

PRECEDENT, SUPER-PRECEDENT

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“Stare decisis is at least the everyday working rule of our law.”¹

“[R]emember that the rule of precedent, or stare decisis, is a means and not an end.”²

INTRODUCTION

“Super-precedent” (or, synonymously, “super stare decisis”³) has crept into our usage lately, primarily through its use—along with “super duper precedent”—in the interrogations of Chief Justice Roberts and Justice Alito before the Senate Judiciary Committee.⁴ Of course the cases that focused this attention were *Roe v. Wade*⁵ and its principal successor, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶ the point being to solicit acceptance of such precedent from the nominees. But the nominees did not concede, and with justification; any theory of precedent that proposes the stature of these cases is unchangeable, making them super-precedent, is

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¹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 20 (1921).

² Max Radin, *The Trail of the Calf*, 32 *CORNELL L. Q.* 137, 159 (1946).

³ Some draw a distinction between the ‘precedent’ and ‘stare decisis’: *See, e.g.*, Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 *AM. J. LEGAL HIST.* 28, 30 (1959) (Precedent needs a doctrine developed through a line of cases; stare decisis can use one case alone as authority); K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 *J. APP. PRAC. & PROCESS* 397, 415-16 (2001) (explaining that stare decisis means only “stand by things decided”; precedent is about bases for decision, and is an “evolving doctrine.”); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 *B.C. L. REV.* 81, 105 (2000) (explaining that stare decisis is strict, formalistic; precedent is less so.) I shall treat them as synonyms, unless noted. They are of the same ilk. Put ‘doctrine of’ in front of them and they are indistinguishable in ordinary legal usage; though you can have ‘a precedent’ you cannot have ‘a stare decisis;’ stare decisis is used only for the doctrine.

⁴ *See text infra* Part VI. Professor Farber uses the term ‘bedrock precedent’ to much the same effect. *See* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 *MINN. L. REV.* 1173, 1175, 1176, 1180 (2006).

⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

questionable.⁷ Although it has taken some hits of late,⁸ we might use *Marbury v. Madison*⁹ or *Erie Railroad v. Tompkins*¹⁰ as safe exemplars.¹¹

“Super-precedent” seems to have been coined in 1976 by Judge (then professor) Posner and Professor Landes in an article about testing theories of precedent by counting citations. A super-precedent would be

so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place, or, if they do arise, induces them to be settled without litigation. In the limit, such a “superprecedent” might never be cited in an appellate opinion yet have greater precedential significance than most frequently cited cases.¹²

The problem was not enough to bother their project as “such cases are probably rare,”¹³ being either too narrow or too broad to have significant progeny.¹⁴ From this beginning, however, their neologism seems not to have gained any popular currency.

It was re-introduced in 2000 by Judge Michael Luttig of the 4th Circuit Court of Appeals, apparently completely afresh, and this time it did catch some attention:

I understand the Supreme Court to have intended its decision in *Planned Parenthood v. Casey* to be a decision of super-stare decisis with respect to a woman’s fundamental right to choose whether or not to proceed with a pregnancy. And I believe this understanding to have

⁷ Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1219-20 (2006).

⁸ From *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), through *United States v. Mead Corp.*, 533 U.S. 218 (2000), to *FCC v. Brand X Internet Servs.*, 545 U.S. 967 (2005), there has been a steady erosion of the power of the courts to interpret legislation in favor administrative agencies. See Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. (forthcoming 2007), available at SSRN, <http://ssrn.com/abstract=900582> at p.3.

⁹ *Marbury v. Madison*, 5 U.S. 137 (1803); see Gerhardt, *supra* note 7, at 1208-09.

¹⁰ *Erie v. Tompkins*, 304 U.S. 64 (1938).

¹¹ The authority of judicial review has become a target of academic scrutiny over the last ten years or so. See Lawrence Alexander, *What is the Problem of Judicial Review?* (Univ. of San Diego Law School, Research Paper No. 07-03, 2005), available at <http://ssrn.com/abstractID=802807> (examining arguments by Jeremy Waldron and others).

¹² William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976).

¹³ *Id.*

¹⁴ *Id.* Perhaps this rationale has to be read to be believed:

If a case is highly specific, it will hardly qualify as “superprecedent”; by definition it will control only those infrequent cases that present virtually identical facts to those of the case in which it was originally announced. If it is highly general, and therefore more likely to be an important precedent, it is unlikely to decide—so clearly as to prevent disputes or litigation from arising—the specific form of the question presented in subsequent cases.

Id.

been not merely confirmed, but reinforced, by the Court's recent decision in *Stenberg v. Carhart*.¹⁵

Although Judge Luttig does not attempt to define it,¹⁶ there is a rough, intuitive content in the word 'super-precedent,' probably sufficient for popular use.¹⁷ To say a case is a super-precedent means it is judicially unshakeable, a precedential monument which may not be gainsaid, akin to having the statute-like force of vertical stare decisis horizontally. But what might it mean if put into legal use? Standing alone in a brief, as if self-justifying, it would not make an argument, not even of rhetorical moment. So the word needs explication. That is the aim of this paper: to explain how the concept of super-precedent might fit in our understanding of stare decisis, and how, in turn, it might affect judicial decision-making.

