Note to readers: This is an edited version of a longer article. Deletions are indicated by ellipses (* * *).

CONSTITUTIONAL STARE DECISIS, LEGAL FORMALISM, AND THE FUTURE OF UNENUMERATED RIGHTS*

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I. INTRODUCTION: CONTEMPORARY DEBATES ABOUT CONSTITUTIONAL STARE DECISIS

Constitutional *stare decisis* is a hot topic. One reason for the heat is the reemergence of originalism as important movement in constitutional theory and practice. Originalism calls into question the legitimacy of many of the Supreme Court's constitutional decisions—including the unenumerated rights decisions of the Warren and Burger Courts. This destabilizing potential of originalism has led originalists to debate among themselves about the role that precedent should play in constitutional adjudication. But this debate is of more than theoretical interest. The recent nominees for Justice and Chief Justice—Judges Samuel Alito and John Roberts—were questioned extensively about their views about *stare decisis*. And this debate has an odd flavor. In the Warren Court era, the political, judicial, and academic left seemed to view constitutional *stare decisis* as the enemy of progressive (living constitution) constitutionalism. In the Roberts Court era, *stare decisis* may be the last defense of Warren Court precedents against conservative (originalist) constitutionalism on the ascendancy.

Current debates about constitutional *stare decisis* take place in a jurisprudential and legal context. Contemporary thinking about the role of precedent in constitutional adjudication is influenced by many sources, but two ideas shape current debates. The first shaping idea is the realist (or "legal instrumentalist") view of precedent. Crudely put, legal realism rejects the idea that precedent is a source of "binding rules" as part and parcel of a wholesale rejection of legal formalism. If all legal reasoning should be instrumentalist, then, it would seem to follow, reasoning about constitutional precedents should focus on policy or a balancing of relevant interests. The second shaping idea is the Supreme Court's well-settled doctrine that it has unfettered power to overrule its own prior decisions.³ Whereas, a three-judge panel of the United States Court of Appeal is

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¹ [Originalists on precedent]

² [Roberts & Alito questioned about *stare decisis*.]

³ See Lawrence Solum, Stare Decisis, Judicial Estoppel, and Law of the Case, MOORE'S FEDERAL PRACTICE.

bound to follow circuit precedent⁴ and the lower federal courts are bound to follow the decisions of the United States Supreme Court,⁵ the Supreme Court considers its own prior decisions as entitled to deference or a presumption of correctness but not as "binding."

Given these two shaping ideas—realism and the Supreme Court's freedom to overrule—it is not surprising to find contemporary theorists groping for some notion of precedent that has more "oomph" than a mere presumption. One product of this theoretical floundering has been the idea of "super precedent," "super *stare decisis*," or even "super-duper precedent." The particular focus of this discussion is usually the Supreme Court's decision in *Planned Parenthood v. Casey*, the relevant paragraphs of which are quoted in full in the footnote accompanying this text. In *Casey*, the Supreme

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was, for that very reason, doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of stare decisis is not an "inexorable command," and certainly it is not such in every constitutional case, see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 -411 (1932) (Brandeis, J., dissenting). See also Payne v. Tennessee, 501 U.S. 808, 842 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); Arizona v. Rumsey, 467 U.S. 203, 212 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e.g., United States v. Title Ins. & Trust [505 U.S. 833, 855] Co., 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see Patterson v. McLean Credit Union, 491 U.S. 164, 173 -174 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, e.g., Burnet, supra, 285 U.S. at 412 (Brandeis, J.,

So in this case, we may enquire whether Roe's central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left Roe's central rule a doctrinal anachronism discounted by society; and

⁴ See Lawrence Solum, Stare Decisis, Judicial Estoppel, and Law of the Case, MOORE'S FEDERAL PRACTICE.

⁵ See Lawrence Solum, Stare Decisis, Judicial Estoppel, and Law of the Case, MOORE'S FEDERAL PRACTICE.

⁶ See Randy Barnett, "Super Precedent," The Volokh Conspiracy, October 25, 2005, http://volokh.com/posts/1130273312.shtml (visited January 16, 2006); Orin Kerr, "Alito on Precedent," The Volokh Conspiracy, November 1, 2005, http://volokh.com/posts/1130824707.shtml (visited January 16, 2006); "Judge Easterbrook on "super precedent," Confirm Them, November 11, 2005, http://www.confirmthem.com/?p=1901 (visited January 16, 2006).

⁷ 505 U.S. 833 (1992).

⁸ Id. at 854-55:

Court suggested that *Roe v. Wade*⁹ should only be overruled if "found unworkable," and not if its overruling would create "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it." Senator Arlen Specter's op/ed in the New York Times¹¹ gave the phrase popular currency:

The confirmation precedents forcefully support the propriety of a nominee declining to spell out how he or she would rule on a specific case. Abraham Lincoln is reputed to have said pretty much the same thing: "We cannot ask a man what he will do, and if we should, and he should answer us, we would despise him. Therefore, we must take a man whose opinions are known."

