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IS STARE DECISIS INCONSISTENT WITH THE
ORIGINAL MEANING OF THE CONSTITUTION?:
EXPLORING THE THEORETICAL AND EMPIRICAL
POSSIBILITIES

*James Cleith Phillips**

For some time, a scholarly debate has raged over whether a commitment to the original meaning of the Constitution allows for the doctrine of stare decisis, whereby courts defer to precedent simply because it is precedent. This Essay explains the range of theoretical possibilities for this seemingly incompatible duo, as put forth by originalism's leading scholars, and situates these various theories on a continuum. The Essay ends with a preview of the difficulties and possibilities that follow from the various empirical answers regarding the relationship between stare decisis and the Constitution at the Founding.

I. THE THEORETICAL POSSIBILITIES

At one end of the theoretical spectrum is the position of strong stare decisis—it always trumps constitutional meaning. This view of the perpetual supremacy of stare decisis is problematic for two reasons. First, it reads three words in the Constitution—“[t]he judicial Power”¹—as relegating the rest of the text to second-class status. This view further means that originalism, or any theory of constitutional interpretation, is only relevant when a court is dealing with a constitutional matter of first impression. It thus reduces originalism to a theory of stare decisis almost all of the time. Second, under what I call the *Plessy* test—whether a theory of stare decisis would mean *Plessy v. Ferguson*² would still be good law—this view fails. While it is possible that the judicial-power tail is designed

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1 U.S. CONST. art. III, § 2.

2 163 U.S. 537 (1896).

to wag the constitutional dog, it does seem odd. Though possible, why would the Constitution elevate the Supreme Court above itself? How, under that scenario, could the judiciary be the least dangerous branch, or could we even have a republic?

The polar opposite position is one where stare decisis is irrelevant as to the meaning of the Constitution. Michael Stokes Paulsen, Gary Lawson, and to a lesser extent, Akhil Amar and Randy Barnett, make arguments along these lines.³ Paulsen contends that stare decisis is incompatible with any interpretive theory because it ultimately corrupts the theory.⁴ For instance, if one ascribes to originalism—that the meaning of the Constitution is what the words originally meant when enacted—then stare decisis is incompatible and following precedent when it is not the original meaning rejects the premise of originalism.⁵

Lawson argues that the logic of judicial review, inherent in the judicial power, rejects stare decisis.⁶ This is because it is the duty, not just the

3 Steven Calabresi “defend[s] the textualism of Amar, Lawson, and Paulsen” by “lay[ing] out an argument as to why the Supreme Court ought often to follow the text of the Constitution, as originally understood, rather than its own precedents.” Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006). It is not clear, though, that what Calabresi argues for is the same as what at least Lawson (originally) and Paulsen have argued for.

4 Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) [hereinafter Paulsen, *Intrinsicly Corrupting*]. Similar to Lawson’s original view, Paulsen argues that:

[*Stare decisis*] would have judges apply, in preference to the Constitution, that which is not consistent with the Constitution. That violates the premise on which judicial review rests, as set forth in *Marbury*. If one accepts the argument for judicial review in *Marbury* as being grounded, correctly, in the supremacy of the Constitution (correctly interpreted) over anything inconsistent with it, and as binding the judiciary to enforce and apply the Constitution (correctly interpreted) in preference to anything inconsistent with it, then courts must apply the correct interpretation of the Constitution, *never* a precedent inconsistent with the correct interpretation. It follows, then, that if *Marbury* is right (and it is), *stare decisis* is unconstitutional.

Id.; see also Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731–34 (2003).

5 Paulsen also argues that stare decisis in constitutional matters is a judge-made doctrine not required by the Constitution itself. To prove this, though, he relies on Supreme Court cases stating such. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1537 n.1 (2000) (collecting cases). This is an odd move for an originalist to make, especially when he is arguing stare decisis is unconstitutional.