Part I is about stare decisis, the doctrine of precedent: how we think of it, how we use it, and what the virtues and vices are that have balanced so heavily in its favor. The section thus enumerates the criteria, both empirical and normative, by which we evaluate theories purporting to explain the doctrine. Parts II through V describe theories of stare decisis and how they might account for the concept of super-precedent. Part II is about the progenitor, the "declaratory theory" of the "brooding omnipresence in the sky."¹⁸ Part III is about Christopher Columbus Langdell's quasi-empiricism. Part IV is about the "enactment theory" (that cases make rules), the "anti-theory of legal realism", and the "legal process theory". Part V lays out a rather more detailed theory, the "standard theory" that is pretty much accepted today. It provides a natural and consistent account of a spectrum of precedential force, with super-precedent at the most powerful extreme.

But one may argue about theory and practice, consistency and incoherence endlessly without making one whit of difference to popular usage or actual effects. Part VI takes up that problem: what sense can be made of

¹⁵ *Richmond Med. Ctr. v. Gilmore*, 219 F.3d 376, 376-77 (4th Cir. 2000).

¹⁶ There are three indicia in the quoted passage: consistency of decisions over 19 years, institutional integrity, and the Court's resolve "not revisit those legal principles."

¹⁷ Professor Gerhardt gives many definitions, overlapping, interchangeable, functional, and on the whole consistently serviceable. See Gerhardt, *supra* note 7, at 1205-07, 1213, 1221-23; most usefully "[s]uper precedents are the doctrinal, or decisional, foundations for subsequent lines of judicial decisions (often but not always in more than one area of constitutional law). . . . Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal." *Id.* at 1205-06. Professor Farber defines 'bedrock precedent' as "rulings [which] are not overturned except . . . only for compelling reasons," Farber, *supra* note 4, at 1176, and as "precedents that have become the foundation for large areas of important doctrine." *Id.* at 1180.

¹⁸ See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); Letter from Oliver W. Holmes, Jr. to Harold J. Laski (Jan.29, 1926), in 2 HOLMES-LASKI LETTERS, 1926-1927, at 822 (Mark DeWolfe Howe ed., 1953).

the use of super-precedent in the Senate Committee hearings for Chief Justice Roberts and Justice Alito?

I. WHAT IS STARE DECISIS?¹⁹

In law as in so many aspects of life there is often a tension between the wisdom of the past and the rationality of the present. We see it quite dramatically when ancient religious texts and current empirical science disagree. In law, received wisdom comes to us not only in the authoritative writings of the founding fathers (constitutions) and legislatures (statutes) but also in past judicial decisions. Rationality lies in attending to “[t]he felt necessities of the time,”²⁰ that is, in the adaptivity of governing law to present societal needs.

The Constitution is authoritative, constitutive wisdom from the past; so too are statutes properly made pursuant to it.²¹ These are the texts provided to us by the ancients, but they do not come with ready-made interpretations. Nor do they cover all domains of human behavior, or all sources of conflict. Judicial decisions fill the gaps. They have to, as conflicts cannot be left unresolved if society is to survive as such. It follows that judicial decisions should be normatively adaptive to “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men” as Holmes famously put it.²² But times change, and those decisions join the authority of the past, texts in tension with new, adaptive rationality. Stare decisis, the doctrine of precedent, mediates that tension, giving the edge to prior decisions, be they purely common law, or interpretations of statutes or constitutions.

How does the doctrine of precedent do this? This is a surprisingly difficult question to answer.²³ We may all have a pretty good grasp of the doc-

¹⁹ Only a few years ago people were talking of the demise of stare decisis, that we no longer had such a doctrine in operation. In 1999 Professor Lee was able to begin an article with two pages of sources to that effect. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 648-49 (1999) (citing many sources and quotes about the decline or irrelevance of *stare decisis* to present courts).

²⁰ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (beginning perhaps the most famous and most quoted sentence of all secondary legal literature).

²¹ See U.S. CONST. Art. VI.

²² See HOLMES, *supra* note 20.