This, of course, does not foreclose probing inquiries on the nominee's general views on jurisprudence. For example, it would be appropriate to ask how to weigh the importance of precedent in deciding whether to overrule a Supreme Court decision. Some legal scholars attach special significance to what they call superprecedents, which are decisions like Roe v. Wade that have been reaffirmed in later cases ¹²

* * *

The notion of *super stare decisis* is difficult to square with the realistic conception of legal rules and the Supreme Court's power to overrule its own prior decisions. What is so "super" about "superprecedent" if it can be overruled for instrumentalist reasons? This question is highlighted by the joint opinion of Justices Kennedy, O'Connor, and Souter in *Casey*—which made the question whether *Roe* should be overturned a matter of the balance of instrumental concerns, like workability, reliance, and so forth. For realists, superprecedents are really just "super" reasons to follow precedent or "super" interests to balance against those interests that favor a change in the law.

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II. NEOFORMALISM, STARE DECISIS, AND THE RULE OF LAW

I recently had one of those embarrassing moments. I was having a lunchtime conversation with distinguished colleagues and we were discussing the topic *du jour*—the Alito confirmation hearings. One of my colleagues, whom I consider to be one of the greatest legal philosophers of the post-war period, was discussing Judge Roberts's analogy between judging and umpiring. You may remember the following testimony:

whether Roe's premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

⁹ [cite to Roe]

¹⁰ *Id.* at 855.

¹¹ Arlen Specter, "Bringing the Hearings to Order," New York Times, July 24, 2005, Late Edition - Final, Section 4, Page 12, Column 1 (available online at http://select.nytimes.com/gst/abstract.html?res=FB0610FF3E5B0C778EDDAE0894DD404482);

¹² *Id*.

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Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical to make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire. . . . ¹³

My colleague then proceeded to ridicule Robert's view. I can't remember the exact words, but they amounted to something like the following:

No one (serious) could possibly think that judges are like umpires. Of course, judges make law—they have to. Who could (seriously) think otherwise?

I bravely raised my right hand—branding myself as beyond the jurisprudential pale—as someone who takes serious the idea that judges should apply the law rather than make it. I felt like I should go to a peculiar sort of twelve step meeting, where I would be required to say, "My name is Larry Solum and I am a legal formalist."

Well, my name is Larry Solum, and I am a legal formalist. I do think that judges should apply the law rather than make it—with some limited exceptions. I believe that Justices of the Supreme Court should consider themselves bound by the Court's prior decisions. I even think there is something to the umpire analogy—although not as much as Justice Roberts testimony suggests. Let's begin with the big picture and situate contemporary formalism in the context of the contemporary domination of the academy, bench, and bar by instrumentalist thinking about law.

A. Formalism and Realism

We swam in a Legal Realist sea. If anything united the American legal academy in the late twentieth century it was an opposition to legal formalism. If American law students learned anything in their first year, it was that "black letter law" was in disrepute and that law school was about *policy* or maybe *fairness*—or even *politics* or *empirical research*—but not unadorned *doctrine*. If there was any uncontroversial advice for an ambitious young law professor, it was to stay away from doctrinal scholarship that is "merely descriptive." If any legal theory was a bad one, then it was "legal formalism" or "mechanical jurisprudence"—the view that disputes can be resolved by the unthinking application of abstract and general rules without appreciation of their purposes and without regard to the consequences for welfare or fairness. The disreputability of legal formalism was reflected in a revolution in legal scholarship—the flowering of law and economics, law and philosophy, empirical legal studies, and a variety of other approaches to the study of law. Of course, there were exceptions. Formalism of a sort was found in originalism in constitutional theory as well as plain meaning approaches to statutory interpretation. But these were the exceptions that proved the rule. 15

¹³ An online version can be located by entering the following URL: http://www.asksam.com/cgibin/as_web6.exe?Command=Doc&File=JGRHearing&DocID=261288&Request=balls+and+strikes.

¹⁴ Umpires are unlike judges in many respects. Umpires make their calls in real time—without the lesiure of deliberation. Umpiral decisions do not set authoritative precedents—although the collective actions of many umpires may establish a practice that constitutes a sort of interpretation or gloss on the rules of a particular sport.

¹⁵ One of the most common objections to constitutional originalism is that it is a "flag of convenience"—originalist judges adhere to the original meaning of the constitution when it serves their ideological objectives, but ignore it when it does not. [Cite to Barnett & Sunstein.]

And the rule was acceptance of what might be called *the instrumentalist thesis*: roughly, the proposition that the outputs of legal decision making processes (paradigmatically, appellate adjudication) are, and should be, determined by extralegal considerations—that is, by (extralegal¹⁶) considerations of policy or principle.¹⁷ Contemporary American legal thought accepted as an almost dogmatic truth that legal decisions are (and should be) made on instrumental grounds—shaping outcomes to serve normative concerns. We were all instrumentalists. Weren't we? Aren't we still?

We swim in a Legal Realist sea—or do we? The most extreme form of legal instrumentalism embraced what has been called the strong indeterminacy thesis: roughly, the notion that the outputs of legal processes are not constrained by formal legal considerations. 18 Stated baldly, the claim was that the law does not constrain the choices of legal actors: because any possible outcome can be squared with the law, something else (principle, policy, or politics) must be doing the real work of determining which outcomes are selected. We are most familiar with the version of the strong indeterminacy thesis associated with the critical legal studies (CLS) movement and expressed in the slogan, "Law is Politics." ¹⁹ Characteristically, CLS rejected claims that legal decisions could be explained by a consistent normative theory—whether it be the welfarism of normative law and economics²⁰ or the rights theory of Dworkin's law as integrity²¹—and claiming that political struggle between and among oppressed and powerful groups did the explanatory work. American legal theory ended the twentieth century with a decisive rejection of critical legal studies—albeit a rejection that was soon tempered by the academic firestorm created by the Supreme Court's decision in Bush v. Gore.²² Legal rules may underdetermine outcomes while constraining them. More fundamentally, systematic normative legal theory—whether it comes from the left, right, or center in consequentialist or deontological form—needs legal formalism, the mechanism by which normative conclusions can be translated into rules that can guide low-level legal actors (trial judges and other bureaucrats) who cannot be expected to engage in *de novo* normative theory every time they must make a decision.

