulations or even new regulations under existing statutes, because a

221 139 S. Ct. 2116, 2121 (2019) (plurality opinion).

222 *Id.* at 2131–48 (Gorsuch, J., dissenting).

223 *Id.* at 2030–31 (Alito, J., concurring in judgment).

224 Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari).

225 Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 319 (2014).

226 *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825), Chief Justice Marshall sets forth this standard, according to some originalists. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 359–61 (2002). For a different version of the strict nondelegation doctrine, see Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 195 (Peter J. Wallison & John Yoo eds., 2022).

227 For instance, the Clean Air Act requires the EPA to promulgate national ambient air quality standards (NAAQS) for each air pollutant identified by the agency as meeting certain statutory criteria. *See* 42 U.S.C. §§ 7408–7409 (2018). For each pollutant, the EPA sets a "primary standard[]"—a concentration level "requisite to protect the public health" with an "adequate margin of safety"—and a "secondary standard[]"—a level "requisite to protect the public welfare." *Id.* § 7409(b).

prospective overruling could declare in effect a safe harbor for preexisting statutory delegations. No regulation under a current delegation would be invalidated for failure to comply with the nondelegation doctrine.

It is true that Congress would have to comply with the new standard in the future. But with notice of what it needed to do, it could pass one statute at a time, moving incrementally as new regulation was needed. Moreover, Congress in fact has multiple ways of complying with the stricter nondelegation doctrine. Besides writing statutes that confer less agency discretion, Congress could instead delegate broad authority to the agency but require that regulations become enforceable only when approved by Congress under fast-track procedures that guarantee a vote. This requirement could be modelled on a proposal currently before Congress, the Regulations from the Executive in Need of Scrutiny (REINS) Act.[228] Under the REINS Act, agencies would recommend "major" rules to Congress but the rules would not take effect unless they were enacted on a vote by both houses and signed by the President.[229] Congress could also create congressional agencies in particular regulatory areas to advise it on what to enact, thus giving Congress the expertise on which executive agencies now depend.[230] Congress thus has a variety of institutional responses to temper the effects of the ruling on any reliance interests prospectively.[231]

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228 Regulations from the Executive in Need of Scrutiny Act, H.R. 277, 118th Cong. (2023); *see also* Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 141–48 (2013) (describing procedural changes the REINS Act would introduce).

229 H.R. 277 § 3 (proposing to amend 5 U.S.C. § 801(b)(1) to state that a "major rule shall not take effect unless the Congress enacts a joint resolution of approval"). For a discussion of how the REINS Act could be improved, see Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, *in* THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT 105, 108 (M. Todd Henderson ed., 2018).

230 *See* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 OHIO ST. L.J. 5, 57 (2022) (suggesting creation of agencies modelled on the Congressional Budget Office).

231 A variation on this paradigm case would be to prospectively hold that major international agreements could be ratified only through the Treaty Clause. Currently, congressional-executive agreements allow Congress and the President to enter into very important international agreements with domestic effect through legislation rather than by following the strictures of the Treaty Clause. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. e (AM. L. INST. 1987) (stating that interchangeability of congressional-executive agreements is the prevailing view). But many originalists believe that the Treaty Clause is the sole mechanism for reaching major international agreements. *See, e.g.*, MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 174–93 (2007). On the assumption that making such major international agreements outside the mechanism of ratifying a treaty is unconstitutional, a prospective change would be the best approach for returning to the original meaning.

### 2. Paradigm Case for Retrospective Overruling

Even if prospective overruling is sometimes appropriate, retrospective overruling should remain the norm. Following the Constitution's original meaning has benefits, and those benefits are greater if they are realized immediately. Nonoriginalist precedents, even old ones, may not have generated sufficient reliance interests. In those circumstances, Congress or state legislatures would not feel under immediate pressure to take action if these precedents were overruled.