6 Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL. 23 (1994) [hereinafter Lawson, *Constitutional Case*]. Lawson moderated his view slightly in a later article, arguing that “[a]fter considering the issue further, and digesting a decade and a half of criticism of my argument by the legal academy, I want to change my conclusion . . . from ‘never’ to ‘mostly never.’” Gary Lawson, *Mostly Unconstitutional:*

power, of a court to say what the law is, and in so doing courts must choose between conflicting laws of differing hierarchical authority, and must independently do so. Thus, if the President claims his actions are constitutional, or Congress alleges its laws are constitutional, a court has an independent responsibility to conduct its own analysis and announce legal conclusions—judicial review does not allow a court to defer its responsibilities. Its duty is to follow the Supremacy Clause and strike down any lesser law that clashes with the Constitution, and precedent is a lesser law. There is therefore no room for a court to delegate its responsibilities to a previous court and to allow a court decision to trump the Constitution itself.⁷ And while Lawson acknowledges there is some indeterminacy in constitutional meaning, whenever the meaning is determinable that meaning should trump what previous courts have said.⁸

Lawson acknowledges that one can “plausibly argue” that “when the Constitution authorized judges to decide cases, it must also be taken to have authorized them to use the tools traditionally employed by judges in that endeavor, including the attribution of legal effect to prior decisions” since “[t]he Constitution’s framers . . . were well aware of the established British practice of treating precedent as a source of law—a practice that extended to the interpretation of written texts, such as statutes.”⁹ While calling such an argument “tempting,” he states “it sidesteps rather than rebuts the prima facie case against precedent” because “[t]he judicial Power’ is fundamentally the case-deciding power” and this requires adhering to “the sources of law that courts should employ when deciding cases and the hierarchical order of those sources in the event of a conflict among them.”¹⁰ Thus, the Supremacy Clause requires the Constitution to trump precedent since it is lower on the totem pole of law, and the Clause essentially limits the exercise of the judicial power and what traditional judicial tools can be incorporated when interpreting the Constitution.¹¹

The Case Against Precedent Revisited, 5 AVE MARIA L. REV. 1, 3–4 (2007) (footnote omitted). His new, narrow exception is that “the Constitution only *permits* the use of precedent in constitutional cases . . . [if] the precedent is the best available evidence of the right answer to constitutional questions.” *Id.* at 4.

7 I think this may be an inaccurate characterization of what is occurring—a current court is pitting its interpretation of the Constitution against a previous court’s interpretation, not pitting the Constitution’s text against a previous court’s interpretation. That is a different question of supremacy.

8 See Lawson, *Constitutional Case*, *supra* note 6, at 31.

9 *Id.* at 29.

10 *Id.*

11 There is a possible problem with this argument. Statutes were known to trump court decisions prior to the Constitution, which would have made stare decisis a nullity in statutory interpretation, limiting it only to the common law, but that doesn’t appear to have been the case.

Amar takes a slightly different tack that is not necessarily inconsistent with Paulsen and Lawson's positions since they confine their arguments to stare decisis and original meaning. Amar conceives of what I think of as uppercase Stare Decisis and lowercase stare decisis,¹² and appears to be tapping into Keith Whittington's conceptions of constitutional construction and interpretation.¹³ In the scenario of uppercase Stare Decisis—where it is dealing with the meaning of the Constitution—the text trumps precedent and stare decisis is inappropriate. In the scenario of lowercase stare decisis, where courts are dealing with tests or doctrines that allow for the application of the Constitution, stare decisis is very much an appropriate and necessary tool of the judiciary.¹⁴

Barnett, like Paulsen, Lawson, and Amar, argues that original meaning takes precedence over precedent, and that “permitting original meaning to trump precedent is not nearly so radical as it sounds.”¹⁵ Barnett notes the potential problem with rejecting stare decisis: “[It] seems important to the rule of law . . . [as] the stability of constitutional law might be undermined as each Court considers itself completely free to reach different conclusions about the meaning of the text as time goes by.”¹⁶ Yet, as Barnett notes, “[n]o one thinks that precedents should last forever. Everyone thinks that some precedent should be rejected.”¹⁷ In fact, “many nonoriginalists who now invoke precedent to browbeat originalism themselves appear committed only to the precedents they happen to like, and this is hardly a commitment to the doctrine of precedent at all.”¹⁸ Thus, for Barnett:

The normative case for originalism is based, in large measure, on the superiority of the enacted text over the opinions of the branches of government that it is supposed to govern and limit—including the Supreme Court. An originalist simply could not accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist.¹⁹

12 See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78–89 (2000).

13 See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 195–212 (1999); see also generally KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (2d prtg. 2001).

