Original Meaning and the Precedent Fallback

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There is longstanding tension between originalism and judicial precedent. With its resolute focus on deciphering the enacted Constitution, the originalist methodology raises questions about whether judges can legitimately defer to their own pronouncements. Numerous scholars have responded by debating whether and when the Constitution's original meaning should yield to contrary precedent.

This Article considers 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. In those situations, deference to precedent can serve as a fallback rule of constitutional adjudication. The strengths and weaknesses of the originalist methodology take on a unique valence when a primary commitment to original meaning is coupled with a fallback rule of deference to precedent. Even when the Constitution's original meaning leaves multiple options available, falling back on precedent can channel judicial discretion and contribute to a stable, impersonal framework of constitutional law.

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I. INTRODUCTION

The status of judicial precedent has posed a conceptual challenge for originalism. On some accounts, the originalist methodology leaves little room for fidelity to the pronouncements of prior courts.[1] After all, how can a theory that is motivated by the primacy of text and historical understandings permit deference to judicial gloss?[2]

1. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 154 (2013) ("Originalism is often thought, by both its advocates and its critics, to be inconsistent with precedent."); Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1473 (2007) (describing the claim that originalists face "an unpleasant choice: either take a principled stance with such dire implications for the rule of law that it endangers originalism as a viable theory of interpretation, or apply an inconsistent and unprincipled stare decisis"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 767 (1988) ("[T]he central problem for originalism is whether the cost of embracing stare decisis is too high—whether, in the end, the embrace destroys originalism's bedrock assumption that, until formally amended, the Constitution establishes a permanent ordering binding on all organs of the government, including the courts.").

2. *See, e.g.*, Gary Lawson, *Rebel Without a Clause: The Irrelevance of Article VI to Constitutional Supremacy*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 38 (2011) ("The 'judicial Power' is the power to decide cases in accordance with governing law. If the Constitution conflicts with any other potentially applicable source of law, such as statutes or prior judicial decisions . . . , the Constitution must prevail."); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) ("If one is an

The apparent tension between originalism and precedent has elicited a robust scholarly response. Recent years have witnessed notable attempts to demonstrate that adherence to precedent, even flawed precedent, is compatible with a commitment to the Constitution's original meaning under certain circumstances.[3] According to these arguments, precedent is not simply a conceptual obstacle that justifies an exception to originalism for the sake of practicality.[4] Rather, precedent can function as an intrinsic and coherent part of originalist theory.

Scholarly treatments of the operation of precedent within originalism commonly feature situations of conflict between judicial case law and the Constitution's original meaning.[5] This emphasis is understandable, for it reflects the importance of determining whether originalism can accommodate widely lauded precedents even if they represent deviations from the originalist Constitution.[6] Yet there is another set of questions relating to cases in which the Constitution's original meaning is uncertain. For example: How should courts respond if the Constitution's text, structure, and historical context leave substantial doubt about whether corporate electioneering is part of the

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originalist . . . then *stare decisis*, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism.").

3. *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 1, at 177–78 ("[W]hen an existing precedent conflicts with the original meaning, an intermediate approach that sometimes follows original meaning and sometimes follows precedent is best."); Lash, *supra* note 1, at 1441–42 ("A theory of stare decisis that takes into account the majoritarian commitment of popular sovereignty may justify upholding an erroneous precedent, depending on the costs imposed on the majoritarian political process."); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 3 (2011) ("[T]he justices may—in limited situations—use wrongly decided constitutional precedents as rules of decision without betraying their allegiance to the enacted constitutional text."); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 420 (2006) ("[A] limited respect is due some nonoriginalist constitutional precedent because of the larger societal and constitutional goal of effectively pursuing the common good.").

4. *Contra* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 139 (1997) ("The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1174 (2006) ("Rather than embracing precedent as critical to the rule of law, [Justice Scalia] views it as an obstacle to correct constitutional interpretation.").

5. "Often," but not "invariably." Among the most notable exceptions is Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003). *See infra* Part V. For an overview of several approaches to conflicts between precedent and original meaning, see Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1870–73 (2013).

6. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990) ("[I]t is too late to overrule not only the decision legalizing paper money but also those decisions validating certain New Deal and Great Society programs pursuant to the congressional powers over commerce, taxation, and spending.").

"freedom of speech" protected by the First Amendment?[7] What if there is insufficient evidence to determine whether the "right . . . to keep and bear Arms" applies to individuals?[8] Or if there is no reliable way to figure out the application of the jury-trial right to the imposition of mandatory-minimum sentences?[9] In situations like these, is there a meaningful role for judicial precedent to play? It is this aspect of the relationship between originalism and stare decisis that I wish to consider: the function of precedent when the Constitution's original meaning cannot confidently be discerned.[10]

Focusing on situations of constitutional uncertainty underscores the fact that deference to precedent need not come at the expense of respecting the Constitution's original meaning.[11] Evidence of original meaning will sometimes be inadequate to provide a clear answer to a disputed question.[12] Moreover, vague constitutional terms, even when understood in historical context, will sometimes permit a range of outcomes. I suggest that in such situations, originalists may consider stare decisis as a fallback rule. Upon finding that the Constitution's original meaning is insufficient to resolve a dispute, courts can adopt a presumption of deference to judicial precedent. Such a fallback rule is compatible with several (though not all) prominent versions of originalism. Whether one's commitment to originalism is grounded in the rule of law, consequentialism, or popular sovereignty, deferring to precedent is a coherent response to constitutional uncertainty.[13]

From a normative perspective, this precedent fallback has much to recommend it. Asking judges to defer to the pronouncements of their predecessors can be a useful mechanism of judicial constraint, which is

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7. The example is drawn from *Citizens United v. FEC*, 558 U.S. 310 (2010).

8. The example is drawn from *District of Columbia v. Heller*, 554 U.S. 570 (2008).

9. The example is drawn from *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

10. This Article uses the term "stare decisis" in the general sense of "[f]idelity to precedent." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring).

11. *Cf.* MCGINNIS & RAPPAPORT, *supra* note 1 at 185 ("When the original meaning is uncertain, a far stronger argument exists for following precedent—provided that the precedent constitutes a reasonable interpretation of the original meaning—than when the precedent clearly conflicts with the original meaning.").

12. My claims are intended to apply equally to (a) original meaning as defined in terms of the original intentions of some relevant set of constitutional framers and ratifiers and (b) original meaning as defined by the original public meaning of the Constitution's text at the time of ratification. *See, e.g.*, Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926–34 (2009) (summarizing the competing approaches). I take no position regarding which definition of original meaning is superior. Further, my focus on situations of constitutional uncertainty makes the distinction less salient. *Cf.* Nelson, *supra* note 5, at 557 (contending that "in the very cases where divisions among the framers and ratifiers make the 'original intention' indeterminate, the 'original meaning' is likely to be similarly indeterminate").

13. *See infra* Part IV.B.

a value that many originalists have long prized.[14] To some critics of originalism, the constraint argument is "naïve" due to the "fragmentariness and contestability of the historical record."[15] A related challenge has arisen within the originalist school itself. The source of the challenge is the movement to distinguish between the *interpretation* of the Constitution's linguistic meaning and the *construction* of constitutional law. Decoupling the steps of interpretation and construction implies that within the "construction zone,"[16] there can be a range of outcomes from which a judge must select on some basis other than the semantic meaning of constitutional text.[17] In the view of one recent commentator, "[t]he very changes that make" the construction-based approach "theoretically defensible also strip it of any pretense of a power to constrain judges to a meaningful degree."[18]

Fidelity to judicial precedent responds to both lines of criticism. When the implications of constitutional text and historical evidence are uncertain, judges need not receive license to decide cases according to their subjective intuitions. A primary commitment to original meaning can be coupled with a secondary preference for judicial precedent, including nonoriginalist precedent. Stare decisis becomes a

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14. *See id.*

15. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 89 (2009); *see also* Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 331 (2013) ("Whatever its merits . . . originalism often cannot fulfill its promises of fixation and constraint."); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 723 (2011) (recounting the criticism that "it is often impossible to determine the actual original understanding of a particular constitutional provision . . . because the historical record is contradictory, incomplete, or severely compromised" (footnotes omitted)); Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2015 (2012) (describing originalism as harboring "pretensions of objectivity and determinacy"); David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 970 (2008) ("[O]riginalism, contrary to appearances, in fact imposes only a very uncertain limit on judges and leaves them a great deal of latitude to find, in the original understandings, the outcomes they want to find.").

16. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 108 (2010).

17. *See, e.g.*, Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1509 (2012) (arguing that "the originalist construction school . . . permits the very results that originalism was designed to avoid—namely, the unrestrained judicial trumping of democratically authorized decision making and the implementation of textual understandings of which those alive at the time of ratification would have been totally unaware."); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 502–03 (2013) ("If one were attracted to originalism because one was opposed to unconstrained judicial discretion in constitutional cases, then the notion of a construction zone in which judicial decisions were unconstrained . . . would be worrisome.").

18. Colby, *supra* note 15, at 714; *see also* Dorf, *supra* note 15, at 2014 ("[N]ew originalists may rely on the relative open-endedness of original meaning in order to justify results that comport with their values.").

supplemental constraint on judges when the Constitution's original meaning is in doubt.

Falling back on precedent can also contribute to the stability and impersonality of constitutional law. Once again, these are values that many originalists have embraced.[19] A commitment to originalism coheres with skepticism about judicial updating of the Constitution.[20] When the original meaning is uncertain, deference to judicial precedent can reinforce a similar principle. Combining a primary commitment to original meaning with a precedent fallback promotes a conception of constitutional law as enduring over time and transcending the proclivities of individual jurists. Further, invoking precedent in response to uncertainty has a basis in America's constitutional history: Leading scholars have contended that figures such as James Madison posited that uncertainties in the Constitution's text would be "liquidated" through, among other things, the creation of judicial precedent.[21] Against this backdrop, the case for falling back on precedent draws force from history as well as normative argumentation.

For originalism's proponents, the primary implication of this analysis is that the precedent fallback is worthy of consideration as a tool for enhancing the methodology's effectiveness and appeal. For originalism's critics, the analysis suggests that neither incompatibility with precedent nor inability to constrain is an inherent defect of originalist theory. Many versions of originalism are fully consistent with the precedent fallback. Or so I claim.

What I do *not* claim (for present purposes) is that the precedent fallback is superior to other potential means of responding to constitutional uncertainty. Commentators have offered a variety of proposals for how judges should behave when the inquiry into the Constitution's original meaning is inconclusive. The options include deferring to the political branches of government, protecting individual liberty, and consulting the methods by which the Founding generation expected judges to react to textual and contextual uncertainty.[22] The respective arguments in favor of those positions are comprehensive (and insightful). My goal in this Article is far more modest: I hope to demonstrate that, within the originalist school, deference to precedent deserves consideration as a possible response to constitutional uncertainty. What I am after, in short, is a particular way of thinking

19. *See infra* Part IV.D.
20. *See id.*
21. *See infra* Part VI.E.
22. *See infra* Part VI.B.

about precedent—one that views precedent as a source of value rather than a conceptual obstacle that originalism must overcome or explain away.[23]

Finally, though I return to the issue below, I note that my analysis does not depend on any single definition of constitutional "uncertainty" or constitutional "indeterminacy."[24] The question of where to set the bar for establishing constitutional certainty is crucial to the precedent fallback's operation because it determines when a judge should shift her focus from constitutional text and history to judicial precedent. Nevertheless, the precedent fallback maintains the same shape regardless of how the concept of constitutional uncertainty is defined.[25]

This Article begins in Part II by examining the normative overlap of stare decisis and originalism on three key issues: constraining judicial discretion, contributing to doctrinal stability, and promoting the impersonality of law. Part III offers a brief clarification of the various roles that precedent can play within originalist adjudication. Part IV explains how a fallback rule of deference to precedent coheres with several versions of originalism that are prominent in the literature. Part V then considers various questions about the mechanics of the precedent fallback, including its defeasibility, its treatment of recent cases as compared with older ones, and its application to nonoriginalist reasoning. I suggest that, while the precedent fallback prescribes definitive answers to the latter two questions, it does not require any particular view of the countervailing circumstances that justify departures from precedent.

Part VI addresses the argument that constitutional adjudication is best understood as consisting of discrete steps of interpretation and construction. For those who emphasize such a distinction, the precedent fallback can be reconceptualized as a principle of constitutional construction. Precedent can also serve as a bridge between theories that

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23. It is worth noting that this Article makes no attempt to defend or criticize the originalist methodology as a general matter. My goal is simply to contribute to the existing account of originalism's relationship with judicial precedent.

24. Technically speaking, it may be more accurate to say "underdeterminacy" rather than "indeterminacy" because the Constitution's text and original meaning will always take some options off the table. *See, e.g.*, Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) ("The law is *indeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is identical with the set of all imaginable results."). Nevertheless, for expositional ease and syllabic savings, I will use the term "indeterminacy" in the sense of "uncertainty," with the understanding that the term (as I use it here) means that multiple options—as opposed to all conceivable options—are left open by the Constitution's linguistic meaning.

25. *See infra* Part V.A.

endorse the practice of constitutional construction and theories that urge the resolution of constitutional uncertainty through interpretive methods that were recognized at the time of ratification. Finally, Part VII discusses three remaining questions raised by my analysis: whether deferring to nonoriginalist precedents poses a threat to originalism; whether fidelity to precedent limits the discretion of later judges only by amplifying the discretion of earlier ones; and whether the evidentiary bar for establishing the Constitution's original meaning should be set high or low.

II. PRECEDENT AND ORIGINAL MEANING AS COMPLEMENTARY CONCEPTS

Despite their well-chronicled tension, originalism and stare decisis can converge in the values they pursue. I begin by exploring these areas of common ground.