¹⁶ Whether considerations of policy and principle are *extralegal* is itself a complex question—implicating debates about the nature of law in general and the controversy between inclusive and exclusive legal positivism in particular.

¹⁷ Fully stated there are actually several instrumentalist theses: (1) a descriptive claim about existing legal practice, (2) a stronger empirical (or conceptual) claim about possible legal practice, (3) a normative claim of ideal legal theory, and (4) a normative claim of nonideal legal theory.

¹⁸ See Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. CHI. L. REV. 462 (1987).

¹⁹ See, e.g., Frank Michelman, Bringing the Law to Life: A Plea for Disenchantment, 74 CORNELL L. REV. 256, 256-57 (1989); Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 BUFFALO L. REV. 205, 211-14 (1979); Peter Gabel, What It Really Means to Say "Law is Politics": Political History and Legal Argument in Bush v. Gore, 67 Brook. L. Rev. 1141 (2002).

²⁰ See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002). Simplifying somewhat, we can say that welfarism is a form of utilitarianism—in the philosophical sense of that term—that takes has a preference-based conception of utility.

²¹ See, e.g., Ronald Dworkin, Law's Empire (1986); Ronald Dworkin, A Matter of Principle (1985); Ronald Dworkin, Taking Rights Seriously (1978).

²² 531 U.S. 98 (2000).

Thus, we find ourselves in a familiar but disquieting situation. On the one hand, we affirm the instrumentalist thesis, rejecting legal formalism as a naïve and unattractive legal theory. On the other hand, we embrace the formalist picture of legal practice in myriad ways—blithely deconstructing doctrinalism in the Parts One of our articles and reconstructing new doctrinal paradigms in the Parts Penultimate. In the classroom, we ridicule our students' quest for the easy certainty of black letter law and then on exam day, we test them for their mastery of intricate formal rules. We might call this predicament the antinomy of realism and formalism—our simultaneous affirmation and rejection of fundamentally inconsistent ideas about the nature of law.

What to do? Faced with this sort of existential dilemma, the easy way out is always tempting. Ignore it! After all, the antinomy of realism and formalism doesn't really interfere with our ability to go on with our business—writing books and articles, teaching classes. Tempting, because, as Yoda would say it, "bliss, ignorance may be." But the subtle ecstasy of rational ignorance often eludes the serious and thoughtful. Once you notice the alligator in the bathtub, it become hard to ignore.

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B. Formalism and Neoformalism

The core of formalism may sound naïve and platitudinous. Formalists believe assertions like the following:

- Judges should apply the law and not make it.
- There are legal rules that constrain what legal actors may lawfully do.
- There is a difference between following the law and doing what you think is best.
- Judges should decide cases in accord with the text of the applicable constitutional or statutory provision or with the holding of controlling precedents.

I've got a million of them, but you get the general idea. The core idea of formalism is that the law (constitutions, statutes, regulations, and precedent) provide rules and that these rules can, do, and should provide a public standard for what is lawful (or not).

That is, the core of legal formalism entails a commitment to a set of ideas that more or less includes the following:

- 1. The law consists of rules.
- 2. Legal rules can be meaningful.
- 3. Legal rules can be applied to particular facts.
- 4. Some actions accord with meaningful legal rules; other actions do not.
- 5. The standard for what constitutes following a rule *vel non* can be publicly knowable and the focus of intersubjective agreement.

This core notions of legal formalism are *thin* (they don't assume much). So far, I've only said that legal rules *can* be meaningful, applied to particular facts, and the subject of intersubjective agreement.²³ I haven't yet said that most or all legal rules are, in fact

²³ This thin version of legal formalism is similar to what Frank Michelman calls "minimal legal formalism" in his contribution to this symposiu. *See* [cite to Michelman in this symposium].

meaningful, applicable, or the focus of intersubjective agreement. Those are further claims.

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C. A Neoformalist Theory of Constitutional Law

For the sake of argument, let's assume that the case for neoformalism is sufficiently strong to be taken seriously. What are the implications for constitutional law? What would a neoformalist theory of constitutional law look like? These are not easy questions: American constitutional law is a tough nut for formalists to crack. Why? First, the Supreme Court's constitutional jurisprudence has always included prominent realist elements. Second, the United States Constitution contains a variety of abstract and general provisions—"executive power," "freedom of speech," etc.—which seem to invite the judges to invest their own ideology or values into the process of constitutional interpretation. In other words, we are familiar with a realist practice of constitutional interpretation and have a difficult time imagining a formalist practice. But constitutional realism is not inevitable. We can imagine a much more formalist style of constitutional interpretation—one that took the constitutional text and stare decisis seriously. Consider the following six principles as one version of constitutional formalism:

Constitutional Formalism, Principle One, Precedent: Judges in constitutional cases should follow an adequate and articulated doctrine of *stare decisis*. Among the features of such a doctrine is that even courts of last resort (i.e. the United States Supreme Court) should regard their own constitutional decisions as binding, overruling prior cases (or limiting them to their facts) only when the precedents themselves require this result.