14 See also Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729 (adopting a position similar to Barnett's, and to a lesser degree Amar's, that allows for precedent that relies on originalism to reach its conclusions, as well as precedent that constructs the doctrinal meaning of constitutional provisions).

15 Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263 (2005).

16 *Id.* at 259.

17 *Id.* at 261.

18 *Id.*

19 *Id.* at 262–63.

The reason this proposition is not so radical in Barnett's view is that the clash of stare decisis and the original meaning of the Constitution will not happen frequently. First, he observes, only about a fifth of the Supreme Court's cases deal with the Constitution, and hence "the doctrine of precedent could survive for any or all cases whose outcome does not concern the original meaning of the text."²⁰ Second, in the constitutional cases, sometimes "the original meaning is rather abstract, or at a higher level of generality The Due Process Clause [is an example]."²¹ Because of this, and like Amar, Barnett argues that "an original meaning originalist can take the abstract meaning as given, and accept that the application of this vague meaning to particular cases is left to future actors, including judges, to decide"—via "constitutional construction"—"[t]he process of applying general abstract provisions to the facts of particular cases by adopting intermediate doctrines."²² Though even there not all precedent is created equal, and the principle Barnett proposes is that "judicial constructions of the Constitution that are not inconsistent with original meaning may well be subject to the doctrine of precedent."²³ For instance, for Barnett "content neutrality," despite being a "judicially-created doctrine" that "is by no means a product of the original meaning of the First Amendment, [is] a constitutional construction by which the original meaning of the First Amendment can be applied in concrete cases."²⁴ Hence, once this doctrine "is adopted, there is no originalist objection to it being considered a binding precedent, even if someone proposes a different way to implement the right of freedom of speech."²⁵ However, such an intermediate doctrine can be properly rejected once another is proposed that is either "better . . . in implementing the original meaning of the text,"²⁶ or, if equally good on those grounds, better "enhance[s] the legitimacy of the Constitution."²⁷

In dealing with the concern about reliance interests, Barnett argues that "[a]n originalist need not reject legal claims made by particular persons made in reliance on mistaken precedent."²⁸ Thus, for example, if the Social Security Act is held unconstitutional because it is inconsistent with the Constitution's original meaning, "the government might still be obligated to make good on its promises to those who have relied to their

20 *Id.* at 263. But why isn't Barnett's logic equally extended to statutory interpretation, since statutes are written laws that are inferior only to the Constitution?

21 *Id.* at 263–64.

22 *Id.*

23 *Id.* at 265 (emphasis omitted).

24 *Id.*

25 *Id.*

26 *Id.* at 264.

27 *Id.* at 265.

28 *Id.* at 266.

detriment upon them.”²⁹ Barnett would limit this to “properly tailored reliance claims by individual citizens,” and reject reliance claims of “governmental actors or interest groups on the continued existence of unconstitutional powers or institutions,” arguing that reliance interests are “usually applied much too broadly to cases where people have ‘relied’ in much too inchoate a sense.”³⁰

Barnett further agrees with Amar that “precedent can play an ‘epistemic’ role” by applying a “presumption of correctness” to past precedent that saddles a new judge with a burden of proof to overcome.³¹ However, Barnett would only extend “any epistemic ‘presumption of correctness’” to “previous decisions that actually attempted to discern original meaning.”³² Barnett also appears to adopt Caleb Nelson’s arguments (detailed later) that early precedent and practices can fix the original meaning of ambiguous clauses of the Constitution such that later decisions should not be able to overturn them.³³ But Barnett would limit this to constitutional terms that are ambiguous—“historically irresolvable”—not just those that are vague.³⁴