A. Constraint, Stability, and Impersonality

A constrained judge is one whose discretion is confined by preexisting determinants of legal meaning.[26] At base, constraint entails nothing more than a commitment that limits the subsequent exercise of judgment. Even a judge who decides a First Amendment case by reference to her own personal commitment to (for example) individual liberty is in some sense *constrained* in her decisionmaking. The same is true for all other interpretive touchstones.[27] Precommitment to any adjudicative theory implies a degree of constraint.[28]

Yet constraints can be particularly effective when they emanate from an external, publicly available source.[29] Publication can enhance the clarity with which constraints are understood and fortify them against distortion in future cases.[30] And while constraints are only

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26. I follow Thomas Colby in defining judicial "*constraint*" as relating to "the discretion of judges." Colby, *supra* note 15, at 751. So defined, the concept of constraint is distinct from judicial "*restraint* . . . in the sense of deference to legislative majorities." *Id.*

27. *Cf.* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 40 (1999) ("[M]ost interpretive approaches can at least constrain judges within bounds and in all likelihood could provide greater constraints over time as techniques of application are worked out in practice.").

28. *See id.* at 39 ("[T]he adoption of any interpretive method constrains judges from engaging in arbitrary or willful behavior.").

29. *Cf.* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) ("[A] legitimate Court must be controlled by principles exterior to the will of the Justices"); *id.* at 7 (discussing the need to "protect the judge from the intrusion of his own values").

30. *Cf.* Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274–75 (2005) ("Restrained judges render decisions that

made necessary by the pressures to defy them, sources of constraint that are available for public scrutiny are better designed to retain their shape even in the difficult cases, when a judge's internal precommitments might otherwise give way to case-specific impulses. The key is the heightened prospect of accountability: when constraints are publicly accessible, there is a "basis of legal accountability for the power" exercised by those "in positions of authority."[31]

In a similar way, the externality of legal constraints can bolster the degree to which the judiciary demonstrates itself as principled and consistent.[32] It is one thing for a judge to give assurances that she will make decisions in accordance with her internal interpretive commitments. It is quite another thing for the judge to empower onlookers to reach their own conclusions regarding the compatibility of her decisions with articulated sources of legal meaning.[33] Jeremy Bentham suggested that the difference between a "cloak" and a "check" is publicity.[34] The same principle explains the value of external constraints.

Judicial constraint, particularly constraint that flows from a publicly available source, has been an animating force for many originalists.[35] Emblematic is the position of Justice Scalia, who contends that by "establish[ing] a historical criterion that is conceptually quite separate from the preferences of the judge himself," originalism cabins judicial discretion.[36] Justice Scalia has argued that, by focusing on predefined, external sources of meaning, originalism avoids "judicial personalization of the law" and establishes itself as "the lesser evil" among interpretive methodologies.[37] More recently, he used his concurrence in *McDonald v. City of Chicago* as occasion to reiterate

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conform to what an experienced lawyer, familiar with the facts of the case and the relevant legal authorities, would counsel a client would be the most likely outcome.").

31. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012).

32. *Cf.* WHITTINGTON, *supra* note 27, at 39 ("Originalism is said to offer at least a comparative advantage in being able to constrain judges by providing fairly objective and specific criteria by which to evaluate judicial performance.").

33. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 569 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting the importance of "facilitating the operation of the check of professional criticism").

34. 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827), *quoted in* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

35. *See, e.g.*, BORK, *supra* note 6, at 146 ("When a judge finds his principle in the Constitution as originally understood, the problem of the neutral derivation of principle is solved . . . . He need not, and must not, make unguided value judgments of his own."); Colby, *supra* note 15, at 714 ("Originalism was born of a desire to constrain judges." (footnote omitted)).

36. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

37. *Id.* at 863–64.

that "the question to be decided is not whether the historically focused method is a *perfect means* of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world."[38]

Comparable arguments are salient within the academic commentary. Lawrence Solum has explained that one of the central tenets uniting different strands of originalism is the belief that "constitutional actors," including judges, "ought to be constrained by the original meaning when they engage in constitutional practice."[39] Randy Barnett's theory of constitutional legitimacy is likewise bound up with the importance of constraint: because "a written constitution is the means by which law is imposed on those who would impose law on the general public," it follows that judges may not alter the Constitution's "meaning at their own discretion."[40] In Professor Barnett's view, the Constitution is designed to "lock-in" rights and "define" and "limit" the power of government.[41] Such is the language of constraint.[42]

In much the same way, judicial constraint can be linked with fidelity to precedent. As Alexander Hamilton wrote, in a passage the Supreme Court has endorsed,[43] deference to precedent is a means of preventing the enterprise of judging from becoming the province of "an arbitrary discretion."[44] John Adams also looked to precedent as displacing "the arbitrary Will or uninformed Reason of Prince or Judge."[45] To similar effect is William Blackstone's contrast of deference to precedent with a judge's disposition of cases "according to his private sentiments."[46] And these concerns continue to reverberate, as in Justice

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38. 561 U.S. 742, 804 (2010) (Scalia, J., concurring); *see also id.* ("I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process."); BORK, *supra* note 6, at 155 ("No other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters, perhaps radically, the design of the American Republic.").

39. Solum, *supra* note 17, at 456.

40. Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 637 (2009).

41. *Id.* at 658; *see also* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 18 (2006) ("[A] written constitution can perform neither the 'lock-in' or rights-protecting functions if those who are supposed to be bound and limited by its terms may alter their meaning at their discretion.").

42. *See also, e.g.*, WHITTINGTON, *supra* note 27, at 6 ("[T]he Constitution is binding only to the extent that judges do not have discretion in its application.").

43. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

44. THE FEDERALIST NO. 78 (Alexander Hamilton).

45. John Adams, Draft correspondence to a newspaper, November 5, 1760, *in* 1 THE ADAMS PAPERS: DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 167 (L. H. Butterfield ed., 1961).

46. 1 WILLIAM BLACKSTONE, COMMENTARIES *69; *see also id.* ("[H]e being sworn to determine, not according to his own private judgment, but according to the known laws and

Scalia's statement that to "disregard our own precedent" in the absence of other guideposts is to "leav[e] only our own consciences to constrain our discretion."[47] A host of commentators have likewise underscored the constraining force of precedent.[48]

At the outset, then, we find adherence to original meaning and adherence to judicial precedent sharing a normative foundation. Both are mechanisms for ensuring that judges are constrained by a publicly available source that is external to themselves.[49] For its proponents, originalism provides a means of "fixing [the] will" of judges within certain bounds.[50] Fidelity to precedent promotes the same objective.[51] Within a system that generally treats caselaw as relevant, judges face meaningful limits on their ability to disregard precedent.[52] Accompanying those limits is a heightened burden of justification for departing from precedent.[53]

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customs of the land . . . ."). *But see id.* at 69–70 ("Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law.").

47. Holland v. Florida, 560 U.S. 631, 673 (2010) (Scalia, J., dissenting).

48. *See* Merrill, *supra* note 30, at 278 ("[A]t least in theory, a strong theory of precedent . . . will result in more judicial restraint . . . in the context of modern American constitutional law"); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 83–84 (2001) ("[S]tare decisis grew in America as a way to restrain . . . the discretion that occupies the space left by the indeterminacy of the underlying rules of decision."); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300 (2005) ("Precedent limits judges in constitutional cases just as it has for a long time limited judges in cases about contracts, torts, and property."); *cf.* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 169–70 (2006) ("The core idea of formalism is that the law (constitutions, statues, regulations, and precedent) provides rules and that these rules can, do, and should provide a public standard for what is lawful (or not).").

49. *See, e.g.*, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997) (noting that "text and original understanding" and "precedent" are all "constraints on judicial discretion" that serve "as means of tempering judicial arrogance by forcing judges to confront, and take into account, the opinions of others").

50. *Cf.* WHITTINGTON, *supra* note 27, at 56 ("The people can constrain their governmental agents only by fixing their will in an unchanging text.").

51. *See* Christopher J. Peters, *Originalism, Stare Decisis, and Constitutional Authority*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 222 (Christopher J. Peters ed., 2013) ("Stare decisis can promote the perception of impartiality by visibly preventing the Court from reaching its preferred result."); Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977, 981 (2008) ("A judiciary that stood firm with a strong theory of precedent would rechannel our nation back toward democratic institutions and away from using the courts to make social policy.").

52. *Cf.* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 21 (2008) (drawing on the work of H.L.A. Hart in stating that "[w]hen judges follow precedents they do so not because they fear the imposition of a sanction, but because precedent-following is regarded among them as correct practice, as a norm, deviation from which is likely to be viewed negatively").

53. *See id.* at 165 ("Precedent, particularly accumulated precedent, can place a significant justificatory burden on those minded to decide differently on the same facts.").

A related area of conceptual overlap concerns the value of judicial impersonality. Originalism is commonly defended as promoting the ideal that the law itself, not the man or woman who dons the judicial robe, should determine the resolution of legal disputes.[54] Adjudication is the province of overarching, durable legal commands that transcend any particular dispute and resist the subjective vagaries of judicial personality.[55] "Judges," Keith Whittington asserts, "are not simply private citizens well positioned to prevent public harm."[56] Only when judges subordinate their subjective impulses to the enacted Constitution can impersonality flourish.[57]

The doctrine of stare decisis can promote similar ideals. The Supreme Court has explained that stare decisis facilitates "impersonal and reasoned judgments"[58] and contributes to the maintenance of a legal system in which "bedrock principles are founded in the law rather than in the proclivities of individuals."[59] Stare decisis thus emerges from, and contributes to, "a conception of a court continuing over time."[60] The doctrine's promotion of impersonality is bound up with its substantive neutrality: at its core, stare decisis is committed to no agenda other than respect for whatever has gone before.[61]

The overlap between original meaning and stare decisis also extends to the promotion of stability. Adherence to the Constitution's original meaning can enhance stability by reducing the incidence of

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54. *Cf.* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 211 (2008) (including among the features of the rule of law that "governmental authority . . . be impersonal, residing in offices rather than in individuals").

55. *See, e.g.*, Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 288 (1988) ("The outstanding characteristic of original intentions adjudication, for good or ill, is that it is, compared with the alternative methods, most likely to produce relatively clear and stable rules for lawful government activity."); Lawrence B. Solum, *Semantic Originalism* 129 (Ill. Pub. Law & Legal Theory Research Papers, Series No. 07-24, 2008), *available at*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244, *archived at* http://perma.cc/FW7-QM33 (stating that a "familiar justification for originalism is based on the great value of the rule of law and its associated values, predictability, certainty, and stability of legal rules").

56. WHITTINGTON, *supra* note 27, at 140.

57. *See* BORK, *supra* note 6, at 318 ("Though there are many who vehemently oppose [originalism], that philosophy is essential if courts are to govern according to the rule of law rather than whims of politics and personal preference.").

58. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

59. Vasquez v. Hillery, 474 U.S. 254, 265 (1986); *see also* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) (arguing that the rule of law depends on combating the idea that "the Constitution is nothing more than what five Justices say it is").

60. Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 683 (1995).

61. *Cf.* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 540 (2000) ("The basic principle itself is substantively neutral as to possible answers because it simply embraces the judicial answer that came first in time.").

judicially initiated change. And deference to precedent ensures that the frequent reconsideration of judicial decisions will not "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."[62] It is that stability, the Supreme Court has stated, "upon which the rule of law depends."[63] The aspiration is to establish the legal system as a framework of durable rules rather than "a series of unconnected outcomes."[64] At the same time, deference to precedent can protect the settled expectations of those who have acted and made plans in reliance on judicial pronouncements.[65] The importance of a stable backdrop is another consideration that implicates both fidelity to original meanings and fidelity to judicial precedent.[66]

B. The Promise and Reality of Precedent

A bad doctrine of stare decisis is little better than none at all. A doctrine that is ill-defined or excessively weak will lead not to constraint and predictability but to cynicism that the law is being applied in good faith. Rather than confidence that judges are acting as part of a unified judiciary, appeals to stare decisis will breed suspicion of rhetorical cover in service of individual agendas. Yet the promise of stare decisis remains integral to American constitutional practice.[67] The Supreme Court has gone so far as to describe the doctrine of stare decisis as "indispensable" to the rule of law.[68] And there are many

62. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008).

63. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 457 (2008); *see also* Nelson, *supra* note 48, at 4 (noting the argument that "the primary purpose of *stare decisis* is to protect the rule of law by avoiding an endless series of changes in judicial decisions").

64. Farber, *supra* note 4, at 1179.

65. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007) ("To be sure, reliance on a judicial opinion is a significant reason to adhere to it."); Quill Corp. v. North Dakota, 504 U.S. 298, 317 (1992) (retaining a precedent that had "engendered substantial reliance and . . . become part of the basic framework of a sizable industry"); BORK, *supra* note 6, at 157 ("Governments need to know their powers, and citizens need to know their rights; expectations about either should not lightly be upset."); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722–23 (2013) ("Stare decisis protects reliance interests by putting newly ascendant coalitions at an institutional disadvantage.").

66. Notwithstanding the conceptual overlap, the reliance implications of originalism and stare decisis may be at odds if a judicial precedent has commanded substantial reliance despite its deviation from the Constitution's original meaning. Even so, my point is simply that the underlying impulses in favor of promoting reliance and stability are compatible with originalism and stare decisis alike.

67. *See supra* Part II.A.

68. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[T]he 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 also* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79 (1987) (asserting that "[t]he rule of law depends in large part on adherence to the doctrine of *stare decisis*").

examples in which precedent does seem to play a meaningful role, from high-profile disputes in the Supreme Court[69] to cases in which lower courts heed closely to Supreme Court holdings (and even dicta).[70]

Still, the modern doctrine of stare decisis arguably lacks the structure and certainty to yield significant benefits, at least with respect to the Supreme Court's "horizontal" treatment of its own precedents. Part of the explanation owes to the fact that the Court has described its doctrine as a "series of prudential and pragmatic considerations."[71] The resulting fluidity impedes consistent application across cases. Another problem arises from the continuing debates—not simply as a matter of jurisprudential theory, but within Supreme Court opinions—over what it means to follow precedent.[72] And a third reason why the doctrine of stare decisis can seem uncertain and ad hoc is a simple matter of growing pains: although the concept of stare decisis has a long lineage, the Court's attempts to "doctrinalize" the treatment of precedent are of more recent vintage.[73]

Notwithstanding these challenges, my working assumption in this Article is that there is some hope yet for precedent. For the reasons explained in the previous Section, the doctrine of stare decisis has the potential to produce substantial benefits in terms of constraint, stability, and impersonality.[74] In the following Parts, I presuppose a doctrine that is sufficiently stable and determinate to facilitate coherent and principled application. The extent to which the existing doctrine resembles that ideal is another matter.[75]

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69. I would hold up *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000), which reaffirmed the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), as one prominent example.

70. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 198–99 (2014).

71. *Casey*, 505 U.S. at 854.

72. *See* Kozel, *supra* note 70, at 202–20 (discussing the complexity of formulating and applying a consistent definition of precedential scope).

73. *See* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1168–69 (2008) (describing the 1992 decision in *Casey* as "the Supreme Court's first systematic attempt to set forth a general theory of the role of precedent and 'stare decisis' in constitutional adjudication").

74. *See supra* Part II.A; *cf.* MCGINNIS & RAPPAPORT, *supra* note 1, at 189 ("[W]e believe that questions of precedent should be settled by rules, not by open-ended balancing tests, because of the advantages in terms of predictability and constraint that rules confer.").

75. For an evaluation of the Supreme Court's existing doctrine of stare decisis against a backdrop of interpretive disagreement, see Randy J. Kozel, *Second-Best Stare Decisis*, CALIF. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498125&download=yes, *archived at* http://perma.cc/VBL5-LC3R.

III. FUNCTIONS OF PRECEDENT WITHIN ORIGINALISM

There are several potential functions of precedent within originalism. My focus on the use of precedent as a fallback rule captures just one of those functions. To clarify the nature of my argument, I begin with a brief overview of other ways in which an originalist judge might invoke precedent.[76]

1. Historical Precedent. A judge may consult precedent to help determine the most accurate interpretation of the Constitution's original meaning. Judicial precedent becomes one of several tools—which also include constitutional text and structure, as well as evidence about historical usage—that can lend meaning to an otherwise uncertain provision. The reason for consulting precedent is not that there is anything special about judicial case law; it is the recognition that precedent can sometimes assist judges in conducting the historical inquiry that originalism entails.

Such uses of precedent are relatively benign in terms of their theoretical coherence with originalism. One can certainly imagine objections to the reliability of judicial precedents as indicia of the Constitution's original meaning. But those objections deal with originalist technique. They do not raise any deeper question about the legitimacy of consulting precedent within an originalist framework.

2. Epistemic Precedent. The second use of precedent is related to the first. A judge who is attempting to resolve a constitutional case may defer to a prior opinion because she suspects that it is likely to embody the correct interpretation of the Constitution's original meaning.[77] Of course, this "epistemic"[78] use of precedent will extend only to "previous decisions that actually attempted to discern original meaning."[79]

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76. For further exploration of various uses of precedent within originalism, see Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1766–67 (distinguishing between situations in which "[o]riginalist precedent provides evidence of how the original meaning is connected to and governs the activity under its purview" and situations in which "[o]riginalist precedent . . . determines the Constitution's meaning" through the process of construction).

77. *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 1, at 187 ("Precedent may . . . appropriately change a judge's prior beliefs about the correct interpretation, just as the opinion of an expert appropriately changes the prior beliefs of decision makers about the conclusion to which the expert testifies.").

78. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 43 (2000) ("The Court may presumptively adhere to its past constitutional precedents not because precedent, right or wrong, binds, but because precedent can teach and help find the right answer.").

79. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 267 (2005); *see also* MCGINNIS & RAPPAPORT, *supra* note 1, at 187 ("Many cases have deserved no weight on epistemic grounds because they have not attempted to derive their results from the Constitution's original meaning.").

3. Conflicting Precedent. Respect for precedent may drive a judge to make a conscious choice to depart from the Constitution's original meaning in pursuit of other values such as the promotion of stability and the protection of reliance expectations. As I suggested above, there is a wealth of thoughtful commentary about this practice, and scholars differ greatly over the situations (if any) in which an overt decision to depart from the Constitution's original meaning is justifiable.[80]

4. Fallback Precedent. The fourth use of judicial precedent, and the one that will be my focus, is a step removed from following precedent notwithstanding its conflict with the Constitution's original meaning. When a judge determines that her inquiry into text, structure, and history is unavailing, she might defer to precedent despite the fact that it does not shed any light on the Constitution's original meaning. The judge would conclude that, in the absence of textual and historical clarity, the best approach is to adopt a presumption of stare decisis. That is the use of precedent that I describe as the precedent fallback.

5. Methodological Precedent. To complete the taxonomy, let us briefly consider a final use of precedent that involves the process for discerning the Constitution's original meaning. Interpreting the historical record is a complex task, and it stands to reason that different judges will sometimes have different perspectives about how best to do it. Against that backdrop, we might imagine a judge who defers to her predecessors' choices regarding the process for interpreting the Constitution's language in historical context. The judge might defer to her predecessors' determination that a particular historical account is more reliable than others, or that a particular dictionary or newspaper is the best indicator of contemporary usage, or so forth.

The crucial question is *why* the subsequent judge sees fit to defer. If she believes that her predecessors' choices of materials and procedures are likely to be better than her own, then we are back in the realm of using precedent to achieve the most accurate interpretation of the Constitution's original meaning. By contrast, if the subsequent judge thinks that her predecessors actually made the wrong choice by emphasizing a source that is less reliable than some others, to follow precedent would be to prioritize case law notwithstanding its conflict with the Constitution's original meaning.

What if our judge surveys a variety of historical sources that point in different directions before concluding that there is no strong reason for believing that any is more reliable than the others? May the judge select the source that is consistent with existing case law? At first blush, there may not appear to be anything objectionable about this

80. For an introduction, see Kozel, *supra* note 5, at 1870–73.

practice; the judge must do *something*, after all, so why not select the historical source that is consistent with precedent? Nevertheless, when a judge determines that competing historical accounts are equally plausible, it follows that the meaning of the relevant constitutional provision is uncertain. If using precedent as a tiebreaker is legitimate, it must be because stare decisis is a permissible fallback rule.

IV. INTEGRATING PRECEDENT WITH ORIGINALISM

Some judges and commentators contend that the Constitution's original meaning is frequently so opaque or inconclusive as to impose little constraint on courts.[81] Justice Stevens has argued that "[e]ven when historical analysis is focused on a discrete proposition . . . the evidence often points in different directions."[82] In reality, "a limitless number of subjective judgments may be smuggled into" what purports to be historical analysis.[83] David Strauss similarly concludes that "[o]riginalism, as applied to the controversial provisions of the U.S. Constitution, is shot through with indeterminacy."[84] For Professor Strauss, originalism's lack of constraining force is one reason why the methodology is inferior to alternative theories such as common-law constitutionalism.[85]

But notice what happens when the constraining effect of original meaning—whether one believes that effect to be substantial or meager—is paired with the constraining effect of precedent. A judge might well conclude that the Constitution's original meaning is unclear as it pertains to a particular dispute. Yet if the judge responds by adhering to precedent, she is still acting in accordance with external, publicly available sources of law. A judge who falls back on precedent

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81. *See, e.g.*, Berman, *supra* note 15, at 89 ("Given the fragmentariness and contestability of the historical record, the Originalist judge has substantial discretion, a point at which professional historians have long hammered."); Peters, *supra* note 51, at 195 ("In our actual world, originalist methodology is neither especially transparent nor especially determinate."); Strauss, *supra* note 15, at 970 ("Partly this is just a technical problem of becoming conversant with all the relevant materials. But the greater problem is knowing what inferences to draw from those historical materials.").

82. McDonald v. City of Chi., 561 U.S. 742, 907 (2010) (Stevens, J., dissenting); *see also id.* ("The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole.").

83. *Id.* at 908.

84. DAVID A. STRAUSS, THE LIVING CONSTITUTION 45 (2010).

85. *See, e.g.*, Strauss, *supra* note 15, at 973 ("Judges pick and choose among precedents, often overrule precedents, and follow precedent uncertainly. But it seems to me that originalism is much more manipulable. As a practical matter, precedent closes off many options." (footnote omitted)); *cf.* Colby, *supra* note 15, at 764 ("The New Originalism is . . . no more constraining than other theories of constitutional interpretation. And it may even be less constraining.").

accordingly finds added insulation against the claim that originalism is too indeterminate to be constraining. Even when original meaning is inadequate to settle a matter, the judge can be constrained by precedent.[86] The combination of precedent and original meaning yields a "thicker" body of norms to guide the process of adjudication than does originalism alone.[87] Viewed in isolation, originalism and precedent both aspire to limit judicial discretion. When the two are combined, their constraining power is amplified.

Much the same is true of the values of stability and impersonality. An approach to constitutional law that demands adherence to the Constitution's original meaning will achieve a certain degree of stability. But adhering to precedent in situations of constitutional uncertainty will go further in lending stability to the law. And a judge who subordinates her individual preferences to the Constitution's textual commands can create even more distance between her own preferences and the content of the law by deferring to precedent when those commands are uncertain.

Still, none of these benefits is relevant if deference to precedent is conceptually inconsistent with a commitment to originalism. To explore that possibility, let us examine the precedent fallback's compatibility with several prominent strands of originalist theory.[88]

A. Rule of Law Originalism

Begin with the argument that a paramount dedication to the rule of law justifies the adoption of originalism.[89] The central idea is that the original meaning of the Constitution's text is better than competing methodologies at requiring judges to decide cases based on a predefined, external source of legal rules. In addition, applying the original meaning of the Constitution satisfies the requirement of nonarbitrariness; that is, originalism does not resemble decisionmaking processes such as coin flips, which might be fully constraining but which

86. *See* Peters, *supra* note 51, at 223 ("[T]he best way to enhance the determinacy of constitutional law is likely to be the very system of stare decisis that many originalists distrust.").

87. Merrill, *supra* note 51, at 980; *see also id.* ("At this stage in our legal evolution, precedent provides more law to draw upon in supplementing the language of the Constitution than do originalist sources.").

88. *See* Lash, *supra* note 1, at 1440 ("Because originalism is an interpretive method and not a normative constitutional theory, different originalists advance different normative grounds for their interpretive approach.").

89. *See* Primus, *supra* note 54, at 211 ("The rule of law is a fundamental constitutional value, and many theorists have argued that the rule of law requires originalism.").

nonetheless would flout the rule of law.[90] Even if other theories, such as pragmatism or common-law constitutionalism, are plausible modes of interpretation, the argument goes, originalism is superior due to its rule of law effects.

Accepting the rule of law defense of originalism does not require applying the Constitution's original meaning in every case. A prominent illustration of this point comes from the writings of Justice Scalia, who has described deference to precedent as a "pragmatic *exception*" to originalism that is grounded in the desire to maintain stability.[91] Justice Scalia's willingness to depart from original meaning for the sake of upholding precedent has drawn sharp criticism from originalists and nonoriginalists alike.[92] But his position can be fortified through a reconceptualization. Justice Scalia's depiction of precedent can be reframed to emphasize an underlying focus on the rule of law.[93] Fidelity to precedent may sometimes create costs for the rule of law by supplanting democratically enacted mandates with (mistaken) judicial gloss.[94] Yet deference to precedent can also yield rule of law benefits by enhancing continuity and avoiding disruption. Putting these features together, one might understand originalism as demanding adherence to the Constitution's original meaning *unless* the competing rule of law costs of deviating from precedent exceed some threshold. Rather than a pragmatic exception to originalism, deference to precedent becomes an outgrowth of the same devotion to the rule of law that justifies originalism in the first place.

The foregoing paragraphs raise the familiar concern with whether stare decisis presents a conceptual obstacle for originalism by counseling adherence to decisions that stray from the Constitution's

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90. *Cf. id.* at 215 ("The rule 'Always award judgment to the defendant' is highly constraining, but following it is not a good way to reach substantively valid rulings.").

91. SCALIA, *supra* note 4, at 140; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 413–14 (2012) ("Stare decisis . . . is not a part of textualism. It is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity.").

92. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 231 (2012) ("If the touchstone here is pure practicality, it is hard to see why pure practicality cannot also be the touchstone for all issues of constitutional interpretation across the board . . . ."); Barnett, *supra* note 41, at 7 (arguing that Justice Scalia is "not really an originalist at all" for reasons including his view of precedent); Reva B. Siegel, Heller *and Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1409 (2009) ("Deferring to non-originalist precedent dilutes originalism and makes it a nakedly discretionary practice . . . .").

93. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989) ("Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes. . . . Only by announcing rules do we hedge ourselves in.").

94. *Cf.* Nelson, *supra* note 48, at 61–62 (noting the argument that a willingness to reconsider precedent "promotes 'democratic values' by bringing the law enforced in court closer to the collective judgments that our representatives have authoritatively expressed").

original meaning. Precedent's potential value as an *asset* for originalism moves to the forefront when there is no such conflict because the Constitution's original meaning is obscured by vague language or inadequate historical evidence. In those situations, a theory of originalism that is grounded in the rule of law is compatible with a fallback rule of deference to precedent. When it comes to privileging external determinants of legal meaning over subjective judgments, a judge who resolves a dispute based on her best reading of precedent closely resembles a judge who resolves it based on her best interpretation of the Constitution's original meaning. Stare decisis thus delivers some of the same rule of law benefits as scrupulous fidelity to text and history.

It certainly does not follow that judicial identity is rendered irrelevant to the adjudicative process.[95] Different judges will occasionally reach different conclusions regarding the implications of precedent, just as they will occasionally adopt different interpretations of the historical record. Umpires are people, too.[96] Still, the consultation of precedent, like the consultation of original meaning, will require the judge to move beyond her own intuitions to apply predefined, publicly accessible legal rules. The effect is to leverage the disciplining power of precedent within an originalist framework. From this perspective, the choice between constraint by original meanings and constraint by judicial precedents is not a choice at all; it is a matter of "and" rather than "or."