One example of a precedent that could be overruled retrospectively is the legislative veto. In *Immigration & Naturalization Service v. Chadha*,[232] the Supreme Court issued an opinion that held over three hundred provisions with legislative vetoes to be unconstitutional.[233] Yet, the decision did not cause significant disruption, largely because the legislative vetoes were generally severable from the remainder of the statutes.[234]

Another example of a precedent that could be overruled retrospectively is the one that allowed independent agencies, which many originalists believe to violate the President's constitutional power to

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Retrospective overruling of congressional-executive agreements would impose enormous costs, because Congress would have to respond immediately to maintain the many important international agreements, such as the Uruguay Round Agreements Act and the United States-Mexico-Canada Agreement Implementation Act, that have generated substantial reliance interests of private citizens. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020). Declaring unconstitutional legislation that enforces a large number of important international agreements would also raise questions about the reliability of the United States as an international partner that Congress would need to immediately address. The costs of a prospective overruling would be substantially less. Congress would not have to take immediate action. Diplomats could make clear to our foreign partners that future agreements would have to go through the treaty process. They could shape their negotiations in the shadow of the more arduous requirements for ratifying a treaty.

But the difference between congressional-executive agreements and the nondelegation doctrine is that Supreme Court precedent covers only the latter issue. Congressional and executive practice has created a long tradition that supports the constitutionality of congressional-executive agreements. Nevertheless, the Court has never ruled on it. Is there any basis in the common law for the Court to defer to practice in the first place, particularly where the practice does not reflect early contemporaneous or recent interpretations of the Constitution? If not, the question of a prospective change in the law does not arise, because the Court should apply the originalist principles regardless of the practice. If there is deference based on a common-law principle of interpretation to long-standing practice, treatment similar to prospective overruling may well be warranted.

232 462 U.S. 919 (1983).

233 *Id.* at 959; William West & Joseph Cooper, *The Congressional Veto and Administrative Rulemaking*, 98 POL. SCI. Q. 285, 286 (1983).

234 Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439, 451 (2021).

supervise executive officials.[235] While *Humphrey's Executor v. United States*[236] has been in place for generations, it seems clear that overruling it would not generate enormous costs. Assuming that the insulation from removal is severable, which the Court has generally held,[237] overruling *Humphrey's Executor* would permit regulation by the agency to proceed much as it did before. To be sure, the various executive review functions contemplated by executive orders, such as Executive Order 12866,[238] could then be applied to the formerly independent agencies, but it is doubtful that individuals have any substantial reliance interests in the presence or absence of such procedures.[239]

The more general point is that prospective overruling should not be used as a substitute for retrospective overruling when reliance costs are not high. There is a value to returning completely to the original meaning and when the countervailing costs are relatively small, the opportunity to do so should be seized.

### 3. The Paradigm Case for No Overruling

While prospective overruling reduces the reliance costs of overruling precedents, there may still be precedents that result in such enormous costs that it is better not to overrule them at all—retrospectively or prospectively. These cases will be ones where even future changes in the law upset past expectations. Thus, disruption of past and future actions cannot be easily segmented.

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235 *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1215 (1992) (defending the hierarchical conception of the unitary executive).

236 295 U.S. 602 (1935).

237 *See, e.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2211 (2020); *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508 (2010) (using severability in a similar way).

238 Exec. Order No. 12866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2018), *amended by* Exec. Order No. 14094, 88 Fed. Reg. 21879 (Apr. 11, 2023).

239 One objection to the argument for eliminating the insulation of review of independent agencies is that it would endanger the independence of the Federal Reserve. One possibility is that such undermining would create enormous costs. Another possibility is that the Federal Reserve is not actually independent. The Chairman of the Federal Reserve, who appears to have the predominant authority, and the two Vice Chairmen are not insulated from removal from their positions as Chairman and Vice Chairmen. *See* 12 U.S.C. § 242 (2018); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1176 (2013). Yet no President has ever removed or tried to remove the Chairman, the public face of the Federal Reserve. *See* Charlie Savage, *Does Trump Have the Legal Authority to Demote the Federal Reserve Chairman?*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/us/politics/trump-fed-chairman-powell.html [https://perma.cc/M6BU-6H8D]. Thus, it seems likely that the independence of the Federal Reserve is protected by conventions backed by the fear of market reactions to unjustified removal more than by statutory restrictions on presidential removal.