There are two potential problems with a view that completely rejects *stare decisis*, at least when it comes to the meaning of the Constitution. First, it creates the potential, especially on a closely divided court, for frequent doctrinal whiplash as the court’s personnel or views change, leading to instability that undermines the rule of law, reducing legitimacy of the court and possibly also the Constitution, and trampling on reliance interests. And this is also a position of hubris for a court that overlooks the fallibility of courts—at least it weights the fallibility differently by emphasizing a past court’s fallibility while deemphasizing its own, and arguably does little to restrain current courts. But these prudential concerns—if not a part of the text, logic, and structure of the Constitution—are ones that originalism would seemingly not countenance.³⁵ After all, reliance interests, for example, are policy

29 *Id.*

30 *Id.*

31 *Id.* at 267 (quoting Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 81 (2000)).

32 *Id.*

33 *Id.* at 268.

34 *Id.*

35 Paulsen observes that “[s]ome notable would-be originalists accept *stare decisis* as a limitation on, or qualification of, their originalist interpretive premises, without recognizing that such acceptance fundamentally undermines their entire interpretive justification.” Paulsen, *Intrinsically Corrupting*, *supra* note 4, at 289 n.2 (first citing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 155–59 (1990); then citing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–40 (1997) (“The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of

concerns. If an originalist will not allow other policy concerns to trump the original meaning of the text, why should this policy concern be treated any differently if it was not incorporated into the adopted constitutional text? Second, it may be that stare decisis vis-à-vis the meaning of the Constitution's text was, as an original matter, incorporated in "[t]he judicial Power" and a view completely rejecting stare decisis is simply not correct on originalist grounds.

John McGinnis and Michael Rappaport argue in direct response to the arguments of Lawson that the "no-precedent position is unconstitutional."³⁶ Instead, they contend that "the Constitution's original meaning embraces at least some precedent,"³⁷ what they call "a very narrow" or "minimal concept of precedent," one that "is actually slightly weaker than the weakest one that was followed historically."³⁸ Given the ambiguity of the term "judicial Power," they see it as being plausibly interpreted "to include certain traditional aspects of the judicial office that were widely and consistently exercised" since "[s]uch core aspects of an office often come to be identified with the power that the officer exercises."³⁹ While they note that "the fact that judges deployed a legal concept at the time of the Framing does not necessarily make it a requisite element of Article III's judicial power," they differentiate "[w]idely followed precedent rules" from "particular common law rules," positing that "giving weight to a series of precedents would have been seen as an aspect of judging, not simply as one of a multitude of rules judges happened to apply."⁴⁰

McGinnis and Rappaport further see the "Supremacy Clause and a vibrant precedent doctrine [as] coexist[ing] under the Constitution."⁴¹ This is because of the Supremacy Clause's ambiguity, and "[u]nder [a] narrower

stability. It is a compromise of all philosophies of interpretation . . . [S]tare decisis is not part of my originalist philosophy; it is a pragmatic *exception* to it.")). *But see* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1480–81 (2007) (arguing that a "principled popular sovereignty-based originalist" would see that "current enforcement of original meaning is not always necessary and, in fact, on occasion may not be advisable" due to concerns about "constitutional legitimacy" and "the rule of law").

36 JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 169 (2013).

37 *Id.* at 169.

38 *Id.* at 168–69; *see also* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (arguing that originalism is inclusive in that it allows precedent if justifiable under originalist analysis).

39 MCGINNIS & RAPPAPORT, *supra* note 36, at 168; *see also* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1863–66 (2012) ("Stare decisis might simply be a recognized common law doctrine . . . [that was] in effect at the time of the Founding . . .").