B. Consequentialist Originalism

A second illustration of precedent's interplay with original meaning involves versions of originalism that are grounded in consequentialist analysis. For consequentialists such as John McGinnis and Michael Rappaport, the primary reason for adhering to the Constitution's original meaning is the belief that legal rules that were created through the supermajoritarian ratification process will tend to deliver desirable results.[97] Consequentialism presumes that the

95. *Cf.* Dorf, *supra* note 60, at 685 ("To acknowledge the impersonal ideal of law does not require that one deny that an individual judge's experiences, education, temperament, and values often play a decisive role in her resolution of cases.").

96. The reference to "umpires" is drawn from then-Judge John Roberts's testimony during his Supreme Court confirmation hearings. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

97. *See* MCGINNIS & RAPPAPORT, *supra* note 1, at 19 ("First, we maintain that a good or desirable constitution is one that promotes the welfare of the people and that such a constitution

Constitution's original meaning should be implemented,[98] but the theory allows for the elevation of precedent over original meaning under certain circumstances. For example, when a flawed (in originalist terms) precedent has come to receive supermajoritarian support, its retention on grounds of stare decisis is justifiable.[99] Likewise, if a precedent's overruling would generate extraordinary costs, the precedent may be retained despite its deviation from the Constitution's original meaning.[100] The driving objective for consequentialists is "to use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true."[101]

A focus on cost-benefit analysis also aligns consequentialism with deference to precedent in situations where the Constitution's original meaning is uncertain. As a threshold matter, Professors McGinnis and Rappaport argue that "the Founding generation expected precedent to apply to, and continue after, the Constitution," and that nothing in the Constitution's text forbids adherence to precedent.[102] On a more conceptual level, the precedent fallback coheres with consequentialism's foundational premises. In the absence of any conflict between precedent and original meaning,[103] deference to precedent may be justified as tending to produce greater benefits than alternative approaches to the resolution of constitutional disputes. That is, the precedent fallback is consistent with consequentialist originalism so long as the functional benefits of stare decisis exceed the benefits of alternative responses to the lack of textual and historical clarity.[104] For those who see significant value in promoting judicial constraint and

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should be followed. Second, we hold that passing a constitution through a strict supermajoritarian process provides the best method for discovering and enacting a good constitution.").

98. *See id.* at 189 ("[T]he strong reasons for following the original meaning generally preclude a presumption in favor of precedent.").

99. *See id.* at 181–82 ("[E]ntrenched precedent should take priority over the original meaning. . . . It is the precedent rather than the original meaning that currently has consensus support and thus a presumption of beneficence.").

100. *See id.* at 179 ("Precedents should be respected when overruling them would result in enormous costs.").

101. *Id.* at 177.

102. *Id.* at 154–55.

103. *Cf. id.* at 185 ("When the original meaning is uncertain, a far stronger argument exists for following precedent—provided that the precedent constitutes a reasonable interpretation of the original meaning—than when the precedent clearly conflicts with the original meaning.").

104. *Cf. id.* at 186 ("[C]onstitutional ambiguity militates against the original meaning because we cannot be sure exactly what meaning obtained consensus support during the enactment process.").

legal stability, there is a powerful argument that this condition holds true.[105]

The precedent fallback's consequentialist payoff arises from the enhancement of predictability, continuity, and uniformity that a sound doctrine of precedent can offer by supplementing textual ambiguity with durable judicial interpretations.[106] It also reflects the importance of cultivating impersonal legal norms that resist alteration. Moreover, when a precedent has engendered substantial reliance, the consequentialist argument for stare decisis becomes even stronger: preserving a precedent whose overruling would threaten significant disruption—say, by undermining the lawfulness of paper money or jettisoning the Social Security system—is a means of controlling transition costs.[107]

The precedent fallback thus advances the consequentialist project of promoting functional benefits without disturbing the baseline assumption that respecting supermajoritarian judgments is usually the wisest course. To be sure, a different assessment of the respective importance of settlement, stability, and constraint could lead to a more skeptical view of the precedent fallback. But if one is inclined to ascribe significant value to such matters, consequentialist originalism permits a fallback rule of deference to precedent.

C. Popular Sovereignty Originalism

A third justification for originalism is the principle of popular sovereignty. The popular sovereignty account focuses on the nature of a written constitution as "a people's highest expression of its consent to the government."[108] Constitutional discourse results in "binding expressions of [the people's] will" that become the "fundamental law" for private citizens and public officials alike.[109] For popular sovereignty originalists, the distinctive nature of constitutional politics dictates

105. *Cf.* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 49 (1989) ("[A]dherence to rules even when the rules dictate incorrect results—as they inevitably will in some cases—may achieve more value and thus be more 'correct' than deciding each individual case 'correctly.' ").

106. *See* MCGINNIS & RAPPAPORT, *supra* note 1, at 185 ("[I]f the original meaning is unclear, then there is less reason to follow it. Instead, a precedent that reasonably resolves the uncertainty will better promote clarity, even though a court may later believe the precedent resolved the matter incorrectly.").

107. *See id.* at 186 ("[Reliance costs] will be high when the government establishes a program that people rely on to a great extent, such as Social Security. And they will be great when people make significant private investments based on assumptions about the law.").

108. WHITTINGTON, *supra* note 27, at 128.

109. *Id.* at 135.

that "the laws of the Constitution trump the laws of the mere majority."[110] As compared with the operation of ordinary majoritarian politics, the people are engaged in a more foundational enterprise when they create and alter the Constitution.[111] Within the realm of conventional politics, "a variety of factors tend to undermine the link between the will of political actors and the actual majoritarian will of the people."[112] Constitutional debates alleviate these problems by permitting "direct[ ] appeal[s] to" the people and "provid[ing] for the highest degree of democratic input by the people directly."[113] It follows that popular sovereignty demands respect for original meanings, which have "earned the right to be treated as the will of the people."[114] This conclusion is reinforced by originalism's focus on ensuring that every generation has the power to engage in its own "higher-order decision making."[115]

Viewed against the backdrop of popular sovereignty, conflicts between original meaning and stare decisis require consideration of the degree to which judicial precedent interferes with the political will.[116] When the judiciary fails to protect a constitutional liberty, the people generally retain the power to insulate the neglected liberty through legislation, thus mitigating the impact on popular sovereignty.[117] That creates the possibility that "a conscientious judge could uphold erroneous precedent on stare decisis grounds without fatally undermining the basic normative principle of democratic government."[118] It may be permissible for a court to retain a dubious precedent whose overruling would create significant disruption if the

110. Lash, *supra* note 1, at 1445.

111. It is sometimes suggested that the sovereignty of the people ebbs and flows, coming to fruition only during the process of constitutional deliberation. *See* WHITTINGTON, *supra* note 27, at 143 ("By engaging in constitutional meaning, by entering into a discourse as to what the text means and what kind of constitution should govern us, we are drawn into the sovereign.").

112. Lash, *supra* note 1, at 1445.

113. *Id.* at 1445–46; *see also id.* at 1446 n.24 ("[I]t is the ultimately majoritarian basis of the Constitution and its rules for amendment that establish the legitimacy of the document under the theory of popular sovereignty.").

114. *Id.* at 1444.

115. WHITTINGTON, *supra* note 27, at 111; *see also id.* at 133 ("By accepting the authority of the Constitution, we accept our own authority to remake it. The existing Constitution is a placeholder for our own future expression of popular sovereignty.").

116. *See* Lash, *supra* note 1, at 1479 ("Under popular sovereignty, 'judicial error' is defined in reference to the degree of departure from the considered will of the people.").

117. *But cf.* Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2211 (2014) ("[I]t is possible that failure to intervene in cases involving majoritarian interference with the political process would be viewed as imposing just as high a cost as erroneous intervention in a matter of claimed immunity.").

118. *Id.* at 2213.

precedent's error was the failure to fully protect a constitutional right—a failure that could be rectified through ordinary legislation. By contrast, judicial recognition of rights that do not find support in the Constitution's original meaning tends to be a more serious offense against popular sovereignty; the only formal mechanism for political correction is the process of constitutional amendment, which is onerous and challenging.[119] In situations of conflict, then, managing the tension between stare decisis and originalism requires considering a precedent's degree of interference with the will of the people.

In the absence of such a conflict, precedent once again has significant potential as a fallback rule. The popular sovereignty approach reflects the belief that the enacted Constitution is the highest expression of the democratic will.[120] If a court defers to a precedent that is inconsistent with the Constitution's original meaning, there is a risk that popular sovereignty is being undermined. But that concern does not arise when a court chooses to follow precedent only after concluding that the Constitution's original meaning is uncertain. Deferring to precedent in those cases does not displace the sovereign will of the people with the prerogative of the judiciary. It simply provides a fallback rule for channeling judicial discretion where constitutional meanings are unclear.

This analysis, however, must go a step further. A focus on popular sovereignty may suggest a problem with deferring to precedent even when the inquiry into the Constitution's original meaning does not furnish a clear resolution to a legal dispute. The source of the problem is the institution of judicial review.[121] Popular sovereignty originalism accepts the invalidation of democratically enacted legislation in order to effectuate the people's directives as reflected in the written Constitution.[122] The rationale is that the people have made the courts the "designated enforcer" of the Constitution, which is the ultimate embodiment of popular will.[123] It is the people's delegation that saves the exercise of judicial review from creating a "counter-majoritarian difficulty" by placing the courts in opposition to the forces of

119. *See* Lash, *supra* note 1, at 1442.

120. *See, e.g.*, WHITTINGTON, *supra* note 27, at 46 (describing the argument that "the practice of judicial review derives from the Court's claim to be enforcing the supreme law of the sovereign people, which in turn requires an originalist approach").

121. *See, e.g.*, DaimlerChrylser Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("Chief Justice Marshall, in *Marbury v. Madison*, grounded the Federal Judiciary's authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases." (citation omitted)).

122. AMAR, *supra* note 92, at 238 ("*Marbury*-style judicial review presupposes that judges are enforcing the people's document, not their own deviations.").

123. WHITTINGTON, *supra* note 27, at 112.

democracy.[124] By striking down legislative and executive actions that violate the Constitution, courts promote self-government even as they confound the efforts of transient political majorities.[125]

But popular sovereignty originalism may also suggest that the judiciary lacks authority to invalidate political action in the absence of a discernible prohibition in the Constitution's original meaning.[126] When they invoke precedent to rebuff the political branches, the argument goes, courts act without democratic authorization to exercise the power of judicial review.[127] Fidelity to precedent ends up elevating the judiciary above the people.[128]

Nevertheless, there remains room for a precedent fallback within popular sovereignty originalism. To see how, consider a criticism that is often leveled against originalism: the application of original meanings is inconsistent with the sovereignty of *today's* citizens.[129] In reality, the critics charge, originalism subjects living, breathing persons to commitments made by generations long past.[130] Among the potential responses to this criticism is that the sovereignty of today's citizens stems not from their explicit assent to the Constitution but rather from their unquestioned power to *change* it.[131] The authority to alter the old, dusty Constitution resides, now and forever, in the generation of the moment.[132] That authority justifies imposition of the Constitution's imperatives upon those who played no role in the document's creation.

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124. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

125. *See* Lash, *supra* note 117, at 2206–07 ("[P]opular sovereigntist constitutional government . . . protects the will of the *super-majority* over the will of the mere majority (or mere transient political majorities)." (emphasis added)); Lash, *supra* note 1, at 1446 ("Popular sovereignty theory resolves the [countermajoritarian] difficulty by grounding judicial review in the more deeply democratic law of the people.").

126. *See* WHITTINGTON, *supra* note 27, at 54. *But cf.* Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 129 (2010) ("So long as judges are acting as faithful agents to provisionally maintain constitutional understandings widely shared by other political actors, then their role in articulating constitutional constructions may not be objectionable.").

127. *See* Lash, *supra* note 1, at 1447 ("Prior decisions that erroneously identify the original meaning of the Constitution lack the very characteristic that, under popular sovereignty, justifies judicial review.").

128. *Cf.* Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2057 (2006) ("[I]f the meaning of the Constitution's language fails to provide . . . [a sufficiently determinate legal] rule or standard . . . then a court has no basis for displacing the rule supplied by some other relevant source of law . . . .").

129. *See, e.g.*, Siegel, *supra* note 92, at 1401 (discussing the issue of "dead hand control" over subsequent generations).

130. *See, e.g.*, Dorf, *supra* note 15, at 2036–37.

131. *See* WHITTINGTON, *supra* note 27, at 149 ("The founders' constitution gains authority over us by giving us the capacity to reject it.").

132. *See* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 778 (arguing that the Constitution is "our law by virtue of the fact that the

A similar argument can support the application of the precedent fallback in situations of constitutional uncertainty. Judicial precedent, like enacted constitutional text, is binding only to the extent that today's generation allows it to be so. To be sure, the judiciary exacts a cost on popular sovereignty when it improperly recognizes constitutional rights whose elimination would require a constitutional amendment; the amendment process is too costly and cumbersome to fully mitigate judicial errors. Still, just as the people hold the power to amend problematic constitutional text, they possess the power to overturn mistaken judicial interpretations using the very same amendment process.

One might object that this argument proves too much by rationalizing adherence to flawed precedents even when the Constitution's original meaning is painstakingly clear. So long as the amendment power resides with the people, why should courts *ever* reconsider the judicial decisions of the past, even when those decisions conflict with the Constitution's original meaning? But this challenge overlooks a crucial distinction between constitutional clarity and constitutional uncertainty. The people's control over the Constitution depends on judicial fidelity to enacted meaning. It does little good for the polity to ratify a constitutional amendment overturning a judicial decision if, going forward, the courts possess authority to distort the amendment itself.[133] There is no comparable problem when judges respond to a lack of constitutional clarity by deferring to judicial precedent. By acknowledging that deference to precedent is permissible only within the range of constitutional uncertainty, the judiciary concedes its subservience to the people. At the same time, the precedent fallback guides judicial discretion when the will of the people cannot confidently be discerned.

The counterargument is that maximizing respect for popular sovereignty demands adherence to the Constitution's original meaning or, where the original meaning is uncertain, deference to the actions of political government. That position leaves no room for the doctrine of stare decisis when the result is to strike down legislative or executive action. But while such arguments are certainly reasonable, not every constitutional lawyer who comes to originalism through devotion to popular sovereignty must seek to optimize that value at the expense of all others. Instead, it is plausible to argue that, while respect for

Founding generation made the Constitution, and each generation can amend the Constitution, under largely the same supermajority rules").