Here is a hypothetical example for the purposes of illustration. Assume that the Supreme Court had adopted a strong requirement that all regulations that diminish the value of private property should receive compensation under the Takings Clause, a position advocated for by Richard Epstein.[240] While regulations justified by the police power would not require such compensation, Epstein's conception of that power is narrow and limited to protections against threats to life, liberty, or property.[241]

Assume now that that the Supreme Court reconsiders this view and finds that it violates the original meaning, perhaps because the Takings Clause applies only to physical intrusions on property.[242] This new rule cannot be applied retrospectively as it would revive many laws that undermine reliance interests. Property owners have bought and invested in property based on the idea that regulation not justified by a narrow police power will be unconstitutional.

But applying the original meaning prospectively will not do much to reduce these costs. People buy property for its stream of future income. That income can be reduced, indeed destroyed, by future regulation. For instance, even if the overruling were prospective, future historic preservation regulation that would have been a taking under the old regime would be permissible under the new one.[243] Yet such regulation could radically affect the value of property, reducing it far below the purchase price. And the property owner could take no action to protect his investment after the Court's decision came down.

That this is a hypothetical example is not an accident. It is difficult to come up with examples under current law where prospectivity would not substantially reduce costs, particularly if the prospective rule is tailored to avoid those costs—a matter we discuss below. Prospectivity is a powerful tool, because in most instances both the government

240 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195–200 (1985).

241 *Id.* at 112.

242 Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994) (arguing that the original meaning of the Taking Clause covers only physical takings); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985). *But see* Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008) (arguing that the Fifth Amendment protected only against physical invasions, but that the Fourteenth Amendment may protect against regulatory takings).

243 *See generally* Daniel T. Cavarello, Comment, *From* Penn Central *to* United Artists' I *&* II*: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENV'T AFFS. L. REV. 593 (1995) (discussing the effect of *Penn Central*'s test for takings and its insulation of historic preservation regulation from substantial challenge).

and individuals can adapt their conduct to avoid the most serious reliance costs.

### *B. Prospective Overruling Complications*

#### 1. The Problem of Updating Laws

In most cases, the line drawn by prospective overruling between the past and future can be clear. Simply apply the original meaning to laws enacted after the date of the Court's decision declaring a category of law unconstitutional but not to those enacted before.[244] But in other cases, that line may not be as desirable, because the existence of enormous costs does not depend entirely on the date of the decision.

Reviving what many originalists think was the original meaning of the Commerce and Necessary and Proper Clauses is likely a case on point. Many originalists believe that the original meaning of the Commerce Clause gives Congress the authority only to regulate buying and selling—matters that are commerce in the sense connoted by the use of the term in the title of Uniform Commercial Code.[245] Under that view, the Commerce Clause does not cover the regulation of manufacturing and many other areas such as mining and agriculture.[246]

It is clear that overruling all the modern Commerce Clause decisions retroactively and returning to a narrow power that excluded manufacture would have enormous costs. Much of the federal code regulates manufacture and these other areas.[247] As a confirmation of these costs, Congress would have to immediately pass a large amount of legislation to replace the large number of laws the Court had invalidated. Congress does not have an obviously constitutional work-around to protect these widespread interests. Nor does any other institution of government. For instance, conflicting state interests are likely to make use of a state compact joined by all fifty states impractical.[248] Thus, the only way to protect against these costs would be an immediate

244 An example is that of prospectively overruling the practice of congressional-executive agreements. *See supra* note 231. The line here would be easy to draw. Previous congressional-executive agreements would not be affected, but the new rule would apply to all future such agreements.

245 *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1389, 1393–99, 1454–55 (1987).

246 *See id.* at 1410, 1433, 1454–55 (tracing the distinction between manufacture and commerce back to Chief Justice Marshall).

247 *See, e.g.*, 21 C.F.R. § 210.1 (2022).