40 MCGINNIS & RAPPAPORT, *supra* note 36, at 169.

41 *Id.* at 173.

meaning, the Supremacy Clause would tell the courts to follow the Constitution's original meaning, but to do so in the way that courts traditionally apply the law—by applying the governing law in accordance with applicable precedent doctrine.”⁴² They further point out that “given this tradition of precedent, an instruction to the courts to ignore precedent would seem odd, and therefore Framing era interpreters might require a clear statement to that effect before concluding the Constitution required it,” and “the Supremacy Clause does not contain such a clear statement.”⁴³

Further, they note that “the practice of applying precedent to statutory interpretations is extremely instructive as to how supreme law was understood to be applied by courts.”⁴⁴ Because “[t]he history of precedent shows that judicial decisions interpreting statutes were given effect as precedents,” despite statutes “hav[ing] been regarded as supreme law,” this supports “[a] narrower interpretation of the Supremacy Clause: that the clause instructs the courts to follow supreme law in the manner that courts traditionally apply law—by taking into account applicable precedent rules.”⁴⁵ This rests on the assumption that interpreting the supreme law of statutes and interpreting the supreme law of a constitution are differences only in degree and not in kind vis-à-vis precedent and judicial power. One could make a good argument they are just a matter of degrees, but also a good argument that, since the legislature can much more easily overturn precedent they disagree with than the sovereign people can amend the Constitution (and maybe the Constitution was not meant to be amended as often as the legislature overturns or revises its laws), the two types of supreme law are more different in kind.

McGinnis and Rappaport also contend that there are “significant differences between following supreme law and following precedent.”⁴⁶ They note that usually “treating something as supreme law involves following one body of law rather than another,” but “nonoriginalist precedent does not involve a body of law in the ordinary sense.”⁴⁷ Thus, the “Constitution does not authorize courts to issue nonoriginalist precedents,” but rather “precedent is the way that the courts deal with mistaken decisions that have previously been made.”⁴⁸ In short, “[a]llowing precedent law does not involve making precedents supreme law, but instead is orthogonal to the normal situation of making something supreme law.”⁴⁹ Whatever its technical accuracy, this argument does not

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 173–74.

46 *Id.* at 174.

47 *Id.*

48 *Id.*

49 *Id.*

make a lot of sense practically. In a system of stare decisis where precedent actually means anything, precedent will trump the original meaning of the Constitution in at least some situations, even if a decision of the Supreme Court is not actually supreme law in the same sense as the Constitution.

McGinnis and Rappaport's general argument still does not seem to get past the problem that the Constitution arguably contains the seeds of its own irrelevance—as precedent piles on precedent, even if it is flatly contradictory to the original meaning of the text, it will eventually carry the day. Unless what is embedded in the Constitution is a “minimal precedent concept requir[ing] only that *some* weight be given” to “a series of decisions.”⁵⁰

The middle ground between the poles of complete rejection or complete dominance of precedent would allow for stare decisis to play at least some role in fixing the meaning of the Constitution, but not an unfettered one. These middle views can be placed on the same continuum. The first, closer to the view rejecting stare decisis, only allows it as a tiebreaker. When the meaning of the Constitution is ambiguous to the point that one cannot say one is more likely than the other, then the settled meaning from precedent wins. After all, a decision has to be made since the law, like baseball, does not allow ties. Randy Kozel makes such an argument for “consider[ing] the role of judicial precedent not when it conflicts with the Constitution's original meaning but rather when the consultation of text and historical evidence is insufficient to resolve a case.”⁵¹ Thus, “[i]n those situations, deference to precedent can serve as a fallback rule of constitutional adjudication.”⁵²

The question then becomes: what is a tie? Should it be conceived like in public polling wherein fifty-one to forty-nine is essentially a tie if the margin of error is two percent, but not a tie if it is one-half percent? The possible problem with that is we generally cannot ascribe such precision to legal ambiguity. Or one could possibly inject some standard or level of burden such that we treat dueling meanings as sufficiently equal, and thus let stare decisis be a tiebreaker unless the new meaning is seen as the correct interpretation of the Constitution's original meaning beyond a reasonable doubt, or by clear and convincing evidence (or whatever standard is settled on). But this brings up the other problem—again, it may be that the original meaning of the judicial power incorporated a different concept or use of stare decisis.