²³ Professor Farber states:

It is one thing to say that a precedent should be followed. It is another to say precisely what it means to follow precedent. This is not an easy question to answer. As a writer of an earlier generation remarked, “Yet when one asks, how does one determine the legal significance of judicial precedents?—one finds only fragmentary answers in authoritative materials and no

trine, and use it in analysis and argument,²⁴ yet even at the descriptive level, theories can be surprisingly variable. For example, although stare decisis is “the characteristic and all-pervading method of the common law,”²⁵ one is surprised to find in a widely used introductory textbook that “appellate courts, or so-called ‘higher’ courts, are not legally bound to adhere to the principle of stare decisis.”²⁶ That is not a view shared by many, and certainly not by the justices of our Supreme Court.²⁷

A. *Precedents Interpreting the Constitution, Statutes, and Common Law*

In the United States, especially in commentary on constitutional interpretation, there is a tension between precedent and the perceived mandates of the supreme law of the land.²⁸ The tension is especially poignant for those who purport to find authority only in the Constitution’s original meaning,²⁹ but it is not exclusive to them.³⁰ What is a judge to do when prior judicial interpretation does not agree with her understanding of the Constitution’s requirements? Professor Barnett, an uncompromising subscriber to the supremacy of the Constitution’s original meaning³¹ mockingly

entirely satisfactory theory offered by the writers who have dealt with the subject.” That seems to remain true today.

Farber, *supra* note 4, at 1199 (citing Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 376-83 (1988); Neil MacCormick, *The Significance of Precedent*, 1988 ACTA JURIDICA 174, 178-87; and quoting EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 300 (1953)).

²⁴ For these purposes I shall confine discussion to horizontal stare decisis only, not vertical; super-precedent, if explicable at all, must be so in terms of horizontal, not vertical stare decisis.

²⁵ The Right Hon. Lord Wright, *Precedents*, 8 CAMBRIDGE L.J. 118, 118 (1943), reprinted from 4 U. TORONTO L.J. (1942). *See also* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949); SALMOND ON JURISPRUDENCE 162-63 (Glanville Williams ed., 1957). But not everyone agrees: compare Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 443 (1979) (“Before the Civil War American judges, enthusiastically taking up the legacy of Lord Mansfield, had approached the process of adjudication with a light-hearted disregard for precedent.”) with Julius Stone, *1966 And All That! Loosing the Chains of Precedent*, 69 COLUM. L. REV. 1162, 1164 (1969) (“[T]he rules of precedent have for centuries been thought of as law . . .”).

²⁶ CATHY GLASER, ET AL., *THE LAWYER’S CRAFT* 23 (2002). *See also*, COLIN MANCHESTER, ET AL., *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION* 3-4 (2nd ed. 2000).

²⁷ *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

²⁸ DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 25 (2002); Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006); Farber, *supra* note 4, at 1173.

²⁹ *E.g.*, Barnett, *supra* note 28, at 1233-34.

³⁰ *See* Farber, *supra* note 4, at 1173-74.

³¹ Barnett, *supra* note 28, at 1233 (characterizing himself as a “fearless originalist”).

posits “the existence of a rule of law that precedes any of the super-precedents they cite, a rule of law that might be called ‘super-duper precedent’: the text of the Constitution itself.”³²

Judicial decisions have different degrees of precedential power depending on whether they are interpretations of the Constitution, statutes, or purely common law. This variation is determined by damage control.³³ As a constitutional decision can be changed only by amendment, a process so difficult as to be practically ineffective, *stare decisis* should be weaker, the Court ready to correct an interpretation that has proven maladaptive.³⁴ Decisions under statutes may be treated to a stricter doctrine of precedent because legislative correction is simple and readily available. If the legislature does not like a judicial interpretation, it can revise the statute.³⁵ No sweeping statement can be made about the power of precedent in common law decision making. Legislative revision is available, thus it is more like *stare decisis* in statutory decisions than constitutional interpretation.³⁶ But in some circumstances such revision is inappropriate. In purely common law domains, the strictness of adherence to precedents should be determined by the nature of the behavior governed. Where denizens look to decisions for guidance, those decisions should have very powerful precedential authority; on the other hand, where virtually nobody knows or seeks out judicial authority before acting (think of negligent infliction of emotional distress),

³² *Id.* at 1248.

³³ Any system, to survive, must be able to control the harmful effects of inevitable maladaptive, unjust, and unworkable decisions. Justice Brandeis may have been the first to articulate the differential effect of different types of decision: “[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting) (footnotes omitted).

³⁴ See e.g., *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (“In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.”).

³⁵ *Neal v. United States*, 516 U.S. 284, 295 (1996) (Kennedy, J.) (“One reason that we give great weight to *stare decisis* in the area of statutory construction is that ‘Congress is free to change this Court’s interpretation of its legislation.’” (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977))). See also William N. Eskridge, Jr., Correspondence, *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450 (1990); Lawrence C. Marshall, Correspondence, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467 (1990); Lawrence C. Marshall, “Let Congress Do It”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

³⁶ See Farber, *supra* note 4, at 1184 (“We should resist, however, a simple equation between the common law and constitutional law. Constitutional law does not rely purely on judicial precedents in the same way as the common law.”) The three precedential articles on super-precedent, Farber, *supra* note 4, Gerhardt, *supra* note 7, and Barnett, *supra* note 28, are about constitutional interpretation.