248 *See, e.g.*, Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENV'T L. REV. 49, 62 (2008); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2375 (1996).

constitutional amendment, which would be difficult to secure expeditiously.[249]

While retrospective overruling would impose enormous costs,[250] one might assume that prospective overruling of nonoriginalist Commerce Clause doctrine would avoid such costs, because previous statutes would remain in place. But a simple prospective-overruling rule that applied the original meaning only to new statutes enacted after the date of the Court's opinion could possibly still be problematic. Existing regulatory statutes sometimes need to be updated over time, as new circumstances render them obsolete. People who are subject to Commerce Clause regulations have invested and ordered their lives in reliance on Congress's ability to update these pervasive existing regulations when the world changed. But such updates could not occur under a simple prospective-overruling rule because those updates—as new statutes—would be subject to the original meaning and that meaning would prevent Congress from passing these updates. It is thus possible that Congress's inability to update these statutes could result in enormous costs.

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249 The immediate need for a constitutional amendment would also create strategic costs, as interest groups might hold up the amendment in order to get their pet provisions included in the amendment or in legislation as a price for supporting the amendment.

250 It might be thought that Congress could use its authority under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, to reauthorize Commerce Clause regulations. For instance, Congress could reenact the substance of its previous Commerce Clause regulations by requiring that each state enact those regulations into state law on pain of losing any state funding that has some relation to the regulation to be enacted. *See* South Dakota v. Dole, 483 U.S. 203, 206–07 (1987) (permitting Congress to attach such conditions on grants to the states). Since Congress provides so much money to states, the argument would run, almost any regulation has a nexus to some spending.

There are several problems with this as an alternative. First, the independent spending power itself is questioned by some originalists, who adopt the Madisonian interpretation of the Spending Clause. *See* Douglas A. Wick, Note, *Rethinking Conditional Federal Grants and the Independent Constitutional Bar Test*, 83 S. CAL. L. REV. 1359, 1365–66 (2010). Second, even if one accepted the independent spending power, that power would probably not extend to conditions on funds that do not involve instructions on how to spend the federal monies and instead condition the grant on compliance with regulations that Congress would otherwise be powerless to impose. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1935–54 (1995) (offering arguments for this position). Under this view, Congress could not use its spending power to enforce many regulations that it lacked power to impose under the Commerce Clause. *See id.* at 1962–78. Third, even if neither of these positions were adopted, such a bill might threaten to take away so much money that under existing Spending Clause doctrine, it would very likely be deemed unconstitutionally coercive. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 579–82 (2012) (plurality opinion) (suggesting that a condition that effectively compels acceptance is coercive and beyond Congress's power). Finally, attempting a quick reauthorization of all regulation under the spending power would be a massive undertaking, likely occasioning strategic behavior that would make such reauthorization very difficult. *See supra* notes 248–49 (discussing problems of strategic behavior).

If enormous costs would result, a different version of prospective overruling could address them. Instead of applying the original meaning to all new statutes, the Court could allow Congress to update but not expand existing statutes under the prior nonoriginalist doctrine. This form of prospectivity would protect the reliance created by the need for updating laws enacted under the old doctrine. But it would prevent Congress from passing new statutes that expand upon existing statutes. If Congress could expand upon existing statutes under the prior nonoriginalist doctrine, the original meaning would not really be applied prospectively because Congress would then be able to enact new programs that violated the original meaning.

To be sure, the distinction between updating and expansion would impose substantially greater administrative costs on the judiciary than a prospective-overruling rule that was simply tied to the date of the Supreme Court decision. Still, it is possible that these administrative costs are lower than the benefits of returning to the Constitution's original meaning. In other contexts, the federal judiciary also polices rules to prevent their evasion.[251] In any event, the example illustrates the point that prospective overruling could sometimes be applied in situations where Congress's inability to update would result in enormous costs.

In contrast to the case of the Commerce Clause, we believe it would be sensible to apply the new nondelegation principle not only to completely new statutes but also to attempts to update existing statutes. The benefit of exempting amendments is that it makes it easier for Congress to protect reliance interests. But since Congress has other means of enacting new statutes that comply with the Constitution's original meaning as to delegations, this benefit is likely to be smaller than the administrative costs of exempting amendments, which result from distinguishing between amendments and expansions of statutes.

### 2. Combining Prospective Overruling with Cutting Back Nonoriginalist Precedent

The importance of prospective overruling for originalism is that it provides a principled doctrine for moving the Constitution back toward the original meaning with less disruption.[252] It might at times be

251 Brannon P. Denning & Michael B. Kent, Jr., *Anti-evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773 (describing anti-evasion rules in constitutional law).