Moving further away from rejecting stare decisis on the continuum is the position put forth by Caleb Nelson that analogizes it to *Chevron*

50 *Id.* at 168.

51 Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 105 (2015).

52 *Id.*

analysis.⁵³ Imagine a range of reasonable meanings—as long as a previous court’s interpretation was within that range, it is entitled to stare decisis effect, even if the current court would have chosen a different meaning because they think it is more accurate. But outside that zone of ambiguity—where precedent is “demonstrably erroneous”⁵⁴—stare decisis is given no effect. This approach avoids some of the prudential concerns that afflict positions closer to the rejection of stare decisis, but may or may not be correct as an original matter.

Nelson notes a difference at the Founding between “arbitrary discretion”—a concern of Hamilton’s in Federalist No. 78 that thus weighed in favor of precedent constraining judges⁵⁵—and what John Marshall called “mere legal discretion”: the “duty” of judges to “draw upon known principles of interpretation to figure out ‘the sound construction of the act.’”⁵⁶ This “mere legal discretion” or “duty” was often how those of the Founding period referred to interpreting written texts, with Nelson observing that “antebellum lawyers frequently spoke as if courts exercised no will of their own.”⁵⁷ Of course, as James Madison and others noted, “[w]ritten laws . . . have a range of indeterminacy.”⁵⁸ In order to provide “the certainty and predictability necessary for the good of society”—something not possible “if each judge always remained free to adopt his own ‘individual interpretation’ of the inevitable ambiguities in written laws”⁵⁹—Madison believed that the ambiguous provisions of written laws could have the meaning settled via “a regular course of practice,” whether by the judiciary or other government actors such as the President.⁶⁰

But the ability of others to fix the meaning of written law was not without limits: Madison distinguished between “whether precedents could expound a Constitution” and “whether precedents could alter a Constitution.”⁶¹ Thus, if early interpreters had consistently given a particular meaning to the Constitution, it “might itself be evidence that the

53 Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

54 *Id.* at 1.

55 *Id.* at 9 (quoting The Federalist No. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

56 *Id.* at 10 (quoting *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824)).

57 *Id.*

58 *Id.* at 11; see The Federalist No. 37, at 196–97 (James Madison) (Clinton Rossiter ed., 1999).

59 *Id.* (quoting Letter from James Madison to Jared Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 184 (Phil., J.B. Lippincott & Co. 1865)).

60 *Id.* at 12 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 59, at 143, 145).

61 *Id.* at 13 (quoting Letter from James Madison to N.P. Trist (Dec. 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 59, at 204, 211).

construction was permissible. But if, after giving precedents the benefit of the doubt, subsequent interpreters remained convinced that a prior construction went beyond the range of indeterminacy, they did not have to treat it as a valid gloss on the law.”⁶² Hence, while “[t]here might be a presumption that past interpretations were permissible . . . once this presumption was overcome and the court concluded that a past interpretation was erroneous, there was no presumption against correcting it.”⁶³

One can also adopt an identical position to Nelson’s, but add that stare decisis still holds even where precedent is “demonstrably erroneous”⁶⁴ when there are sufficient reliance interests.⁶⁵ Nelson sees the historical evidence as supporting his theory, though he notes some cases that inject reliance interests based on property rights.⁶⁶

Finally, the last middle position is very close to the stare decisis-always-trumps position and tends to be the most accepted modern view.⁶⁷ It presumes precedent should be upheld and requires that “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”⁶⁸ This view thus does not always allow for stare decisis to overcome the Constitution’s text, but enables it do so more often than any other view outside of the most extreme pro-stare decisis one. This view does not flunk the *Plessy* test, but arguably makes the Constitution’s text and original meaning rather impotent creatures.

62 *Id.* at 14.

63 *Id.*

64 *Id.* at 15.

65 Though that just shifts the analysis to identifying sufficient reliance interests, which will do most of the work under this formulation. And given the arguably substantial reliance interests throughout the South during segregation, would this flunk the *Plessy* test? Some may argue that, while substantial, such reliance interests are not legitimate, but that just raises the question whether or not their constitutionality determines their legitimacy.