stare decisis should be commensurately weak and rational adaptivity to current cultural standards more compelling.³⁷

B. *The Role of Stare Decisis, Its Benefits, and Its Flaws*

By far the most popular virtue of stare decisis—and surely its most significant—is the stability, continuity, and predictability it lends to the law.³⁸ The great virtue of stability and predictability in the law is that the denizens governed can plan their actions in reliance on it.³⁹ According to Justice Brandeis, “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.”⁴⁰

Stability and certainty reduce judicial discretion.⁴¹ F.F. Alexander Hamilton saw this as central: “To avoid an arbitrary discretion in the courts,

³⁷ See MICHAEL SINCLAIR, *GUIDE TO STATUTORY INTERPRETATION* 40 (2000).

³⁸ *E.g.*, WILLIAM BLACKSTONE, 1 *COMMENTARIES ON THE LAWS OF ENGLAND* *69 (1765): For it is an established rule to abide by former precedents, where the same points come again in litigation: . . . as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his own private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one.

Id.; CARDOZO, *supra* note 1, at 150 (With the composition of the court varying, “[t]he situation would . . . be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. . . .”); Farber, *supra* note 4, at 1196 (“[D]eparture from precedent may sometimes threaten the stability and continuity of the political order and should therefore be avoided.” (quoting Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 751 (1988))); Lee, *supra* note 19, at 652-53; Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 409 (1924) (“A natural desire for stability in the law gave rise to reliance on decided cases as far back as Bracton and the early Year Books of the fourteenth century”); Radin, *supra* note 2, at 147; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 601-02 (1987) (“Here precedent has its greatest role to play, generating a format for decisionmaking that channels decisions toward consideration of a comparatively limited number of factors likely to be repeated over time.”).

³⁹ 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* *528 (7th ed. 1851) (stating that *stare decisis* fosters reliance of “professional men” and that “the community have a right” to rely on a decision “to regulate their actions and contracts by it”); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597-98 (1987) (“The Argument from Predictability”: predictability “helps us plan our lives”).

⁴⁰ *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (emphasis omitted), *overruled by Helvering v. Bankline Oil. Corp.*, 303 U.S. 362 (1938), and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938). Justice Rehnquist: “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, [and] fosters reliance on judicial decisions” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (Rehnquist, C.J.) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)).

⁴¹ See BLACKSTONE, *supra* note 38, at *69 (“For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even

it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them⁴² Stare decisis is not merely about garnering support from a prior case with which one agrees. If the virtues of stability and certainty are to be meaningful, a judge's choices must be constrained by prior cases.

A corollary virtue of stare decisis is that it "contributes to the actual and perceived integrity of the judicial process."⁴³ Following precedent tends to show that the court is not following the whims of political winds or the judge's own predilections; that she is not, in the fashionable phrase, legislating from the bench.⁴⁴ The argument is easily carried too far. Professor Schauer argues that "standardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an institution,"⁴⁵ but legislation is the appropriate vehicle for standardized decisions, and it comes at the cost of justice in particular cases.⁴⁶

However, to mean anything, stare decisis must, at least on occasion, work against justice. As Thomas Lee puts it, stare decisis means a court "must [follow a prior case] when it perceives an error in the ways of the past."⁴⁷ Justice and fairness are sometimes proffered as values enhanced by the doctrine,⁴⁸ the idea being that it requires treating right cases alike.⁴⁹ But

and steady, and not liable to waver with every new judge's opinion"). See also Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) ("Precedent decentralizes decisionmaking and allows each judge to build on the wisdom of others," "economizes on information," limits judicial idiosyncrasy, and increases the chances of correctness.); Farber, *supra* note 4, at 1196 (quoting Monaghan, *supra* note 38, at 752 ("[A]dherence to precedent can contribute to the important notion that the law is impersonal in character, that the Court believes itself to be following a 'law which binds [it] as well as the litigants.'" (quoting ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 50 (1976)))).

⁴² THE FEDERALIST NO. 78, at 168 (Alexander Hamilton) (Frederick Quinn ed., 1997).

⁴³ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (Rehnquist, C.J.) ("Stare decisis is the preferred course because it . . . contributes to the actual and perceived integrity of the judicial process. See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).") (parallel citation omitted).

⁴⁴ Lee, *supra* note 19, at 653.

⁴⁵ Schauer, *supra* note 38, at 599-600 ("The Argument from Strengthened Decisionmaking" "2. Strengthening the decisionmaking institution").

⁴⁶ Justice Scalia: "But the whole point of rulemaking (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability." *ADAPSO v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 689 (D.C. Cir. 1984) (Scalia, C.J.).

⁴⁷ Lee, *supra* note 19, at 654 (emphasis added).

⁴⁸ Schauer, *supra* note 38, at 595-96 ("The Argument from Fairness" argued that this "relatively large categories of likeness," but missed the point that exactly that undermines stability and certainty and constraint on judicial decisions.) (emphasis omitted).