252 Some rights of criminal procedure, like *Miranda* rights, *see* John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 446, 445–46 (2013) (describing the critique that *Miranda* was wrongly decided "because the Constitution does not empower judges to create extra-constitutional rules and enforce them against other governmental actors"),

combined with another tool that performs the same function—what we call cutting back.

Cutting back involves overruling a nonoriginalist precedent to move it closer to the original meaning, even though it does not move it all of the way to the original meaning. The form of cutting back that we recommend has two limitations. The cutback interpretation must be unambiguously closer to the original meaning, and the interpretive line drawn must also be administratively manageable.[253]

An example of cutting back comes from the Commerce Clause. As discussed above, even if the Court cannot retrospectively overrule the nonoriginalist Commerce Clause decisions to fully return to the original meaning, it could cut back on Congress's authority in a rule-oriented way. The cutback that we have in mind is similar to the Court's decision in *United States v. Lopez*,[254] but would be a broader and more persuasive decision. In *Lopez*, the Court limited Congress's power to regulate noneconomic activities on the ground that they have a substantial effect on interstate commerce.[255] For noneconomic activities, the Court did not permit a large number of smaller effects to be aggregated to show a substantial effect on interstate commerce, even though it would permit such aggregation for economic activities.[256] The Court argued that this new decision did not overrule a single case,

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and the exclusionary rule, *see* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 20–43 (1997) (arguing that the modern Court has misunderstood the Fourth Amendment and proposing an alternative model for Fourth Amendment rights and remedies), present another area where many originalists believe the Court's jurisprudence is infirm. But if the Court were to overrule these rights of criminal procedure as inconsistent with the original meaning, the reversal should also be done prospectively. For example, a criminal defendant may decline a plea deal based on the belief that illegally obtained evidence would be excluded, but then, after a Supreme Court decision, find the evidence admitted at trial. For cases already begun, defendants should be held harmless for proceeding under the rules as they existed. Otherwise, they face enormous costs to life and liberty from being punished under the new regime.

To be sure, the prospective overruling in these cases differs somewhat from the prospectivity in our previous examples. There the government was deprived of some power either by narrowing its authorities or by expanding rights. Thus, the prospectivity took the form of protecting prior legislation from invalidation. Here individuals lose rights they previously enjoyed. And the prospectivity takes the form of protecting their litigation choices in a system that respected those individual rights. But the principle is the same.

253 The cutback interpretation would fail the first limitation if the cutback interpretation moves closer to the original meaning in some respects but moves farther away in other respects. The cutback interpretation would fail the second limitation if it adopted an administratively unmanageable line, such as drawing a distinction based on the public interest.

254 514 U.S. 549 (1995).

255 *Id.* at 561.

256 *Id.*

claiming that even cases such as *Wickard v. Filburn*[257] involved economic activities.[258]

But the Court could have moved nonoriginalist Commerce Clause doctrine closer to the original meaning, without imposing enormous costs, by cutting back on that doctrine. In our view, *Lopez* could have kept its ruling prohibiting the aggregation of smaller effects for noneconomic activities but should have defined economic activities to exclude activities in which a person produced or grew something for their own use rather than for sale on the market. Under that view, both *Wickard* and *Gonzales v. Raich*[259] would have involved noneconomic activities that could not be regulated under the Commerce Clause. This view would have generated a cleaner and more sensible line between economic and noneconomic than that produced by *Lopez* and *Raich*, which somehow treat a farmer's consumption of his own wheat as economic.[260]

This example of cutting back would move Commerce Clause doctrine closer to the original meaning. But since the regulation of production that does not lead to a sale on the market is probably a very small portion of the economy, this overruling is very unlikely to involve enormous costs.

While cutting back is an important tool for moving closer to the original meaning, it is especially powerful in combination with prospective overruling. The Court could combine prospective overruling of a larger swath of Commerce Clause doctrine with a retrospective overruling of a smaller swath. Under that regime, the original meaning of the Commerce Clause would apply prospectively whereas the existing statutes would be cut back to limit regulation of noneconomic activities.