133. *See* WHITTINGTON, *supra* note 27, at 156 ("The ideal of popular sovereignty would be meaningless if others could set the actions of the sovereign aside.").

popular sovereignty is essential, it demands only that judges apply the enacted Constitution where its original meaning is discernible, because the contrary view would undermine the people's power to control the document that governs them. When original meaning is uncertain, judges may defer to precedent in order to promote other values such as doctrinal continuity and impersonal adjudication. Even if it leads to the invalidation of political action, adherence to precedent is justified by its effects on doctrinal continuity, legal stability, and the power of constitutional law to transcend periodic "changes in the composition of the court."[134]

The point is not that devotion to popular sovereignty *requires* acceptance of the precedent fallback. The claim is simply this: For those who see greater value in fostering doctrinal consistency and systemic stability than in validating legislative and executive actions that conflict with existing case law, a fallback rule of deference to precedent can form a legitimate component of popular sovereignty originalism.

D. Other Theories of Originalism

While versions of originalism grounded in the rule of law, consequentialism, and popular sovereignty are of special interest due to their prominence in the recent literature, the utility of the precedent fallback extends to other versions of originalism as well. To take one more example, consider the argument that originalism has a basis in legal positivism,[135] meaning that the methodology's legitimacy derives from its social acceptance.[136] To oversimplify (greatly), the positivist claim is that the content of constitutional law is understood by the relevant stakeholders as flowing from the Constitution's original meaning, including its provisions for changing the law as it initially existed.

The operation and implications of such a view are complex, but the takeaway for present purposes is more straightforward. If one is persuaded by the positivist argument regarding the relevance of the Constitution's original meaning, there is a strong basis for

134. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 146 (1921). *But cf. id.* ("I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.").

135. I am grateful to Will Baude, who is in the process of developing a positivist account of originalism, for suggesting the relevance of positivist theories to this Article's analysis.

136. For a recent inquiry into originalism's potential connection with positivism, see Stephen E. Sachs, *Originalism as a Theory of Legal Change*, HARV. J.L. & PUB. POL'Y (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498838, *archived at* http://perma.cc/SW9W-RQG4.

acknowledging a role for judicial precedent. Attention to precedent is a well-established and well-accepted part of America's constitutional consciousness.[137] And as explained in greater detail below, there is historical support for the liquidation of constitutional uncertainty through judicial pronouncements.[138] To the extent it is persuasive, then, the positivist account of originalism would seem to leave ample room for a precedent fallback.

The example of positivism underscores the point that the precedent fallback is not tethered to any particular strand of originalism. The fallback rule is compatible with multiple versions of originalism as a mechanism for controlling adjudicative change while preserving a primary commitment to the Constitution's original meaning. Even so, the precedent fallback is not suitable for all versions of originalism. For example, I argued above that it is possible to believe both that (a) respect for popular sovereignty requires the application of the Constitution's original meaning when that meaning can confidently be discerned, and (b) judges may legitimately defer to precedent when the Constitution's original meaning is uncertain.[139] Yet, as I suggested, such an argument will be unsatisfying to those who believe that the power of judicial review is authorized only when the Constitution's commands are clear. Nor will the precedent fallback find favor among those who believe that maximizing popular sovereignty trumps competing values such as doctrinal stability even when the people act through ordinary legislation rather than constitutional amendment.

The precedent fallback is likewise at odds with the belief that the Constitution's text and structure foreclose the invocation of judicial precedent to resolve constitutional uncertainties. Particularly notable on this point is the work of Michael Stokes Paulsen. Professor Paulsen contends that the Constitution contains both instructions for interpreting the document's textual meaning and principles for deciding what happens "when that meaning runs out."[140] Specifically, "the logic of the governmental structure created by the Constitution indicates that the democratic, republican institutions vested with legislative and executive power" are the bodies charged with operating in the realm of textual uncertainty.[141] Professor Paulsen concludes that political actions "must stand" unless they are "contrary to a rule of law

137. *See, e.g.*, STRAUSS, *supra* note 84, at 33–34 (emphasizing the centrality of precedent in constitutional litigation and adjudication).

138. *See infra* Part V.

139. *See supra* Part IV.

140. Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1434 (2014).

141. *Id.* at 1435.

supplied by exegesis of the text."[142] The effect of his argument is to prohibit judges from falling back on precedent, at least when the result would be to invalidate political action. Professor Paulsen's account helps to illustrate why it would be incorrect to characterize the precedent fallback as suitable for every version of originalism. Yet for those who come to originalism through other normative and methodological commitments—such as the commitments discussed earlier in this Part—the precedent fallback remains worthy of consideration as a response to constitutional uncertainty.

V. THE MECHANICS OF FALLING BACK

Having examined the precedent fallback's conceptual underpinnings and its coherence with prominent originalist theories, I turn to the issue of implementation.[143]

A. Deference as Absolute or Presumptive?

The threshold question of implementation is whether the precedent fallback should be rebuttable or absolute. An absolute presumption would foreclose any deviation from precedent in cases where the Constitution's original meaning is uncertain. A rebuttable presumption would permit the overruling of precedent in light of some set of countervailing considerations.

Both the absolute presumption and the rebuttable presumption are tenable approaches to the treatment of precedent within the framework of originalism. There is no inherent problem with concluding that the precedent fallback should be unwavering. Nor is there any inherent problem with adopting a fallback preference for precedent while recognizing that the preference may yield to other

142. *Id.* at 1437.

143. The analysis set forth in this Part, like this Article more generally, is limited to the domain of constitutional precedents. I make no claims about the suitability of the analysis for common-law or statutory precedents. I thus leave open the possibility that judge-made rules of procedure or evidence that do not have a direct constitutional grounding should be more open to reconsideration than are constitutional rules. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 233–34 (2009) ("[T]he *Saucier* rule [for qualified immunity cases] is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress."). Nor do I necessarily endorse the conventional wisdom that constitutional rulings should receive weaker deference than other judicial decisions—a position that I view as understating the value of constitutional settlement and the benefits of channeling constitutional change through the Article V amendment process. *See, e.g.*, Patterson v. McClean Credit Union, 491 U.S. 164, 172–73 (1989) (noting the elevated strength of deference to statutory precedents).

considerations.[144] But despite the legitimacy of both approaches, the choice between them is crucial. Every recognized basis for overruling a precedent creates a risk of diminishing doctrinal stability and predictability. Likewise, the level of constraint that judges face will dissipate to the extent they are permitted to invoke a variety of flexible considerations as justifications for departing from disfavored precedents.

Under the strongest formulation of the precedent fallback, a judicial decision would be reconsidered only if it clashed with the Constitution's discernible meaning. When the judiciary has responded to constitutional uncertainty through the creation of precedent, nothing short of eliminating that uncertainty would trigger a reversal of course. Such an approach would bolster the disciplining effect of precedent and enhance the continuity of the legal order. Notwithstanding these benefits, however, irrebuttable deference to precedent would compromise other values: if a troublesome precedent did not violate the Constitution's discernible meaning, the legal system would be burdened by the precedent unless and until the Constitution was formally amended.

Those who are uncomfortable with such a strong rule of precedent might recognize additional grounds for overruling in the face of constitutional uncertainty. For example, overrulings might be permitted in cases involving factual mistakes or anachronisms.[145] When material facts have changed or been proven false, there is a powerful argument for updating a precedent so it no longer rests on faulty foundations.[146] In addition, there is good reason to reconsider precedents that have proven unworkable—another consideration that, like a precedent's factual mistakes, is relevant to the Supreme Court's existing stare decisis jurisprudence. Overrulings might also be acceptable for precedents whose consequences are immoral or destructive.[147] Of course, treating precedents as defeasible based on distaste for their results raises serious concerns in terms of the ability of stare decisis to constrain judicial discretion; if precedents are vulnerable whenever a judge deems them "bad," the precedent fallback

144. *Cf.* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1009 (2009) ("[A] constraint need not be absolute in order to count as a constraint.").

145. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (including among the factors that are relevant to a precedent's durability "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

146. *Cf.* Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37, 40–41 (2013) (discussing the rule of law costs of abiding by mistaken precedents).

147. *Cf.* Solum, *supra* note 48, at 200 (discussing the status of "evil" precedents).

loses its power to unify the voice of different judicial actors working across time. It is nevertheless intelligible to assert that, within a narrow band of cases, a precedent's harmful results should trigger its reconsideration notwithstanding the attendant reduction in judicial constraint.

The more general point is that so long as the grounds for overruling are predefined and adequately cabined, a fallback rule that permits departures from precedent can promote stability, impersonality, and constraint. Such benefits obviously will not be as great as they would be with a rule of absolute deference. Still, whether one adopts a stronger or weaker view of the strength of stare decisis, the precedent fallback remains available as a means of channeling judicial discretion when the Constitution's original meaning is uncertain.

B. Precedential Status as Immediate or Gradual?

Beyond the characterization of deference as defeasible or absolute, another question of implementation is *when* a judicial ruling should become "vested" in the sense of warranting stare decisis effect. Does a single decision carry the power to settle an issue? Or must constitutional law develop more gradually through judicial reaffirmances—or at least repeated applications—over the course of time?

Overruling a precedent that has been applied or reaffirmed on numerous occasions creates a risk of disrupting settled expectations and destabilizing the law, which may suggest that recent decisions should be more amenable to reconsideration than are longstanding and entrenched lines of cases.[148] Yet even the overruling of a recent opinion can challenge the impersonality of constitutional adjudication. Imagine if a new Supreme Court appointment in the coming years led to the abrupt overruling of a high-profile case, such as *Citizens United v. FEC*.[149] Or recall Justice Marshall's dissent in *Payne v. Tennessee*, in which he vehemently criticized the majority for overruling recent precedents despite the fact that "[n]either the law nor the facts," but "[o]nly the personnel of this Court," had changed.[150] The possibility that

148. *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 152 (2010) ("[T]he more recently the earlier case was decided, the less forcefully the stare decisis anti-overruling principle should be applied.").

149. 558 U.S. 310 (2010); *see also* Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012) (Breyer, J., dissenting) (refusing to accept *Citizens United* in an opinion joined by three other justices).

150. Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

recent precedents could effectively be undermined by a change—even a single change—in the composition of the Court tends to conflate the meaning of constitutional law with matters of judicial identity. It also reinforces both the perception and reality that constitutional change occurs through the judicial appointment process rather than the Article V amendment process. In designing the precedent fallback, the better approach is to treat all precedents as entitled to deference when the Constitution's original meaning is uncertain. The fact that a judicial opinion is of recent vintage does not diminish its claim to presumptive respect.

C. Deference for Some or Deference for All?

Given its emphasis on stability and impersonality, the precedent fallback does not discriminate based on the style of reasoning that a judicial opinion embodies. In particular, it does not reserve its presumption of deference for originalist precedents while treating nonoriginalist precedents as unworthy of fidelity. Instead, all precedents can warrant deference, as long as they do not violate whatever indicia of constitutional meaning are discernible. Prior judicial responses to constitutional uncertainty are entitled to respect even if their mode of reasoning is nonoriginalist.[151]

Prominent commentators have rejected the argument that nonoriginalist precedents deserve the same deference as precedents decided on originalist grounds. Robert Bork contended that "precedents that reflect a good-faith attempt to discern the original understanding deserve far more respect than those that do not."[152] In addition, Lawrence Solum has urged greater deference for certain types of precedents under his "neoformalist" approach to stare decisis. Professor Solum recognizes value in judicial opinions whose mode of reasoning is grounded in formalist considerations such as "constitutional text or precedent."[153] His model accords less deference to judicial opinions that employ "instrumentalist" considerations such as "moral goodness or consequences."[154] Professor Solum's explanation for this divergent treatment is that instrumentalist reasoning, which depends heavily on

151. *See* WHITTINGTON, *supra* note 27, at 172 ("A constitutional theory respecting the role of both interpretation and construction in fact assumes the existence of practices that cannot be justified in originalist terms, for constructions necessarily operate where interpretations cannot go.").

152. BORK, *supra* note 6, at 157–58.

153. Solum, *supra* note 48, at 204.

154. *Id.*; *see also id.* at 203–04 ("If a decision rests on instrumentalist grounds, then the prima facie case for regarding the decision as binding is rebutted.").

"the private judgments of adjudicators," hinders the function of law in "provid[ing] public standards for the resolution of disputes."[155] Instrumentalist judging also makes it more difficult to forge "a relatively high degree of consensus about what [a legal] code means and how it applies."[156] The implication, Professor Solum concludes, is that instrumentalist decisions should be more susceptible to overruling than are originalist ones.[157]

Notwithstanding forceful arguments like those of Judge Bork and Professor Solum, nonoriginalist precedents can settle areas of textual and historical uncertainty by articulating constitutional rules of decision. Moreover, nonoriginalist precedents, no less than originalist ones, can constrain future judges. When nonoriginalist reasoning furnishes the infrastructure of a judicial opinion, it becomes a publicly available source of law that can engender reliance and limit judicial discretion regardless of the normative sympathies that future judges might harbor. This is not to say that every statement and prescription contained within a nonoriginalist opinion (or, for that matter, an originalist one) warrants deference going forward; as I will discuss below, defining a precedent's scope of constraint is a separate concern.[158] But on the more basic question of whether a judicial opinion warrants any deference at all, the precedent fallback draws no distinctions based on the style of reasoning that the opinion reflects.[159] If a court concludes that the Constitution's original meaning is too uncertain to resolve a dispute, the court should treat precedent as entitled to presumptive respect regardless of its mode of reasoning.

VI. PRECEDENT AS A PRINCIPLE OF CONSTITUTIONAL CONSTRUCTION

Thus far I have contended that the precedent fallback is consistent with prominent versions of originalism. I have also claimed that the fallback rule can enhance originalism's ability to constrain judges and promote legal continuity. This Part extends the analysis to

155. *Id.* at 181–82.

156. *Id.* at 182.