⁴⁹ "[J]ustice demands, wherever that concept is found, that like men be treated alike in like conditions. Why, I do not know; the fact is given." K. N. LLEWELLYN, *THE BRAMBLE BUSH* 42 (1981).

that is only a virtue where the prior case was decided justly; otherwise it means “an imprisonment of reason”⁵⁰ and the perpetuation of error, of injustice.

Common law and its principle of stare decisis could not have survived through so many social upheavals and radical technological and economic changes without being flexible and adaptive. Lord Mansfield saw the common law’s adaptability to change in the requirements of justice as its principal advantage over statutes: “[A] statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.”⁵¹ Stare decisis works to the contrary.

Perpetuation of error, either in the prior decision or because of change in society, is the principle charge against the strictures of stare decisis.⁵² Compared with following precedent, the willingness of courts to drink from the “fountain of justice” is not so evident. A great judge like Cardozo may have sought a relaxed, adaptive stare decisis,⁵³ but few have had his insight, confidence, and powers of persuasion. Critics have long bemoaned the re-

⁵⁰ *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (quoting *United States v. Int’l Boxing Club of N. Y., Inc.*, 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting)).

⁵¹ *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 22-23 (Ch.) (argument of Mr. Murray, then Solicitor-General of England, later Lord Mansfield) (emphasis omitted).

⁵² See Radin, *supra* note 2 (beginning with a poem describing a calf wandering through scrub, creating a germ of a path, which ends up being the main thoroughfare of a great metropolis, rather like Bleeker Street). It is not, he says, how we should think of *stare decisis*; but why not? *Id.* Nor does it help to say, as Chancellor Kent was fond of repeating, that *stare decisis* does not apply if “it can be shown that the law was misunderstood or misapplied in that particular case.” KENT, *supra* note 39, at *528 (finding similarly that a precedent “ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error” as that simply begs the question of criteria of “misunderstanding” or “misapplication”).

⁵³ CARDOZO, *supra* note 1, at 150. He used as an example *Klein v. Maravelas*, 219 N.Y. 383, 114 N.E. 809 (1916), in which the great Judge Benjamin N. Cardozo frankly acknowledged error in the prior decision on point:

We think it is our duty to hold that the decision in *Wright v. Hart* is wrong. The unanimous or all but unanimous voice of the judges of the land, in federal and state courts alike, has upheld the constitutionality of these laws. At the time of our decision in *Wright v. Hart*, such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour (*Wright v. Hart, supra*, at p. 342). The fact is that they have come to stay, and like laws may be found on the statute books of every state. . . . The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past.

Klein v. Maravelas, 114 N.E. 809, 810-11 (N.Y. 1916) (citations omitted). Similarly from a rather less exulted source, *Leavitt v. Morrow*, 6 Ohio St. 71 (1856): “It would seem, therefore, that a rule which, in its tendency, is calculated to foster bad faith and defeat the purposes of justice, ought not to be adhered to, simply on account of its antiquity.” *Id.* at 81.

luctance of courts to react to societal change. Arch-positivist John Austin wrote:⁵⁴

But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future). . . . [T]he Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.⁵⁵

Striking the right balance between stability and adaptivity, that is, explaining the natural or rational limits of the doctrine's compulsive power, is one of the principle burdens of a theory of precedent.

Finally, *stare decisis* enhances the pragmatic virtue of efficiency; without it, every decision would be a new one, to be argued on a clean slate. "The obligation to follow precedent begins with necessity, . . . With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it."⁵⁶ The reference is to Judge Cardozo's 1920 Storrs Lectures, "Judicial Process," which gave us the benchmark quotable: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of courses laid by others who had gone before him."⁵⁷ There are two reasons here. Were all cases to be decided afresh at all levels (1) there would be a burden of numerosity constrained only by the litigants' willingness and budget, and (2) it would create an insecure base of decisions previously made. From a societal point of view *stare decisis* can be seen as promoting efficiency in dispute resolution resource allocation.⁵⁸

⁵⁴ "'Positive law' is law that is created by human officials and institutions Legal positivism was traditionally contrasted with natural law theory . . . that equated legal validity with not being unjust. By contrast, legal positivism purports to separate the question of whether a norm is 'law' within a particular system . . . from the question of the merits of that norm or that system." BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 120-21 (2004). "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." H. L. A. HART, THE CONCEPT OF LAW 181-82 (1972).

⁵⁵ 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 647 (5th ed. 1885).

⁵⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (Souter, J.) (stating in the ellipsis: "and a contrary necessity marks its outer limit[,] of which more later).

⁵⁷ CARDOZO, *supra* note 1, at 149 *cited in* Schauer, *supra* note 38, at 599 n.58 *and quoted in* Lee, *supra* note 19, at 652.