<u>Constitutional Formalism, Principle Two, Plain Meaning</u>: When the precedents run out, judges should look to the plain meaning of the salient provisions of the constitutional text.

Constitutional Formalism, Principle Three, Intratextualism and Structure: When the text of a particular provision(s) is ambiguous, judges should construe that provision so as to be consistent with other related provisions and with the structure of the Constitution as a whole.

Constitutional Formalism, Principle Four, Original Meaning: If ambiguity still persists, judges should make a good faith effort to determine the original meaning, where original meaning is understood to be the meaning that (i) the framers would have reasonably expected (ii) the audience to whom the Constitution is addressed (ratifiers, contemporary interpreters), (iii) to attribute to the framers, (iv) based on the evidence (public record) that was publicly available.²⁴

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²⁴ This formulation is an adaption of Grice's famous distinction between speaker's meaning and sentence meaning. *See* Paul Grice, *Utterer's Meaning, Sentence Meaning, and Word Meaning*, 4 FOUNDATIONS OF LANGUAGE 225-42 (1968); Paul Grice, *Utterer's Meaning and Intentions*, 68 THE

<u>Constitutional Formalism, Principle Five, Default Rules</u>: And when ambiguity persists after all of that, then judges should resort to general default rules that minimize their own discretion and maximize the predictability and certainty of the law.

Constitutional Formalism, Principle Six, Lexicality and Holism The first five principles are to be understood as lexically ordered in the following sense. Judges should order their deliberations by the first five principles--attempting to structure their conscious deliberations by attending to the features highlighted by each principle in order before proceeding to the next principle. But this requirement does not entail that judges either will not or should not recognize that the considerations thematized by one principle may be relevant to deliberations explicitly organized by another principle. Thus, the interpretation of a precedent will sometimes (perhaps always) require consideration of the text, structure, and original meaning, and so forth.²⁵ These are principles not rules, and lexical ordering operates a methodological heuristic and not as a rigid rule.

These six principles are appropriate to the commitments of rule-of-law neoformalism, but they do not represent the only form that constitutional formalism could take. ²⁶ In particular, the first principle affirms the role of *stare decisis* but does not specify that role in detail. We now have the theoretical resources in place to tackle that task.

III. A NEOFORMALIST CONCEPTION OF CONSTITUTIONAL STARE DECISIS

The Supreme Court should consider itself bound by its own prior decisions—that's my claim. I don't think anyone else is making this claim, and this doesn't surprise me. The mainstream of constitutional theory is antiformalist—opposed to hard constitutional law whether it is derived from the text, history, or precedents. Originalists may be formalists, but they too are usually opposed to really strong *stare decisis*; if Supreme Court decisions were considered binding, it would be very difficult to "restore the lost constitution."²⁷

PHILOSOPHICAL REVIEW 147-77 (1969). Both essays are reprinted in PAUL GRICE, STUDIES IN THE WAY OF WORDS (Cambridge MA: Harvard University Press 1989). *See also* Richard E. Grandy & Richard Warner, *Paul Grice*, Stanford Encyclopedia of Philosophy (2005), at http://plato.stanford.edu/entries/grice/#Mea (visted February 4, 2006).

²⁵ Lexical ordering is a guideline for structuring deliberation, and is not inconsistent with the observation that interpretation involves what Gadamer called the hermeneutic circle. *See* Hans-Georg Gadamer, Truth and Method (2d ed.).

²⁶ An actual practice of constitutional neoformalist judging would need to take into account the differences among the various versions that rule-of-law formalism. Some differences may be conventional; with respect to conventional differences, one might reasonably expect that judicial practice will converge over time. Other differences may be more substantive—reflecting different judgments about how best to achieve the rule of law or about the appropriate balance between the rule of law and other values. With respect to these differences, it seems utopian to hope for perfect agreement. Rather, one would expect that different neoformalist judges and courts would have distinct styles, reflecting their differing conceptions of the best version of neoformalism.

²⁷ The allusion is to the title of Randy Barnett's book. *See* Randy Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTON OF LIBERTY (2003).

Nonetheless, it is surely worth investigating how neoformalism might articulate a conception of constitutional *stare decisis*. That's the enterprise of this Part of the Article.

A. Distinguishing Realist and Formalist Approaches to Stare Decisis

The best place to start is with the contrasts between realist and formalist approaches to precedent. Two distinctions are important: first, the difference between instrumentalist consideration and binding legal force, and second the opposition between the legislative conception of holdings and the idea of holding as *ratio decidendi*.

1. Instrumentalist Consideration versus Binding Force

What role should precedent play in the constitutional decisions of the Supreme Court? The conventional view is that the Supreme Court should afford its own prior decisions a presumption of validity. What does that mean? One possibility would be that this "presumption" is a mere "bursting bubble." Precedents will be followed until and unless there are good reasons to depart from them. If this were the only role for precedent, then it would be virtually no role at all—it takes only a slender needle of argument to burst a bubble. Likewise, the presumption view is virtually meaningless if it only decides cases in which the arguments for and against sticking with the precedent are in equipoise. Of course, there will be some cases in which the arguments for and against a change in the law are perfectly balanced, but such cases are likely to be rare.