157. *See id.* at 194 ("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."); *id.* at 201 ("[T]he 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.").

158. *See infra* Part VII.B.

159. In this respect, the precedent fallback also differs from the theory of precedent advanced by Lee Strang, who argues that "courts should overrule nonoriginalist constitutional precedent except when overruling the precedent would gravely harm society's pursuit of the common good." Strang, *supra* note 3, at 420 (footnote omitted).

the process of constitutional *construction*, which has received considerable attention in constitutional scholarship of late.[160] The interpretation-construction distinction raises unique concerns about originalism's constraining force.[161] I suggest that the precedent fallback is a promising tool for alleviating those concerns.

A. Distinguishing Interpretation from Construction

Several scholars have pressed the argument that constitutional adjudication is most profitably viewed as consisting of two steps: interpretation and construction. Interpretation refers to the discernment of the Constitution's linguistic meaning. Construction refers to the "translat[ion]" of linguistic meaning into rules, principles, and decisions.[162]

The practice of interpretation, revolving as it does around semantic meaning, depends on "linguistic facts . . . about patterns of usage."[163] The objective is to uncover the Constitution's "communicative content," which includes "the words and phrases as combined by the rules of syntax and grammar" and "additional content provided by the available context of legal utterance."[164] Yet communicative content alone cannot resolve a constitutional dispute.

That is where construction comes in. Technically speaking, even when the Constitution's linguistic meaning is clear, the decision to implement that meaning reflects a principle of construction (assuming that one accepts the interpretation-construction divide).[165] A judge conceivably could choose to ignore unmistakable constitutional text based on considerations such as justice or policy. But adherence to originalism negates that possibility.[166] For originalists, the role of

160. *See, e.g.*, Whittington, *supra* note 126, at 119.

161. *See, e.g.*, Solum, *supra* note 17, at 502–03.

162. Solum, *supra* note 16, at 103 ("Courts engage in judicial construction when they translate the linguistic meaning of a legal text into doctrine.").

163. *Id.* at 104.

164. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 488 (2013).

165. *See* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 67 (2011) ("Where the semantic meaning of the text provides enough information to resolve a particular issue about constitutionality, applying it will require little, if any, supplementation, and construction will look indistinguishable in practice from interpretation."); Solum, *supra* note 17, at 499 ("In some cases, judges may attend only to interpretation (because construction seems obvious and intuitive). In other cases, judges may focus entirely on construction . . . But in either case, construction occurs.").

166. *Cf.* Solum, *supra* note 164, at 482 ("[O]riginalists characteristically endorse . . . the constraint principle—which requires that the communicative content of the

construction moves to the forefront only "when the traditional tools of interpretation exhaust themselves."[167] The question then becomes how to "determine legal effect when the meaning of the text runs out."[168]

Linguistic indeterminacy may arise in several ways. The historical record may have become too fragmented or opaque to furnish a reliable answer to a particular problem, leading to what Professor Solum has called "epistemic ambiguity."[169] Alternatively, a term may be so "general, abstract, and vague" as to defy resolution based on linguistic meaning alone.[170] One possible example of this phenomenon is the Fourth Amendment's use of the phrase "unreasonable searches and seizures," in which "[t]he term 'unreasonable' communicates no bright lines to distinguish whether a particular mode of searching is permissible or impermissible."[171] Another is the scope of the "judicial Power of the United States" as articulated in Article III. That power pretty clearly includes some things, such as conducting a "trial of an action of trespass on the case,"[172] and excludes others, such as enacting a criminal statute. But there may be "borderline" cases, like "conducting an administrative hearing in a dispute between the government and a contractor over payments," in which the constitutional text and historical context fall short of furnishing a clear answer.[173]

Linguistic indeterminacy may also arise from "gaps" in the constitutional framework that leave courts and other public officials without "clear instruction for resolving important constitutional issues."[174] Like constitutional ambiguities, gaps may reflect either a "genuine oversight by constitutional drafters or . . . delegation to future political decision-makers."[175] Whatever their genesis, gaps open the door for constitutional construction. If, for example, the enacted Constitution contains a gap regarding how executive branch officials

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Constitution . . . should constrain the content of constitutional doctrine, unless a defeasibility condition obtains.").

167. Whittington, *supra* note 126, at 121.

168. Solum, *supra* note 17, at 516 ("[D]efault rules are paradigm cases of rules of construction. The whole idea of a default rule is to determine legal effect when the meaning of the text runs out.").

169. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 440 (2009).

170. Solum, *supra* note 17, at 458 (arguing that "the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases").

171. Barnett, *supra* note 40, at 635.

172. Solum, *supra* note 17, at 501.

173. *Id.*

174. Whittington, *supra* note 126, at 123.

175. *Id.*

"are to be removed from office,"[176] the result is an indeterminacy that can be resolved through construction.

In each of these categories of constitutional indeterminacy, whatever indicia of linguistic meaning *are* discernible must be respected, so the zone of judicial discretion—that is, "the construction zone"[177]—will always be bounded.[178] Within that zone, however, factors beyond linguistic meaning will carry the analytical burden.[179]

B. Perspectives on Constitutional Construction

Any theory of originalism that emphasizes the interpretation-construction distinction must furnish one or more principles of construction for responding to linguistic indeterminacy. The content of those principles will reflect underlying beliefs about the nature and ends of constitutional adjudication.[180] In Section C, I will recharacterize the precedent fallback as a principle of construction that requires presumptive fidelity to precedent based on a paramount commitment to the stability and impersonality of law. Before doing so, it will be useful to compare—in brief and, thus, oversimplified fashion—several approaches to construction that are prominent in the literature.

One proponent of the distinction between interpretation and construction is Randy Barnett, who argues that the judicial response to constitutional indeterminacy should be shaped by the recognition that "lawmakers acting pursuant to their constitutional powers govern those who did not consent."[181] In order to safeguard the rights of the governed, the Constitution's "vague terms should be given the meaning that is most respectful of the rights of all who are affected."[182] This view leads Professor Barnett to endorse a "presumption of liberty," whereby constitutional indeterminacy is resolved against governmental

176. *Id.* at 123–24.

177. Solum, *supra* note 16, at 108.

178. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 647 (1999) ("[W]hen the original public meaning of a term or provision in a written constitution fails to provide a unique rule of law to apply to a particular case, it still provides a 'frame' that, while excluding many possibilities, requires choice among the set of unexcluded alternatives.").

179. Barnett, *supra* note 165, at 69 (arguing that rules of construction "are rules that apply when the information conveyed by the text itself is insufficient to decide an issue, but the issue still must somehow be decided").

180. *Cf.* Barnett, *supra* note 40, at 636–37 ("[O]ne's theory of construction inescapably depends on one's theory of constitutional legitimacy."); Whittington, *supra* note 126, at 121 (noting that "constitutional constructions make normative appeals about what the Constitution should be, melding what is known about the Constitution with what is desired").

181. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 125 (2004).

182. *Id.* at 126.

"infringement on individual freedom."[183] Professor Barnett defends the presumption of liberty based in part on its effectiveness at "implementing the original meaning of the text" as understood in light of provisions such as the Ninth and Fourteenth Amendments.[184] Professor Barnett also advocates a more general preference for "constructions that enhance the legitimacy of the Constitution," with a focus on the "qualities that enable a legal system to issue laws that bind in conscience those upon whom they are imposed."[185] Among the relevant considerations are whether "laws are 'proper,' in that the laws do not violate [people's] rights," and whether laws "are 'necessary' to protect the rights of others."[186] Finally, if "competing constructions are both equally consistent with original meaning and not clearly preferable on grounds of legitimacy," it may be appropriate to retain prior judicial constructions "subject to the doctrine of precedent."[187]

In contrast to Professor Barnett, Jack Balkin envisions constitutional construction as the process by which "each generation" decides "how to make sense of the Constitution's words and principles" by "applying them to our own time and our own situation."[188] The role of the courts is "usually more cooperative than competitive" with the actions of political government.[189] The judiciary "rationalizes and supplements constitutional constructions by the political branches[ ] and responds to changes in political and cultural values in the nation as a whole."[190] Judicial doctrine becomes a means of both "legitimation" and "policing."[191] It enables courts to "provid[e] reasons why the constructions" of the political branches "are faithful to the Constitution."[192] At the same time, the creation of doctrine allows courts to "set boundaries on what the political branches can do"[193] and to "impose the values of national majorities on regional or local

183. *Id.* at 259–60.

184. *See* Barnett, *supra* note 79, at 265 & n.22.

185. *See id.* at 265.

186. Barnett, *supra* note 40, at 643.

187. Barnett, *supra* note 79, at 265.

188. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293, 352 (2007); *see also* Dorf, *supra* note 15, at 2012 (characterizing Professor Balkin's argument as indicating that "the Constitution's legitimacy derives from a historical process of continual popular commitment to see in the Constitution the possibility of redeeming the document's own promises of a more just society").

189. JACK M. BALKIN, LIVING ORIGINALISM 300 (2011).

190. *Id.*; *see also* Adam M. Samaha, *Talk About Talking About Constitutional Law*, 2012 U. ILL. L. REV. 783, 788 (noting Professor Balkin's emphasis on "today's conventional modes of constitutional argument and the results reached thereunder").

191. BALKIN, *supra* note 189, at 300.

192. *Id.* at 300–01.

193. *Id.* at 301.

majorities."[194] Through this combination of legitimation and policing, courts safeguard the people's authority to "fill out" the constitutional framework "over time."[195] That process can entail the overruling of judicial precedents, which should not persist after their principles have been rendered "obsolete" by "changes in demographics, economics, technology, social customs, or other features of social life."[196]

A third approach to construction comes from Keith Whittington. Professor Whittington underscores the importance of deferring to the political branches in cases of constitutional indeterminacy.[197] While judicial review of political action is appropriate when the courts are enforcing determinate meanings that are closely linked to constitutional text, "[i]t is . . . a harder case to make out that courts should have the authority to trump the actions of elected officials merely on the basis of constitutional constructions."[198] Even so, Professor Whittington suggests that judicial doctrines may reflect acceptable "efforts at filling in the constitutional framework."[199] Deference to the political branches is a vital part of constitutional construction, but there is room for courts to venture beyond the determinate meaning of constitutional text in order to "provisionally maintain constitutional understandings widely shared by other political actors."[200]

Taken in combination, these examples provide a sense of how principles of construction are developed and defended. They also highlight the connection between the process of constitutional construction and underlying theories of constitutional legitimacy. The

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194. *Id.* at 302.

195. *Compare id.* at 3 (describing a theory of "framework originalism" that "views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction"), *with id.* at 54 ("In framework originalism . . . popular sovereignty is not only central to the creation of the written framework, it also underwrites the constructions built on top of the framework that flesh it out over time.").

196. *Id.* at 124; *see also id.* ("When previous constructions no longer make sense or have become deeply unjust or unworkable, it is time to adjust them or substitute new ones.").

197. *See* WHITTINGTON, *supra* note 27, at 172 ("[A]n originalist judiciary . . . would not strike down every government action that cannot be justified in originalist terms but only those that are inconsistent with known constitutional requirements.").

198. Whittington, *supra* note 126, at 127.

199. *Id.* at 128.

200. *Id.* at 129. This is not the only reason why one might endorse judicial restraint in the face of constitutional uncertainty. For example, Adrian Vermeule has defended a restrained approach for reasons including the relative competencies of courts and legislatures. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 230 (2006) ("Judges should . . . defer to legislatures on the interpretation of constitutional texts that are ambiguous, can be read at multiple levels of generality, or embody aspirational norms whose content changes over time with shifting public values.").

optimal process of construction will vary depending on whether one's normative touchstone is individual liberty, collective self-government, or otherwise. Further, even theories that are not explicitly couched in the language of constitutional construction can be translated into compatible terms. A salient example is Gary Lawson's suggestion that linguistic indeterminacy should be resolved "against the existence of federal power and in favor of the existence of state power."[201] Such a claim can be reframed as a principle of construction to guide the resolution of disputes when the Constitution's original meaning is indeterminate.[202] The broader point is that the available approaches to construction are not limited to those that expressly endorse the interpretation-construction divide.

Selecting a principle of constitutional construction is not the only issue that divides construction-minded originalists. There are also differences of opinion over what portion of the constitutional landscape is settled by linguistic meaning. For example, Professor Balkin contends that although the Constitution's "basic framework" must be respected, it "does not settle most disputed questions of constitutional interpretation."[203] Other scholars will be more inclined to find constitutional determinacy based on their interpretation of the relevant linguistic facts. But regardless of how one defines the area in which construction is required, within that zone there must be an appeal to an organizing normative theory and a corresponding set of adjudicative tools.[204]

C. The Precedent Fallback as a Principle of Construction

We have seen that judges can respond to linguistic indeterminacy in myriad ways. They can defer to the political branches, pursue the coherence of constitutional law with contemporary moral sensibilities, or protect individual liberty against governmental

201. Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012); *see also id.* at 1234–35 ("If it is uncertain whether the Constitution forbids a state from acting, the state (or whoever claims under the relevant state act) wins.").

202. *See* Solum, *supra* note 17, at 513 ("Lawson's default rules are best viewed as rules of construction."); *see also* Lawson, *supra* note 201, at 1235 ("One could, of course, call [the proposed] allocation of burdens of proof a kind of constitutional construction [but] . . . [t]he proposition that he who asserts must prove is a basic principle of rational thinking, not a normative theory of governance.").

203. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 649 (2013).

204. *See id.* at 718 ("Lawyers engaged in constitutional construction are building out the Constitution-in-practice. In so doing, they can and should use all of the available tools of argument and persuasion.").

encroachment.[205] Given the normative overlap of originalism and stare decisis,[206] it is also worth considering another approach to constitutional construction: judges faced with linguistic indeterminacy can fall back on precedent.[207]

The precedent fallback is grounded in the pursuit of judicial constraint and legal continuity. Deference to precedent can limit judicial discretion, reduce the role of subjective judgment, and bolster the idea that constitutional law has an independent essence apart from the periodic comings and goings on the judicial bench.[208] I explained in Part III how these objectives support a fallback rule of deference to precedent as an intrinsic component of originalist theory. Refashioned as a tool of constitutional construction, the precedent fallback advances the same goals through a different analytical framework.