⁵⁸ *See* Easterbrook, *supra* note 41, at 423 (stating that precedent "economizes on information"); Lee, *supra* note 19, at 654 (arguing that precedent promotes economy in dispute resolution resource allocation).

C. *Developing a Theory of Stare Decisis*

And there are those who are implacably hostile to stare decisis, most famously Jeremy Bentham.

Do you know how they make [common law]? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me.⁵⁹

He has a point. It is stock jurisprudential wisdom that one cannot be bound by a law of which he or she has no notice.⁶⁰ Bentham himself said it: "That a law may be obeyed, it is necessary that it should be known."⁶¹ But how can the ordinary denizen know of prior judicial decisions? Still fewer than half a percent of the United States populace have the legal training necessary to find a case, and for almost all the activities of life that have potential legal ramifications neither they nor anyone else has the time to look. And what of the landmark case—the one that sets a new standard? The most assiduous legal research would not find it because it was somewhere in the future.⁶² This leads to the criticism that common law decisionmaking is intrinsically retroactive.⁶³ But retroactive law has long been frowned on,⁶⁴ and the Constitution prohibits retroactivity at both the federal and state level.⁶⁵ It is a conundrum with which every theory of stare decisis should come to grips.

⁵⁹ 5 JEREMY BENTHAM, WORKS, OF PROMULGATION OF THE LAWS 235 (Bowring ed. 1859).

⁶⁰ E.g., ST. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. I, Q. 90, Art. 1,3 (1273); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT §§ 57, 136 (1690); BLACKSTONE, *supra* note 38, at *45-46; 1 BENTHAM, *supra* note 59, at 155; LON L. FULLER, THE MORALITY OF LAW 34-35, 39 (1964); Lambert v. California, 355 U.S. 225 (1957) (holding that a felon registration ordinance violated due process when applied to a person who had no actual knowledge of it); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (stating that a vague law which does not afford notice of prohibited activity is a violation of due process).

⁶¹ BENTHAM, *supra* note 59, at 157. See also AQUINAS, *supra* note 60, at Q. 90, Art. 4; LOCKE, *supra* note 60, at § 136.

⁶² Radin, *supra* note 2, at 148 ("Indeed, the fact that a case is in the reports is in itself evidence that when the situation arose, the law was uncertain, in spite of generations during which *stare decisis* has been dominant.").

⁶³ See, e.g., Kenneth Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369 (1984).

⁶⁴ Demosthenes called a retroactive statute "the most disgraceful and scandalous ever enacted in your assembly." Demosthenes' "Speech against Timokrates," XXIV DEMOSTHENES 371, 388 (J.H. Vince, trans., Loeb Classical Library, 1935) (353 B.C.).

⁶⁵ U.S. CONST. art.1, §§ 9, 10. However this was interpretively restricted to criminal statutes only in 1798. See *Calder v. Bull*, (3 Dall.) 3 U.S. 386 (1798); Laura Ricciardi & Michael Sinclair, *Retroac-*

Seventh Circuit Court of Appeals Judge Frank Easterbrook says that although we need a theory to explain, justify, and constrain our reliance on precedent, “[W]e do not have such a theory. . . . [N]o one has a principled theory to offer.”⁶⁶ Were he correct, it should indeed “frighten us.”⁶⁷ Common law with its characteristic stare decisis has been serving our legal decisional needs for more than two centuries and those of England for nearly five centuries. In actuality, there have always been theories, or at least as long as there have been theorists.

We evaluate a theory of stare decisis according to (1) how well it fits actual practice, (2) what judges and lawyers do in arguing from and about precedent, and (3) how it explains the qualities of this doctrine that we hold so jurisprudentially dear. A theory should also explain how, as a matter of history, a workable balance of virtues and vices is commonly, though not always, achieved. Most importantly, it should provide guidance in answering “the sixty-four thousand dollar question [of] . . . when to adhere and when to reverse.”⁶⁸

One’s theory of stare decisis sets the context in which to evaluate an explanation of super-precedent.

II. THE DECLARATORY THEORY

Judges of the new United States had no doubt about the obligation to precedent. To them, as to the framers of the Constitution, precedent was intrinsic to the role of judging.⁶⁹ They understood deciding cases to require finding and applying law, not making it. The latter power was expressly allocated to the legislature.⁷⁰ Following precedent was part and parcel of

tive Civil Legislation, 27 U. TOL. L. REV. 301, 302-28 (1996); DANIEL E. TROY, RETROACTIVE LEGISLATION 47-50 (1998).

⁶⁶ Easterbrook, *supra* note 41, at 422. *But see e.g.*, James J. Eisenhower, III, *Four Theories of Precedent and its Role in Judicial Decisions*, 61 TEMP. L. REV. 871 (1988) (finding theories of *stare decisis* in the works of four great jurists, HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 124-50 (1945), H.L.A. HART, *THE CONCEPT OF LAW* 124-132 (1961), RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-90 (1977), and JOSEPH RAZ, *THE AUTHORITY OF LAW* 180-95 (1979)).