66 *Id.* at 14–21.


67 See, e.g., Charles Fried, Commentary, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1142–43 (1994); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 71 (1991); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1120 n.75 (1995); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 756–63 (1988); see also Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274 (2005).

68 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

These various scholars' positions can arguably be plotted on a continuum of stare decisis strength. While the polar views are easy to place, one could argue over the order of the middle positions.

TABLE 1. SCHOLARS BY STRENGTH OF STARE DECISIS

Lawson Paulsen	Barnett Amar	Kozel	Nelson	Nelson + Reliance	McGinnis & Rappaport	Modern View
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None High

II. HISTORICAL POSSIBILITIES AND PITFALLS

In the quest to determine the degree to which stare decisis was originally incorporated into the Constitution's judicial power, one of four historical scenarios is possible. First, whatever form of stare decisis existed at the Founding, adopting a written constitution, and especially our Constitution, completely undermined the doctrine of stare decisis and made it incompatible with our constitutional system, as Lawson and Paulsen argue. This is possible, though it would seem to require "[t]he judicial Power" to be doing some heavy lifting since it's not clear the Supremacy Clause (and even the Oath Clause, in addition) gets one there. After all, if prior to the Constitution, statutes would have been the supreme law of the land and stare decisis still existed under that regime, making something supreme to statutes does not logically throw out stare decisis.⁶⁹ And when the Court is deciding whether its current views should trump or give way to the Court's past views, again it is not really pitting the Constitution against precedent, but its current interpretation of the Constitution against a previous interpretation of precedent. This Essay has been entirely focused on horizontal stare decisis—a court being bound by itself—rather than vertical stare decisis—which is where a higher court's ruling binds a lower court. It seems an even harder argument to make that the adoption of the Constitution, especially given Article VI, also obliterated stare decisis in its vertical form such that lower federal courts are not bound by the U.S. Supreme Court.

A second option is that the adoption of the Constitution did not negate stare decisis, but weakened whatever form existed at the Founding. This is more plausible than the obliteration argument, but still requires "[t]he judicial Power" to be doing some, if not most, of the work.

⁶⁹ However, if statutes were not as systematically superior, or only superior to a slight degree, then adding a constitution to the hierarchy may be different enough to always trump stare decisis.

A third option is that adopting our Constitution had no effect on the doctrine of stare decisis as it existed at the Founding. This is possible, at least with respect to horizontal stare decisis, if the Supremacy Clause functionally existed in the pre-Founding Era in the relationship between statutes and precedent, if the Oath Clause incorporates the notion that following what the courts say the Constitution means is seen as upholding the Constitution, and if “[t]he judicial Power” ensconced in Article III is seen as no different than the judicial power exercised before the Constitution. This is possible, but it also seems intuitively problematic to argue that the adoption of the first written constitution affected no change on the judiciary, and that all of the other clauses did not modify “[t]he judicial Power” in some way.

A fourth and final option is that adopting the Constitution actually strengthened stare decisis, possibly because of the increased supremacy of the Constitution layered on the existing practice of courts saying what the law is. This seems like a hard argument to make, though, at least as to horizontal stare decisis. It is a stronger argument when dealing with vertical stare decisis, given Article VI.

There are a few difficulties in originalist research on the role of stare decisis in “[t]he judicial Power” in light of other constitutional clauses. First, when looking at what courts did prior to the adoption of the Constitution, one can only look at when early American courts were interpreting statutes, not the common law, reducing the number of observations. Second, one has to determine whether the Framing generation viewed judicial interpretation of statutes as categorically different from interpreting a constitution. And third, it takes a while for precedent to accrue that might create a robust system of stare decisis, and in the decade or two after the Founding there may not have been many instances of a clash between the Constitution and judicial precedent—and once we get past those first two decades, the value of judicial practice loses significant weight for originalist scholarship.

In the end, the question of the relationship between stare decisis and the Constitution’s original meaning is not a theoretical one—it’s an empirical one. To be answered one must sift through the historical data, however difficult. After all, isn’t that originalism’s point?