As an approach to constitutional construction, the precedent fallback entails that when the Constitution's linguistic meaning is indeterminate, courts should act in a manner that is heavily constrained by external sources and that enhances systemic stability, resists disruption, and draws together individual judges as part of a cohesive whole. The precedent fallback implies that courts should pursue these goals even at the expense of other objectives such as maximizing individual liberty or deferring to political government. When a judge has doubts about the Constitution's original meaning as applied to a given dispute, she should defer to existing case law—thereby redirecting the forces of legal change toward other channels.[209] This is true regardless of whether the relevant precedents are originalist or nonoriginalist in their reasoning.[210] What matters is a

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205. For discussion of another potential approach to constitutional construction, see Solum, *supra* note 17, at 473 ("The Moral Readings Theory contends that the resolution of constitutional issues in the construction zone should be guided directly by considerations of political morality.").

206. *See supra* Part II.A.

207. *Cf.* Barnett, *supra* note 79, at 265 ("[J]udicial constructions of the Constitution that are not inconsistent with original meaning may well be subject to the doctrine of precedent."); Solum, *supra* note 16, at 105 n.21 ("[O]ne might argue that constructions must be consistent with the purposes, functions, or goals that motivated adoption of the text, and that judicial construction should be bound by the doctrine of stare decisis."); Strang, *supra* note 76, at 1784 ("[O]riginalist precedent in the context of construction resolves original indeterminacy.").

208. *See* Dorf, *supra* note 60, at 683 ("While stare decisis does not preclude the occasional overruling of cases, the fact that a court's personnel have changed and the new judges have a different view of the law from that of their predecessors is not, by itself, a sufficient basis for overruling."); *supra* Part II.A.

209. *Cf.* Merrill, *supra* note 51, at 981 ("If the Court were to commit to a strong theory of precedent in constitutional law, it would reduce the prospects for change through constitutional interpretation.").

210. *See supra* Part V.C.

precedent's status as a component of the preexisting legal order that can guide judicial discretion and promote impersonality and continuity.

Setting forth an exhaustive normative justification for any theory of constitutional construction is a complicated enterprise, and I do not purport to do so in this space. My aim for present purposes is merely to sketch the basic outline of such a justification by incorporating the earlier discussion of the conceptual overlap between precedent and originalism.[211] Efforts to ground the originalist methodology in considerations of judicial constraint, stability, and impersonality can extend in large measure to the precedent fallback's merits as a principle of constitutional construction.[212] Like the Constitution's original meaning, precedent has the power to constrain the judicial will.[213] Like original meaning, precedent can infuse the legal system with a sense of stability and predictability, making legal change the province of the people—via the formal amendment process—rather than the judiciary.[214] And like original meaning, precedent can encourage a judge to subordinate her own preferences to overarching legal norms.[215] Stare decisis facilitates the act of deferring to one's predecessors on grounds that the court as an institution is something more than the court as an accumulation of individuals.[216] Such deference is powerful proof that it is the rule of law, not the rule of men and women, that defines the liberties and obligations of persons. Of course, deference to precedent may not always carry the day; there are plausible reasons to conclude that the value of continuity will sometimes be overcome by the drawbacks of entrenching mistakes.[217] But a general presumption—even a rebuttable one—of deference to precedent can promote judicial impersonality where the Constitution's original meaning is uncertain.[218]

D. Beyond Constitutional Construction

In defending the precedent fallback and recasting it as a principle of constitutional construction, I have addressed cases that satisfy two criteria: first, there is no clear conflict between precedent and the Constitution's original meaning; and second, there are relevant

211. *See supra* Part II.A.
212. *See supra* Part II.A.
213. *See supra* Part II.A.
214. *See supra* Part II.A.
215. *See supra* Part II.A.
216. *See supra* Part II.A.
217. *See supra* Part V.A.
218. *See supra* Part V.A.

precedents on the books. What if those assumptions are relaxed? Does endorsement of the precedent fallback as a principle of construction imply anything about situations where precedent conflicts with the Constitution's original meaning, or about the resolution of constitutional indeterminacy in cases of first impression?

The answer to the former question, dealing with situations of conflict, was suggested above in Part III. In short, adopting a precedent fallback in cases of constitutional uncertainty does not have any necessary implications for cases in which the Constitution's original meaning is clear. One might support a rigid approach that always, or nearly always, requires applying the Constitution's clear meaning regardless of whether it conflicts with precedent. Alternatively, one might recognize various grounds for deferring to precedent even when the Constitution's original meaning is clear.[219] Either approach is consistent with deference to precedent in instances of constitutional uncertainty.

As for cases of first impression: It is one thing to say that, for example, the "actual malice" rule of *New York Times v. Sullivan*[220] deserves deference as a valid construction made in response to constitutional indeterminacy.[221] It is quite another thing to figure out how courts should respond to indeterminacy in the absence of binding precedent. For present purposes, the important point is that the precedent fallback does not require any particular approach to cases of first impression. It is true that, in order to maintain theoretical coherence with the precedent fallback, one's treatment of cases of first impression should evince a comparable focus on promoting constraint, stability, and impersonality. Still, there are multiple approaches that could satisfy this requirement. A theory that requires deference to political action may constrain the judicial will.[222] But an alternative approach that emphasizes the protection of individual liberty could also constrain judges if its directives were publicly accessible and articulated with precision. The precedent fallback is compatible with both of these—and other—options in cases of first impression. All that

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219. *See supra* Part IV.B.

220. 376 U.S. 254, 279–80 (1964):

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

221. *Cf.* Solum, *supra* note 164, at 516 ("[T]he rule of *New York Times v. Sullivan* is part of the legal content of constitutional doctrine, but it is not part of the communicative content of the text of the First Amendment.").

222. *See supra* Part II.A.

is required is that one's theory of construction in the absence of relevant precedent meshes with an overarching commitment to a stable and impersonal rule of law.

E. Acknowledging the Case Against Construction

The division of constitutional adjudication into discrete steps of interpretation and construction is a controversial proposition. Some commentators criticize the interpretation-construction distinction as insufficiently attentive to Founding Era understandings regarding the proper response to linguistic indeterminacy. They contend that judges must respect not only original understandings about the meaning of constitutional text but also original understandings about how judges should proceed when linguistic meaning is uncertain.[223] The resulting theory is one of "original methods originalism."[224]

The core of this argument is that the Constitution's original meaning encompasses its original "interpretive rules."[225] If it was understood at the time of ratification that judges would resolve apparent ambiguities by selecting whichever meaning "was supported by the stronger evidence," the need for judicial construction would be diminished.[226] The province of construction would be limited even further if there was a Founding Era understanding that linguistic uncertainty should be resolved by upholding the validity of political action through "defer[ence] to the legislature's interpretation."[227] The basic idea is that the Constitution comes packaged with its own troubleshooting manual, so judges should resist the urge to engage the machinery of constitutional construction at the first sign of complexity. A related claim is that the move to construction often occurs without proper appreciation of the fact that what appears to be "abstract meaning" will "turn out to have either a concrete or a general meaning that is not abstract."[228]

In response, some proponents of the interpretation-construction distinction argue that the Constitution's original meaning does not include interpretive assumptions that lack textual footing. According to

223. *See* MCGINNIS & RAPPAPORT, *supra* note 1, at 141 ("[T]he constructionist claim that ambiguity and vagueness necessarily cause the original meaning to run out is untrue. There can be background interpretive rules that provide sufficient resources for resolving ambiguity and vagueness.").

224. *Id.* at 116.

225. *Id.* at 128–29.

226. *Id.* at 143.

227. *Id.*

228. McGinnis & Rappaport, *supra* note 132, at 739.

Professor Barnett, "[w]hen a supermajority 'approves' a constitution, they are not adopting as law their own private intentions or assumptions, or those of others. Rather, they are adopting a text that has an objective public meaning."[229] Construction-minded originalists also contend that many interpretive assumptions are best understood as "canons of construction" that "determine legal effect and not linguistic meaning."[230]

With respect to the precedent fallback, the stakes of this debate relate not to the fallback's validity but to the number of cases in which it will apply. For those who defend the interpretation-construction distinction and assert that the Constitution's linguistic meaning is separable from extratextual assumptions about how linguistic indeterminacy should be resolved, the precedent fallback will have a relatively wide domain. For those who emphasize the relevance of original interpretive rules for resolving linguistic indeterminacy, the construction zone will be smaller.[231]

But the difference between the two approaches takes on a different complexion against the backdrop of history. There is reason to believe that deference to precedent was itself a recognized interpretive method from the time of the Founding.[232] James Madison wrote that the meaning of the law can be "liquidated and ascertained by a series of particular discussions and adjudications."[233] Caleb Nelson has characterized Madison's writings and other contemporaneous sources as evincing an understanding that "[o]nce the meaning of an ambiguous provision had been 'liquidate[d]' by a sufficiently deliberate course of legislative or judicial decisions, future actors were generally bound to accept the settled interpretation even if they would have chosen a

229. Barnett, *supra* note 40, at 659; *see also* Barnett, *supra* note 165, at 69 ("Originalism is not a theory of what to do when original meaning runs out.").

230. Solum, *supra* note 17, at 510.

231. *See* McGinnis & Rappaport, *supra* note 132, at 742 ("It is possible that a constitutional provision that contains abstract language is best understood as having an abstract meaning that allows future decision makers significant power to define its meaning.").

232. I am assuming, arguendo, that the original meaning of the Constitution's text does not provide a clear account of the proper role of precedent. If that assumption is incorrect, deference to precedent might be better characterized as grounded in constitutional text rather than original interpretive methods. *Cf.* Strang, *supra* note 3, at 452 ("By the time of the Ratification, the Framers and Ratifiers understood judicial power to include stare decisis: judges must give significant respect to prior analogous cases and must give significant reasons for overruling precedents.").

233. THE FEDERALIST NO. 37 (James Madison); *see also* Nelson, *supra* note 48, at 13 ("Madison's idea of 'liquidation' is . . . [that] [t]he interpreter gets to pick a particular interpretation from within a range of possibilities, but the interpreter is not at liberty to go beyond that range.").

different one as an original matter."[234] According to Professor Nelson, that obligation was relaxed when "a prior construction went beyond the range of indeterminacy."[235] Precedent thus became a tool for limiting "the discretion that legal indeterminacy would otherwise give judges."[236] The result was to " 'fix' the meaning of provisions that were indeterminate when they emerged from the Philadelphia Convention."[237] Critics of the interpretation-construction distinction have likewise acknowledged that around the time of the Founding, "it was sometimes claimed that unclear provisions would be liquidated or clarified over time through a series of reasonable judicial interpretations"[238]—a practice resembling the precedent fallback.[239] Understood in this way, the precedent fallback is not only a theory of constitutional construction with a basis in normative reasoning but also an original interpretive method with a basis in historical practice.[240]

Yet there is an additional layer of complexity regarding the role of precedent in liquidating constitutional meaning. On one hand, it may be that the Constitution itself "instruct[s] future interpreters to honor settled liquidations of its indeterminacies" because the document was understood "not only to define a range of permissible interpretations, but also to delegate power to the provision's initial interpreters to make

234. Nelson, *supra* note 48, at 12; *see also* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811 (2013) ("[P]ost-ratification practice can serve to give concrete meaning to a constitutional provision even if it was vague as an original matter."); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 665–66 (1999) ("[I]n Madison's view, a precedent that is thought to expound or interpret the law or the Constitution is worthy of deference, but once the precedent ventures into the realm of altering or repealing the law, it should be rejected."); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 941 (1985) ("[F]or Madison there could be no return to the unadorned text from interpretations that had received the approbation of the people.").

235. Nelson, *supra* note 48, at 14; *see also id.* at 11 ("Written laws, then, would have a range of indeterminacy. Madison and his contemporaries believed that precedents would operate within this range.").

236. *Id.* at 8.

237. *See* Nelson, *supra* note 5, at 583.

238. McGinnis & Rappaport, *supra* note 132, at 760; *see also id.* ("This would fix the meaning and obligate future courts to follow the meaning.").

239. *See* Nelson, *supra* note 5, at 550 n.136 (discussing the interpretation-construction distinction and asserting that "[f]or members of the founding generation . . . settled 'liquidations' of the Constitution's meaning . . . helped to define the law that courts and other actors were obliged to follow"); Nelson, *supra* note 48, at 83–84 (arguing that, with respect to judicial choices among plausible interpretations, "it is perfectly sensible for courts to apply a rebuttable presumption against overruling precedents").

240. *See* Nelson, *supra* note 5, at 549–50; *cf.* Barnett, *supra* note 79, at 269 ("When we cannot tell whether a term meant X or Y when it was enacted, early practice favoring X over Y might be an interpretive convention that clarifies original meaning in a manner that is compatible with the normative case for originalism.").

an authoritative selection within that range."[241] On the other hand, perhaps the Founding generation viewed constitutional liquidation as a facet of "so-called 'general' law" that was consistent with contemporary "custom and reason" but nonbinding on future generations.[242] That latter view would mean that "present-day originalists are free to consider alternative approaches to the Constitution's indeterminacies."[243] (It is also possible that there is no historical evidence sufficient to establish which of these two positions predominated.[244])

Notwithstanding this uncertainty, there is a basis for concluding that, at very least, reliance on precedent was a *permissible* response to linguistic indeterminacy at the time of the Founding.[245] To be sure, some originalists contend that the response to indeterminacy must be based on Founding Era understandings rather than normative assessments. Thus, if it was understood that all cases of indeterminacy, or even a subset of those cases, would be resolved through application of an interpretive principle other than deference to precedent, that principle would have a superior claim to validity as an original interpretive method. But if deference to precedent was one of several legitimate tools for dealing with linguistic indeterminacy, the precedent fallback has an adequate historical footing. The fallback may not be required by history,[246] but neither is it foreclosed.