⁶⁷ Easterbrook, *supra* note 41, at 422. The “frighten us” bit comes in a slightly different context; “[t]ext and precedent are an old pair. So old it should frighten us that we do not have a theory of their interaction.” *Id.*

⁶⁸ Barnett, *supra* note 28, at 1236.

⁶⁹ In *Anastasoff*, the late Eighth Circuit judge and legal historian, Judge Richard S. Arnold, explained this obligation. *See Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000). *See* Michael B.W. Sinclair, *Anastasoff versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 706 (2003).

⁷⁰ *Id.*; U.S. CONST. art. III, §1.

judging. In this respect these early judges were simply following in the English common law tradition, a tradition they learned more through the works of Blackstone⁷¹ and Hale⁷² than old English cases.⁷³

Why should a judge follow a prior judge's discovered law? In those days the answer lay in the "declaratory theory" of stare decisis.

Remember Holmes' derogatory reference to the "brooding omnipresence in the sky"?⁷⁴ The brooding omnipresence was a universally applicable morality. It was a blueprint for propriety in all behavior. For many of the founding fathers, at least in their public moments, the world had been created by God according to a plan, and that plan reached not just the physical aspects but also the moral. "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this . . ."⁷⁵ This is not to require some established religion to justify stare decisis; it is simply a recognition of one prevailing and superior morality.⁷⁶ It is not such a strange idea. Think of the esteem in which the British judicial classes of the time held themselves and their mode of civilization, and of their willingness to impose it on others all over the world. Our forefathers too seemed to have few doubts about their rectitude, or about imposing it upon those already here (or dispossessing or disposing of them). That brooding omnipresence of morality was the source of the principles governing common law decision-making.

One might think of it as a great river of wisdom and guidance into which judges dip in their decisions. Of course no two cases are ever quite the same,⁷⁷ though frequently they have similar contours. You could say that of the river too. "You can never bathe in the same river twice," but neverthe-

⁷¹ BLACKSTONE, *supra* note 38, at *69.

⁷² SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 44 (Charles M. Gray, ed., U. Chi. Press 1971) (1713).

⁷³ Chancellor Kent, a near contemporary of the Framers, wrote of Blackstone that he "is justly placed at the head of all the modern writers who treat of the general elementary principles of law." KENT, *supra* note 39, at *512.

⁷⁴ S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); Letter from Oliver W. Holmes, Jr. to Harold J. Laski, in HOLMES, *supra* note 20, at 822.

⁷⁵ BLACKSTONE, *supra* note 38, at *41.

⁷⁶ "[T]he customary law of England, which we doe likewise call *ius commune*, as comming neerest to the lawe of Nature, which is the root and touchstone of all good lawes, and which also is *ius non scriptum*, and written onley in the memory of man . . . doth far excell our written lawes, namely our statutes or acts of Parliament." SIR JOHN DAVIES, LE PRIMER REPORT DES CASES ET MATTERS EN LEY (1628), quoted in S.E. Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 207 (1936).

⁷⁷ Except in cases of *res judicata*, which might be considered the limiting case of stare decisis.

less its banks, depth, current, temperature and viscosity are usually much the same the second time as the first.

A judge, then, would dip into this river of justice and declare the law he found—thus the “declaratory” theory. So long as the judge had accurately perceived the applicable law, a subsequent judge faced with a similar case should naturally follow his predecessor’s decision and decide in the same way. But if the subsequent judge’s case was different in some significant aspect, then he would not be expected to find and declare the same law.

There was no problem of retroactivity in the decision as the parties should also have taken their guidance from that same source. But parties before a court commonly disagreed about what they found when they consulted that brooding omnipresence, hence, their interaction’s becoming legally contentious. Judges were seen as having a better perception of the source of law and perhaps even a privileged access to it. Blackstone saw it almost mystically: “[T]he judges in the several courts of justice . . . are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.”⁷⁸ Hale gave four rather more down to earth reasons for judicial authority:

First, because judges are chosen for their “greater Learning, Knowledge, and Experience in the Laws than others. *2dly*. Because they are upon their Oaths to judge according to the Laws of the Kingdom. *3dly*. Because they have the best Helps to inform their Judgments. *4thly*. Because they do *Sedere pro Tribunali*, and their Judgments are strengthened and upheld by the Laws of this Kingdom, till they are by the same Law revers’d or avoided.”⁷⁹

Judges, then, were held authoritative and they left their declarations in their opinions, to be followed by their successors.⁸⁰ But that authority did not extend beyond what was necessary for the decision, as only to that extent did the judge inquire with the necessary concentration and effort.⁸¹

⁷⁸ BLACKSTONE, *supra* note 38, at *69.

⁷⁹ HALE, *supra* note 72, at 45.