### *C. Tractability of Our Test*

It might be argued that the most important test that we employ for whether precedent should be overruled prospectively or retrospectively—determining the existence of enormous costs—lodges too much discretion in the judiciary. The argument would be that figuring out what the costs are of overruling a precedent for these two different scenarios may require complex calculations and an understanding of many laws rather than just the law being challenged in the specific case.

But all precedent rules require judgment. And if our rules were put in place, the parties' attorneys would bring to the Court's attention

257 317 U.S. 111 (1942).
258 *Lopez*, 514 U.S. at 560.
259 545 U.S. 1 (2005).
260 *Raich*, 545 U.S. at 17–19.

the costs of overturning precedent. Indeed, as this issue became salient, the Court could add as a question presented for its proceeding whether retrospective or prospective overruling creates enormous costs. Amicus briefs would help provide information and frameworks to address the issue.

Moreover, the issue of discretion should not be framed as an inquiry into the amount of discretion in the abstract, but as a comparison with the amount of discretion exercised under current precedent rules. And a rule focusing on enormous costs compares favorably with the Court's present approach. First, the Court is currently not even consistent in the factors that it uses in its stare decisis balancing test to determine whether precedent should be overruled. For instance, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, it did not mention the quality of the reasoning in the precedent to be overruled as a factor in stare decisis.[261] In the *Janus v. AFSCME* decision five years ago, the Supreme Court not only mentioned this, but made it the leading factor.[262] And in the *Dobbs v. Jackson Women's Health Organization* decision last year the Supreme Court added yet a different factor as its first consideration: "the nature of [the] error," by which it appears to measure the degree to which the legal issue is "a question of profound moral and social importance."[263]

Second, the general approach for overruling precedent in the Court, as articulated in all of the abovementioned cases, is a balancing test.[264] Thus, even were the factors in the balance amenable to clear or easy calculation, the test would still provide the judiciary with the discretion as to what weight to give various factors. The enormous-costs test does not balance many disparate factors.

Third, some of the factors in the balance (besides the correctness of the decision) are in fact vaguer and thus more difficult to apply than a focus on enormous costs. For instance, under the current test for overruling precedent the Court must evaluate whether a precedent is "workable."[265] How workable a precedent must be, however, is not clear, and indeed it is not entirely clearly what makes a precedent workable.

In contrast, we focus on the reliance costs imposed by the overruling and further have a gloss on what makes them enormous—the need for immediate government action to protect them. While we do not

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261 505 U.S. 833, 854–69 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

262 138 S. Ct. 2448, 2479 (2018).

263 142 S. Ct. at 2265.

264 *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 648 (2000).

265 *Dobbs*, 142 S. Ct. at 2272; *see also Casey*, 505 U.S. at 855.

pretend that this test provides a bright-line rule, the line seems clearer than at least some of the factors deployed in the current Supreme Court tests for stare decisis. It also has the great virtue of being focused on the central trade-off that should inform precedent rules—the balance between the benefits of returning to original meaning and the costs of disturbing the precedent.

## CONCLUSION

Prospective overruling provides a mechanism for gradually moving towards the original meaning. Without it, the original meaning of many constitutional provisions is likely to be forever ignored, but with it original meaning will often be ultimately restored. For instance, by applying the original meaning to new statutes and not old ones, the Court could step-by-step return to the original meaning as the existing statutes are eventually repealed or modified over time. And it performs this function within a structure of precedent rules, constraining the discretion of the Justices.

This system of gradual change not only aligns the Court's jurisprudence better with originalism, but helps the wider world either adjust to the Constitution's original meaning or take steps to change it. As new regulatory statutes are enacted in conformity with the original meaning, these new methods of regulation may gain greater familiarity and acceptance. They would then be more likely both to be employed in new statutes and to replace existing statutes.

Where such methods do not gain acceptance and people believe that the government requires additional power, the people can pass constitutional amendments to authorize new powers or revise rights. Since the Court will not enforce new statutes that transgress the original powers, the people will have incentives to pass constitutional amendments to provide new powers. Similarly, if they are dissatisfied with the scope of rights that the Court has prospectively declared, they can work to alter it through amendment. Thus, prospective overruling is a gateway to a republic where the people once again debate and change their own fundamental law.