A focus on historical understandings may also have implications for the precedent fallback's operational details. For example, characterizations of liquidation as occurring over a *series* of actions may suggest that judicial propositions warrant deference only after they have been applied and affirmed in multiple opinions.[247] Such an understanding would affect the determination of when a precedent

241. Nelson, *supra* note 5, at 551.

242. *Id.* at 552; *see also id.* at 553 (suggesting that the view of liquidation as general law is "more plausible than the notion that members of the founding generation understood the Constitution itself to require adherence to settled liquidations").

243. *Id.* at 552–53.

244. *See id.* at 553.

245. *See supra* text accompanying notes 232–40; *cf.* Harrison, *supra* note 61, at 522 (arguing that "Americans at the time of the Framing expected courts generally to follow precedent," but denying "that during the Framing era the idea of judicial power was thought logically to imply the creation of precedent").

246. *Cf.* McGinnis & Rappaport, *supra* note 132, at 759–60 (citing evidence of "at least three approaches to resolving" constitutional uncertainty: "pick the interpretation that appears to be the most likely," uphold legislation "if a reasonable interpretation of the [applicable constitutional] provision would allow the legislation," and permit the Constitution to be "liquidated or clarified over time through a series of reasonable judicial interpretations").

247. *Cf.* Nelson, *supra* note 48, at 36 ("The reason people trusted a series of decisions more than an individual judge's opinion was that the series reflected a *collective* judgment.").

becomes binding for purposes of applying the precedent fallback. I contended above that the best approach is to treat individual opinions as entitled to deference, so as to minimize the risk of abrupt reversals that are closely associated with changes in judicial personnel.[248] If, however, deference to a single precedent was not an original interpretive method of dealing with constitutional indeterminacy, this normative analysis would give way (for proponents of the original methods approach) to historical practice, and deference would flow only after an opinion was reaffirmed and converted into a line of jurisprudence over the course of time.

It is also important to note Professor Nelson's argument that liquidation could occur through the decisions of the political branches as well as the judiciary.[249] To similar effect is the Supreme Court's recent discussion of the recess appointments power, in which a majority of Justices made clear that "the longstanding 'practice of the government' can inform our determination of 'what the law is.' "[250] The phenomenon of constitutional liquidation through political practice raises two issues. The first is what value courts should give to political constructions in the absence of contrary judicial precedent. Adoption of the precedent fallback does not dictate any particular answer to that question. The precedent fallback deals with the respect that should be given to judicial precedents when they are relevant to the case at hand. It has no necessary implications for the validity of political constructions when the courts have not yet spoken.[251]

The second issue raised by political constructions is whether they can trump contrary judicial constructions. Once again, those who urge a historical focus will answer the question by using historical evidence to determine which type of construction was paramount. By contrast, for those who believe that historical analysis is improper or insufficient for choosing between political and judicial constructions, the choice will depend on normative commitments. Commentators such

248. *See supra* Part V.

249. *See* Nelson, *supra* note 5, at 528–29 n.38:

> Some members of the founding generation . . . thought that the political branches (and, by extension, the people themselves) should have *exclusive* responsibility for settling the Constitution's indeterminacies, and that courts should play no role in this process. . . . Other members of the founding generation favored a larger judicial role.

250. Nat'l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also id.* ("[The Court's] precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.").

251. The calculus may be different for those who emphasize original methods of responding to constitutional uncertainty; for them, the proper approach would depend on historical evidence about the validity of political constructions.

as Keith Whittington have prioritized political constructions over judicial ones for reasons related to popular sovereignty.[252] I have suggested an alternative approach of prioritizing judicial precedent in order to promote impersonality and doctrinal stability.[253] On the account that I have offered, judicial precedents should receive at least a presumption of deference notwithstanding the subsequent emergence of contrary legislative constructions. But the presumption need not be absolute, and among the factors relevant to its defeasibility may be the value of upholding political constructions.[254]

VII. REMAINING CONCERNS

The previous Parts examined the precedent fallback as an intrinsic component of originalist interpretation and as a principle of constitutional construction. In this Part, I discuss three lingering concerns that apply across both contexts. The first is that by deferring to originalist and nonoriginalist precedents alike, originalist judges may unintentionally contribute to the marginalization of originalist jurisprudence. The second question is that a norm of strong deference to precedent would give judges too much discretion to issue sweeping edicts on the understanding that subsequent courts must follow suit. The third relates to the difficulty of making the threshold determination whether evidence of the Constitution's original meaning is clear enough to resolve a dispute without resort to the precedent fallback.

A. The Ratchet Problem

Imagine an originalist judge who is inclined to defer to precedents regardless of the style of reasoning they embody. The judge thinks it proper to follow precedents that reflect an attempt to discern the Constitution's original meaning. But she also sees value in deferring, on stare decisis grounds, to precedents that treat the original meaning as subordinate to considerations such as policy and justice. Nevertheless, the judge worries that her contemporaries and successors

252. *See* Strang, *supra* note 76, at 1785 (offering a "tentative conclusion" that "originalist precedent that constructs constitutional law is subject to defeasance by the elected branches"); Whittington, *supra* note 126, at 129 ("[M]any political actors may welcome the courts stepping in to construct constitutional meaning, resolve indeterminacies, and maintain consensual values in specific cases. The difficulty arises, however, when that process becomes less consensual and power and influence shifts into the courts.").

253. *See supra* Part V.

254. *See supra* Part VI.

who embrace competing interpretive philosophies will not be so charitable in their treatment of precedent. Her specific concern is that even if originalists defer to precedents without regard to interpretive methodology, nonoriginalists will refuse to reciprocate. In the worst-case (for originalists) scenario, the result would be what Professor Solum has called a "ratchet" effect through which originalist precedents are frequently overruled by nonoriginalists while nonoriginalist precedents are commonly reaffirmed by originalists.[255] This danger may suggest that the precedent fallback should be reconsidered, at least insofar as it fails to distinguish between originalist and nonoriginalist decisions.

In assessing this concern, it is important to recognize that the precedent fallback applies only when there is no conflict between judicial precedent and the Constitution's original meaning. The extent of the ratchet problem, by contrast, depends on the role of precedent when the Constitution's meaning is clear. A judge might adopt a fallback rule of deference to precedent while concluding that all conflicts between precedent and original meaning should be resolved in favor of the latter. That approach would alleviate the ratchet problem because nonoriginalist precedents would never trump the Constitution's discernible commands. Alternatively, the judge might conclude that, in some situations, even clear constitutional meaning should yield to contrary precedent. Whether such an approach would move constitutional jurisprudence away from originalism depends on the circumstances in which precedent could trump original meaning. Defining those circumstances, in turn, depends on the particular version of originalism that is being applied. Hence the discussion in Part III, above, which explained how different strands of originalism entail distinctive rules for when judicial precedents can legitimately displace the Constitution's original meaning.[256]

It is one's view of the status of precedent when it conflicts with original meaning that determines the acuteness of the ratchet concern. If originalists uphold precedents that deviate from the Constitution's original meaning in a wide array of situations, the originalist project may indeed find itself in jeopardy. If originalists instead choose to restrict the situations in which clear textual and historical evidence will yield to contrary case law, the Constitution's original meaning will remain intact. In neither case does the precedent fallback exacerbate the ratchet problem.

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255. *Cf.* Solum, *supra* note 48, at 193 ("If formalists respect precedent and there are alternating periods of realism and formalism, then we have a ratchet.").

256. *See supra* Part III.

B. Constraint Tomorrow But Discretion Today?

Using precedent to constrain later judges has implications for earlier ones. Asking judges to defer to prior opinions affords some degree of "lawmaking power" to their predecessors.[257] This fact should give us pause. Perhaps the infusion of precedent with binding force simply reallocates discretion between the courts of the past and present, without any meaningful impact on the amount of discretion coursing through the judicial branch. Or perhaps the effect is even worse, inflating the lawmaking power of earlier judges beyond the countervailing reduction in the discretion of their successors. The severity of this problem depends on the issue of *precedential scope*—that is, the universe of propositions for which a precedent is treated as binding authority.[258] At the heart of the matter is the recognition that a judicial opinion can be relevant for (much) more than its narrow result. Drawing a line between the parts of an opinion that require deference and the parts that are dispensable is crucial to the allocation of judicial power across time.[259]

Under a broad conception of precedential scope, courts must defer to a wide array of prior judicial statements, provided that the statements include indicia of deliberation rather than appearing as "by the way" asides.[260] Such an approach can be highly constraining of later courts but also highly empowering of earlier ones. The alternative is to define precedents more narrowly, for instance, by deferring only to the core ruling that was necessary to resolve a particular dispute.[261] That approach limits the power of earlier judges to imbue their declarations with forward-looking effect, but it also reduces the constraining force of precedent on future judges.[262] And, of course, there are numerous options between these poles.

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257. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

258. *See* Kozel, *supra* note 70, at 180–81 (defining the problem of precedential scope and distinguishing it from the problem of precedential strength).

259. *See id.* at 181–82.

260. *See, e.g.*, Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006) (drawing a distinction between "subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta" and "well thought out, thoroughly reasoned, and carefully articulated analysis").

261. *See, e.g.*, Grutter v. Bollinger, 288 F.3d 732, 787 (6th Cir. 2002) (en banc) (Boggs, J., dissenting) (stating that "the holding/dicta distinction demands that we consider binding only that which was necessary to resolve the question before the [Supreme] Court"), *aff'd*, 539 U.S. 306 (2003).

262. *See* Kozel, *supra* note 70, at 204–11 (discussing the implications of theories of precedential scope for the degree to which judges are constrained).

The precedent fallback does not demand any single theory of precedential scope. It does, however, imply certain baseline principles regarding the nature of the judicial role. In order to respect the pronouncements of their predecessors and reinforce the ideal of a unified court working across time, judges must not distort or marginalize prior resolutions of disputed legal questions.[263] Nor may they seize upon immaterial factual distinctions. Instead, a judge should treat the rule of decision contained in a precedent "as a genuine legal norm to which the court that he belongs to has already committed itself."[264] It is that type of mindset that establishes a court as "an institution that decides cases on a general basis" rather than "an institutional environment in which individuals make particularized case-by-case determinations."[265] Moreover, it might well be that supplementary principles—such as the virtues of a restrained approach to judging that is conscious of the drawbacks of broad rulemaking—should inform the creation of precedent in the first instance. This need for supplementation is unremarkable, for stare decisis does not work alone. It is part of a dynamic set of interpretive and institutional considerations that define the enterprise of constitutional adjudication.

C. Defining Constitutional Clarity

The precedent fallback applies when the Constitution's original meaning is uncertain. A pivotal question is where the bar for constitutional certainty—or, in the common parlance of the interpretation-construction debate, constitutional determinacy—should be set. If the Constitution's original meaning is deemed to be uncertain whenever one interpretation is more likely than the others, the occasions for falling back on precedent will be relatively rare; the fallback rule's operation would be limited to situations in which the evidence supporting multiple interpretations is equally compelling. If, by comparison, the original meaning is treated as controlling only when the evidence establishes beyond a reasonable doubt that an interpretation is accurate, there will be frequent invocations of precedent as a response to constitutional uncertainty. As Gary Lawson has put it, "it does no good to have a methodology for interpreting a text unless one also knows when it is time to declare epistemological victory or defeat and move on."[266]

263. *See id.* at 188–90 (discussing instances in which the Supreme Court has marginalized "its past expressions by depicting them as peripheral or overbroad").

264. Waldron, *supra* note 31, at 23.

265. *Id.*

266. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 859 (1992).

The most important takeaway for present purposes is that the precedent fallback is compatible with either a low bar or a high bar for proving the Constitution's original meaning. A judge can fall back on precedent in cases of constitutional uncertainty regardless of how the concept of uncertainty is defined. In addition, it may be appropriate to alter the operative standard for constitutional certainty depending on whether an issue is a matter of first impression. In grappling with a thorny constitutional question, a judge might be inclined to fall back on a long line of relevant precedents instead of applying—notwithstanding her substantial doubts about its correctness—the interpretation that she deems most likely. Yet in the absence of a relevant precedent, that same judge might conclude that the best course is to apply her understanding of the Constitution's original meaning despite her concerns. Such an approach can enhance continuity by avoiding interpretive fluctuations when the proper interpretation of the Constitution is subject to reasonable dispute.

Finally, it warrants reiterating that even when the Constitution's original meaning is inadequate to dictate the result to a particular question, fidelity to original meaning will nevertheless demonstrate the implausibility of some interpretations. A judge who begins with an inquiry into original meaning will always be left with a narrowed set of choices.[267] By selecting among the plausible options against the backdrop of deference to precedent, judges can minimize the dangers of individual discretion while preserving a primary commitment to the Constitution's original meaning—wherever the bar for constitutional certainty is set.

VIII. CONCLUSION

Rather than defending or challenging originalism as a general matter, this Article has dealt with one particular aspect of the methodology: its handling of judicial precedent. I have tried to show that originalism does not suffer from an inherent inability to leverage the value of precedent. Through a fallback rule of deference to precedent in situations of constitutional uncertainty, originalism and judicial case law can work hand in hand. The legitimacy of such a fallback rule is important, I have claimed, because evaluating originalism depends in part on what happens when the Constitution's text and context are insufficient to resolve a case.

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267. *Cf.* Nelson, *supra* note 48, at 4 ("[E]xternal sources of law will often be indeterminate and incomplete; they will leave considerable room for judicial discretion. But unless they are *wholly* indeterminate, they will still tend to produce some degree of consistency in judicial decisions.").

Of course, originalists do not *need* to make room for judicial precedent in articulating their vision of the constitutional order. Yet they *can* be faithful to precedent while remaining consistent in their commitment to the Constitution's text. Robert Bork once asserted that "those who adhere to a philosophy of original understanding are more likely to respect precedent than those who do not."[268] Though I will not speculate about whether his statement was (or is) correct as a descriptive matter, the statement is sound to the extent it suggests that concerns about continuity and stability motivate originalism and stare decisis alike. Reasonable minds may differ over the ultimate merits of originalism. But in evaluating originalism's validity as an interpretive philosophy, it is important to recognize the role that judicial precedent can play.

268. BORK, *supra* note 6, at 159.