The presumption view of the force of precedent is implausible. A more reasonable view is that precedents are entitled to weight because of the costs of legal change. One such cost is associated with reliance and expectations. Individuals and institutions may fail to receive expected benefits or incur avoidable costs. Another set of costs may be related to the implementation of new legal rules—at a minimum, the treatises will need to be rewritten. The instrumentalist view of precedent conceives of the decision whether to overrule existing precedent as simply adding another factor to the balance of factors that are relevant to the selection of an optimal rule. From the realist perspective, precedents should be overrule when the benefits of overruling exceed the costs and precedents should be followed when they already provide the optimal rule or when the costs of changing the law are greater than the marginal benefits the better rule would provide.

The instrumentalist view of precedent is peculiar, because it denies that Supreme Court precedents should be treated as legally authoritative by the Supreme Court itself. One way of drawing out this peculiarity is by comparing the situation in which there is a prior Supreme Court precedent on a particular point of law to the situation in which there is no prior decision and a new case presents a novel issue of law. Of course, it is possible

²⁸ For discussion of the "bursting bubble" theory of presumptions, see D. Craig Lewis, *Should the*

decided based solely on the evidence presented concerning the issue."); *see also* James B. Thayer, A Preliminary Treatise On Evidence At The Common Law 336-339 (1898); 9 John H. Wigmore, Evidence S 2491 (3rd ed. 1940).

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Bubble Always Burst? The Need for a Different Treatment of Presumptions under IRE 301, 32 Idaho L. Rev. 5 (1995) ("Under the "bursting bubble" approach a presumption does not affect the burden of persuasion on an issue. Instead, it serves only to shift to the party opposing the presumption the burden of coming forward with some substantial evidence contradicting the presumed fact. When that burden is met, the "bubble bursts" - the presumption disappears, and the factual issue addressed by the presumption is

that the former case involves greater reliance interests than the later case, but this is not necessarily so. It might well be that the relevant individuals and institutions have made plans based on guesses about the Supreme Court's likely decision or that they have made plans for no good reason at all. From the instrumentalist perspective, reliance interests are valued in terms of consequences of disappointed expectations. *Stare decisis* is simply one mechanism by which reliance interests could be generated. The point is that the instrumentalist conception reduces the force of precedent to a contingent policy concern—one that may drop out entirely in some cases.

What is the alternative? The formalist conception of stare decisis is based on the idea that precedents are legally binding or authoritative. That is, a formalist believes that precedents provide what are sometimes called "content independent" or "peremptory" reasons for action. Of course, the formalist conception of precedents as legally binding is quite familiar, even in our realist legal culture. When it comes to vertical stare decisis, the conventional notion is that the decisions of higher courts are binding on lower courts. A Court of Appeals may not decide to overrule a Supreme Court decision because the advantages of the better rule outweigh the costs of changing legal rules. The idea of binding precedent also operates at the level of intermediate appellate courts. Three judge panels of the United States Courts of Appeal are bound by the prior decisions of the Court; they are not free to decide that the benefits of a better rule outweigh the benefits of adhering to the law of the circuit.

The neoformalist conception of *stare decisis* is based on the idea that precedents are more than mere presumptions and that they have binding legal force that cannot be reduced to the instrumental reasons for adhering to them.

2. Legislative Holdings versus Ratio Decidendi

There is a second contrast between realist and formalist conceptions of precedent. Realist courts are inclined to view their power as legislative in nature. This is clearest in the case of courts of last resort, as is the Supreme Court of the United States in constitutional cases. This leads to the emergence of what might be called the *legislative holding*—in which the Opinion of the Court includes a phrase that may begin, "We hold that . . ." and then states a broad rule that decides the case at hand but may go far beyond its facts. Lower courts may be inclined to treat legislative holdings as authoritative. For one thing, courts of last resort have a power that real legislatures lack; they can actually intervene in particular cases and address direct orders to the lower courts—powers that legislatures lack. Legislative holdings blur the familiar distinction between *dictum* and holding. From a realist perspective, a firm statement of the rule joined by a clear majority may constitute good evidence of the court's future actions—even if the statement is unnecessary to the resolution of the dispute at hand.

Even formalists may be tempted by the practice of legislative holdings—after all, they do facilitate predictability and certainty about the content of the law. There are, however, formalist reasons for adhering to the traditional view of *stare decisis*—that opinions are binding only insofar as they decide the case before the court. This is the traditional theory of the *ration decidendi*—"the reason for the decision" which is limited by the legally salient facts of the case that is decided. Given this traditional view, case law is slow moving. It takes many decisions to create a general rule, and many more to change one. Given the realist practice of "legislative holdings," a single case could create a right

to abortion with an elaborate three trimester scheme. And a single case could abolish that right. Given the formalist alternative, a right to abortion could only have been created through many decisions; once established, it would take many many more to modify or extinguish that right.

3. Binding Force and Ration Decidendi in Tandem

Before proceeding any further, it is worth noting that the two distinguishing features of the realist idea of precedent work in tandem. When legal rules are emerging, they are built slowly, piece by piece. Once established by a body of precedent, a legal rule can only change slowly. Each alteration must be consistent with the binding force of prior decisions. New cases can only move the law by small steps, whose limits are demarcated by the facts which define *ratio decidendi* of the new case. Working in tandem, these two features of the neoformalist doctrine of precedent operate to create predictability, certainty, and stability in the law—not by declaring broad rules in single cases but through the accumulated decisions of many cases over time.

B. Constitutional Stare Decisis as Institutional Self Binding

At this point, there is likely to be some theoretical resistance to the neoformalist conception of constitutional *stare decisis*. Is it even possible for the Supreme Court to bind itself? This question is illuminated by contrasting the situation of the Supreme Court from that of the lower federal courts with respect to vertical *stare decisis* and three-judge panels of the Court of Appeals with respect to horizontal *stare decisis* with respect to the law of circuit. The obvious contrast concerns institutional mechanisms for the enforcement of the binding effect of precedent. If a lower court disregards a Supreme Court precedent, the Supreme Court can reverse, summarily if necessary. If a three judge panel ignores the law of the circuit, the whole circuit can reverse *en banc*, acting as a sort of internal appellate court for this purpose. But if the United States Supreme Court fails to follow its own prior decisions, no higher court will reverse them. Without an institutional enforcement mechanism, does it even make sense to say that the Supreme Court could treat its own prior decisions as "binding?"

This is a familiar problem in general jurisprudence. The conventional solution to this problem is what H.L.A. Hart called "the internal point of view." The notion that a norm can be law only if it is enforced by someone other than the addressee of the norm has an obvious regress problem. If the Supreme Court cannot bind itself to precedent, how can it bind itself to the Constitution or federal statutes? Of course, some extreme realists might deny that the Constitution is law, but this is an extreme and unusual position, even in this realist age.

C. Qualification One: Formalist Reasons for Overruling Precedent

I am arguing for the idea that the Supreme Court should regard its own prior decisions as binding. A simple version of this idea might regard binding constitutional precedents

²⁹ See H.L.A. HART, THE CONCEPT OF LAW 54, 198 (1961); see also NEIL MACCORMICK, H.L.A. HART 45 (1981); Brian Bix, H.L.A. Hart and the Hermeneutic Turn in Legal Theory, 52 SMU L. Rev. 167 (1999); Dennis Patterson, Explicating the Internal Point of View, 52 SMU L. Rev. 67 (1999).

as permanent fixed points—subject only to the modifying force of constitutional amendment. That is not my view. I shall argue that the idea of a permanent fixed point is not the best expression of a neoformalist conception of constitutional *stare decisis*. Instead, precedents can be overruled (or confided to their facts) for formalists reasons, including because a precedent is no longer consistent with precedent.

"Overruling precedent for formalist reasons"—how would that work? Some will detect a faint odor of paradox in the claim that precedents can be overruled on the basis of precedents. Wouldn't really strong stare decisis mean that precedents are "fixed points" which can <u>never</u> be overruled? And how could precedents be overruled on the basis of precedents?

The idea that precedents have binding force does not entail that precedents must be understood as permanent fixed points. The core idea of a neoformalist conception of *constitutional* stare decisis is that precedents are legally binding. But a legal norm can be both binding and subject to change. And one way that a binding precedent can be changed is through the force of other precedents. The argument to establish this conclusion can be made in three steps.

Step One: Binding Precedents Can Be Overruled and Still be Binding. This claim is actually quite simple and uncontroversial. Take the case of a Supreme Court decision that is binding on the lower federal courts because of the doctrine of vertical stare decisis. The idea that such decisions have binding force is uncontroversial, but so is the idea that a Supreme Court decision can be overruled or modified by other legal norms. The clearest case would be a constitutional amendment. Chisholm v. Georgia was binding on the lower federal courts, but it was overruled by the Eleventh Amendment. Similarly, the Supreme Court's interpretation of a statute can be overridden by another statute. We have no trouble conceptualizing the notion that binding precedent can be modified or nullified by other authoritative legal materials.

Step Two: The Legal Norms Generated by State Decisis Can Change Over Time. This claim is just a teensy weensy bit controversial. Sometimes we think of holdings as "judicial legislation"—that is, we view the statement that follows "We hold that X" establishes a legal norm with content X. But this is not the neoformalist conception of the way in which precedents generate legal norms. Individual cases have holdings that are limited to their legally salient facts. Only a line of cases can develop a rule that approximates legislation. That means that the doctrine of precedent allows for the evolution of the law—a point that is basic to almost every theory of common law. As precedents are added to a line of authority, the legal norms created by the line can change, becoming broader, wider, deeper, and more articulated. Isolated holdings become general rules which acquire exceptions. One way of establishing this point is via the familiar maxim: "The law works itself pure." 30

Step Three: The Accumulation of Precedent Can Create a Legal Rule that Invalidates a Prior Holding. Once again, this is basic stuff. I'm not doing anything fancy here. A case is decided, subsequent cases distinguish the prior cases. Early in the development of the line of authority, the original case is taken as representing a rule and the later cases represent exceptions. As the exceptions grow, the field is reversed and the original case is now seen as an exception. But as time goes on, the exception is confined to a narrower

³⁰ Omychund v. Barker, 26 E.R. 15, 23 (1744)

and narrower zone of circumstances. Eventually, it becomes clear that the zone has narrowed to the vanishing point and the original case is now seen as a "mistake"—which one could but no longer can be reconciled with the whole line of cases. Finally, a court will acknowledge that the original case is "overruled" or "confined to its facts."

Does it make a difference whether we say that a precedent is overruled or confined to its facts? Legal realists are inclined to view these two descriptions as functionally equivalent, and there is a sense in which this realist insight is correct—in either case the decision loses all generative force. But within neoformalism, there is a point to using the old-fashioned "confined to its facts" locution. Why point is that? When we say that a precedent is "confined to its facts," we emphasize the idea that holdings are not legislation. The holding of a case is always the product of the nexus of fact and law in a particular dispute. When we say "confined to its facts," we are making the boundedness of precedent explicit. When we start talking about holdings being overruled, we may be tempted to analogize to the repeal of a statute—exactly the wrong idea. I don't think it matters much whether we use the language of overruling or the language of confining—as long as we are clear what we do mean and what we don't!

D. Qualification Two: Unlawful Decisions, Antiformalist Precedents, and the One-Way Ratchet

There is another qualification to the idea that precedents are binding. This qualification is complex. It begins with the idea of "unlawful decision" and then proceeds to consider a very thorny question—whether antiformalist precedents should be considered as lawful and binding, and if so, in what circumstances.

1. Unlawful Decisions and the Limits of Binding Force

Let's begin with a fairly obvious point. The idea that precedent should be binding can be qualified by distinguishing between "lawful" and "unlawful" decisions. Not just anything that the Supreme Court could issue would constitute a lawful decision. Let's illustrate this point with an example. Sometimes absurd examples are the best ones. Here's a doozy. Suppose that in *Bush v. Gore* the Supreme Court had issued a decision that declared that neither Bush nor Gore had been elected and that for reasons of policy and national security, the Court had decided to make Chief Justice Rehnquist the President of the United States. It is hard to imagine how this decision could be justified as lawful—as within the legal authority of the Supreme Court. Similarly, the Supreme Court would lack legal authority to decide a case in which no appeal or writ of certiorari was ever filed.

If the Supreme Court were to render an unlawful decision, paradigmatically, a decision beyond the outer boundaries of its authority, then the unlawfulness of the decision would be a good reason, a formal legal reason, to deny the decision binding precedential force. There is no reason why neoformalism should be committed to giving unlawful decisions the same binding force as lawful decisions.

2. The One-Way Ratchet and Self-Defeating Formalism

At this point, I'm going to back up and start from a new angle by exploring a formalist argument against precedent—which is sometimes called "the ratchet" or "the one-way ratchet." The argument called "the ratchet" is actually a cluster of related arguments. All of the arguments share a common structure. Let me begin with a fairly standard statement of the argument:

Suppose that the conservative critiques of the Warren Court are correct--that the decisions of the Warren Court (or at least many of them) cannot be defended on formalist grounds. What then would be the effect of a return to formalism? Why, it would lock in the realist decisions of the Warren Court era. But it would do more than that. Even if formalist judging were to prevail for years or decades, the pendulum might swing back to realism at some point in the future. But those the realists of the future will not be constrained by the formalist decisions of their predecessors. And hence during future periods of realism, the law would be distorted by yet another increment.

You can see where the argument goes. If formalists respect precedent and there are alternating periods of realism and formalism, then we have a ratchet--for emphasis, we might use the redundant phrase, one way ratchet. If this argument were correct, then it might be argued that formalist theory should not incorporate a strong doctrine of precedent, because a strong doctrine would make formalism self-defeating. Formalism would actually operate to entrench realist decision making—if we assume that judicial selection will result in periods during which realist judges dominate the courts.

How can formalists avoid the ratchet? Consider the following two options: (1) rejection of the doctrine of *stare decisis*, and (2) reservation of full *stare decisis* effect for *formalist* precedent.

The first possibility is to eschew precedent. That is, formalists could accept a sort of realist attitude about precedent in order to achieve formalist goals. For example, originalists might reject the doctrine of *stare decisis* in order to accelerate the pace at which the constitution in the courts approaches the original meaning. There are, however, difficulties with this approach. Originalists are unlikely to embrace the idea of an originalist "big bang," in which the original meaning was restored at once. Such a big bang might impose intolerable costs—requiring, for example, a substantial realignment of state and federal authority and a restructuring of the separation of powers. As an alternative, originalists might adopt an instrumentalist attitude about precedent—changing doctrine in the direction of the original meaning at a gradual pace by balancing the value of restoration with costs of constitutional change. This avoids the disruption that would accompany a "big bang," but also puts every case in an instrumentalist frame. If the goal is formalist judging, then instrumentalism about precedent is a poor means.

Wholesale rejection of precedent would create another problem, which we might call doctrinal instability. Sensible formalists need not deny that some constitutional questions are close—even if one is committed to textualism and originalism. Without constitutional *stare decisis*, there would be no guarantee of stability and predictability of constitutional law. Each time a constitutional issue reached the Supreme Court, the Justices would be obligated to consider the question afresh and shifting opinions or changes in the Court's composition could result in the law shifting back and forth. For

all of these reasons, the complete rejection of constitutional *stare decisis* seems undesirable.

The second alternative is for formalists to distinguish between what we might call "formalist precedents" and "realist precedents." Prior decisions which rest on formalist grounds could be given full binding force, whereas precedents that rest on instrumentalist grounds could be treated as entitled only to presumptive validity. This option avoids the one-way ratchet: instrumentalist precedents are not locked in. Giving *stare decisis* effect to formalist precedents would create stability and predictability as the body of binding formalist precedent grows.

3. Precedent About Precedent: Formalism in a Realist Era

I am going to back up yet a third time and tackle this problem form yet another angle. It might be argued that a formalist approach to precedent is inconsistent with the Supreme Court's own realist practice. In other words, it might be argued that the Supreme Court's modern cases are precedents establishing a rule that precedents are not binding. Of course, the instrumentalist cannot endorse this argument—because the argument relies on a formalist premise. And the formalist need not accept that proposition that instrumentalism can entrench itself by formalist methods—after all, that claim would be internally inconsistent. Once these points are in place, we are in a position to appreciate yet another reason for formalists to be skeptical about treating instrumentalist precedents as formally binding. Instrumentalist decisions just aren't constructed in a way that they can be considered binding—because the instrumentalism built into the decision, the case simply cannot bear the burden of being treated as binding law.

But the fact that instrumentalist precedents are poor candidates for treatment as binding law does not mean that they are irrelevant. Given the realist nature of contemporary legal practice, any movement towards a neoformalist conception of constitutional *stare decisis* will inevitably encounter transition problems. In the actual world, the transition to formalism could only happen gradually. Most judges have strong instrumentalist habits, and old habits die hard. Even if judicial selection processes overwhelmingly favored formalist judges, it would still take a generation for the bench to turn over. And even if the bench were occupied entirely by formalist judges, the work of reshaping all of American law would surely take another generation.

Given the practical realities that put breaks on any movement towards constitutional formalism, it is inevitable that instrumentalist precedents will persist for quite some time. The law may work itself pure, but the work is done one case at a time.

* * *

E. A Restatement of the Neoformalist Conception

In sum, the neoformalist conception of constitutional *stare decisis* views the force of precedent as binding rather than as instrumental and rejects the idea of legislative holdings. In particular, the neoformalist conception rejects the power of the Supreme Court to overrule its own prior decisions for instrumentalist reasons, while affirming the Court's authority to overrule (or limit) precedents for formalist reasons, including the special reason that a prior decision is inconsistent with the whole body of precedent. In

addition, the neoformalist conception does not require that unlawful decisions be regarded as binding; one reason a decision may be regarded as unlawful for this purpose is that the decision rests on instrumentalist rather than formalist grounds.

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IV. CONCLUSION: UNENUMERATED RIGHTS AND THE FUTURE OF CONSTITUTIONAL DOCTRINE

Justices of the Supreme Court should regard themselves as bound by legally valid precedents—by the decisions that are reasoned on formalist grounds. But this does not entail the conclusion that there are constitutional fixed points—precedents that never can be reconsidered. Quite the contrary, the best understanding of legal formalism is consistent with the idea that the law works itself pure. This means that our constitutional beliefs are inherently corrigible—subject to revision in light of new arguments and evidence about the meaning of the Constitution. Even *Marbury v. Madison* or *Brown v. Board of Education* could go—although we may not be to imagine the circumstances in which that would happen, here and now. Or to put it another way, if there are constitutional fixed points, there fixity consists only in the fact that we cannot *yet* imagine how they would be dislodged. *Marbury* or *Brown* may be "set in stone," but even stone can crumble, topple, or simply be worn away by wind and sand.

Don't get me wrong. I am not asserting that these cases were incorrectly decided. Nor am I denying what the "priority of the particular" in the context of constitutional jurisprudence. Quite the contrary, it is the priority of the particular that undergirds the inherent corrigibility of constitutional jurisprudence. Because we have confident judgments about particular cases, abstract constitutional theories are always *potentially* in jeopardy: confident assertions about general jurisprudence are called into question when they run into recalcitrant beliefs about particular cases. Lines of precedent can run into each other—transforming our understanding of the meaning and force of what was once considered "settled law."

And don't get me wrong. On the surface, there is something paradoxical about endorsing a formalist conception of *stare decisis* while simultaneously denying the existence of constitutional fixed points. After all, aren't precedents supposed to be the points that are fixed by the doctrine of *stare decisis*? And of course, they are. But they are only as *fixed* as it is possible for constitutional judgments to be—no less, but no more than that. That is to say that precedents should *be* binding precedents, but it is just plain silly to think that precedents can be "superbinding," somehow placed beyond the power of reason and law. Belief in superprecedent rests on the same mistake as does the reduction of formalism to "mechanical jurisprudence." The mistake is to miss the ineliminable role judgment in practical reasoning—of which, legal reasoning and constitutional reasoning are subsets.

And don't get me wrong. When I dismiss "mechanical jurisprudence" and reject the notion of "superprecedent," I am not taking anything back. Quite the contrary. These moves are essential in order to see that formalism (or "neoformalism") is a live possibility for constitutional jurisprudence. A neoformalist conception of constitutional *stare decisis* means treating lawful precedents as *authoritative*—as providing preemptory reasons for actions. But it does not mean treating all (or even all *lawful*) precedents as if

they possessed some magical power to guide action without the intermediation of reason and judgment. That kind of formalism—the realist caricature of formalism—is simply incoherent. Neoformalism gives precedents the kind of authority that can figure as a preemptory reason in deliberation, no more but also no less.

And don't get me wrong, when I conceive of the Supreme Court in bondage, I am not thinking of a submissive Supreme Court, dominated by whips and chains wielded with intent to humiliate by cruel legislative and executive masters. Quite the contrary. What I am thinking about is a Supreme Court that submits in another sense—a Court that binds itself to the rule of law and is entangled by chains of text and ropes of precedent. What I am thinking about is a Supreme Court that does not chafe or struggle against the binding force of its own prior decisions—a judiciary empowered by self-imposed restraint.