⁸⁰ Blackstone:

[T]he monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity . . . receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

BLACKSTONE, *supra* note 38 at *63-64 (contrasting acts of parliament which do not enjoy such authority).

⁸¹ See *Cohens v. Virginia*, 19 U.S. 264 (1821):

If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in

Yet judges were not infallible. Their decisions did not make law, for of mundane institutions, only a legislature could do that.⁸² Judicial decisions were evidence of law, authoritative, but not preemptive. “[I]ndeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such custom as shall form a part of the common law.”⁸³ Yet a subsequent judge could find that his predecessor had been mistaken, that in the precedent case the court had misperceived the moral blueprint in the sky. The prior decision was not “*bad law*, but . . . it was *not law*. . . .”⁸⁴ On the declaratory theory a court did not and could not absolutely bind its successors.⁸⁵

This differs from our current understanding of *stare decisis*. Under the declaratory theory for example, the power to hold a precedent misguided was, and had to be, independent of the status of the court.⁸⁶ There was no

its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Id. at 399-400.

⁸² Hale:

Judicial Decisions [are binding] between the Parties thereto . . . yet they [judicial decisions] do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho’ such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.

HALE, *supra* note 72, at 45.

⁸³ BLACKSTONE, *supra* note 38 at *69 (“[I]n such cases the subsequent judges do not pretend to make a new law but to vindicate the old one from misrepresentation.”). See *Swift v. Tyson*, 41 U.S. 1 (1842) (Story, J.):

In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect.

Id. at *18.

⁸⁴ BLACKSTONE, *supra* note 38, at *70.

⁸⁵ Blackstone:

Yet this rule [to abide by precedents] admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation.

Id. at *69-70.

⁸⁶ In part this was because the hierarchical court structure was not well in place in the early development of the common law in England. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 350 (5th ed., Little, Brown, & Co. 1956); Kempin, *supra* note 3, at 32-33. But even with an hierarchy in place, precedent could transcend hierarchy; here is Justice Story citing a trial court opinion and an appellate court’s reliance on it:

In the earliest case, *Warren v. Lynch*, 5 Johns. R. 289, the supreme court of New York appear to have held, that a pre-existing debt was a sufficient consideration to entitle a *bonâ fide* holder without notice, to recover the amount of a note indorsed to him, which might not, as

distinction between vertical and horizontal stare decisis.⁸⁷ Think of two cases as analogous to observations or experiments in empirical science. They surely must follow natural law, but the scientist and the entire state of scientific understanding might misperceive what that is. The explanatory propositions of established science can be called into question by anybody, no matter what that person's status. A clerk in a Swiss patent office could overrule the most influential scientists in prior history. So too could a judge find a precedent in error no matter what the status of its author. So too can we, as students of law, find a case to be "wrongly decided."⁸⁸

The declaratory theory was not a very compelling notion of stare decisis. A prior decision was evidence of the law only, not itself an instance of it. As merely the effort of a judge, this decision was inherently fallible even as evidence. As Lord Mansfield said, "The reason and spirit of cases make law; not the letter of particular precedents."⁸⁹ To this we must add the uncertainty of the reporting system, especially in the new United States. Reports here were few and not very reliable.⁹⁰ The early ones were merely notes kept by lawyers, sometimes published as a public service, but unofficial.⁹¹ Dallas's reports of the United States' Supreme Court decisions and the Pennsylvania Supreme Court were "submitted to the public in 1790 as a collection of lawyers' notes."⁹² They also focused on the arguments of

between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent in *Bay v. Coddington*, 5 Johns. Ch. Rep. 54.

Swift, 41 U.S. at 16. But one should note that Justice Story was also prepared to trace the point to Roman and 18th century English jurists: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord MANSFIELD in *Luke v. Lyde*, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world." *Id.* at 19.

⁸⁷ The earliest court to draw the distinction was an ecclesiastical court, part of a religious system thoroughly familiar with hierarchy, and even there quite late in coming. *Veley v. Burder*, (1837) 163 Eng. Rep. 127, 133-34 (Consistory Court of London).

⁸⁸ Justice Scalia says this "explains why first-year law school is so exhilarating: because it consists of playing the common-law judge, which in turn consists of playing king . . . How exciting!" ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 6-7 (1997). My impression is rather that it creates rampant insecurity, sending students scurrying for the shelter of black letter study guides.

⁸⁹ *Fisher v. Prince*, (1762) 97 Eng. Rep. 876, 876 (K.B.).

⁹⁰ Kempin, *supra* note 3, at 34 ("While England had some reliable, although unofficial, reports during the 17th and 18th centuries, it is safe to say that the colonists had none until the nineteenth century.").

⁹¹ Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 AM. U. L. REV. 757, 773 (1995) (In the United States in the late eighteenth through mid-nineteenth century recording of decisions was "unsystematic, idiosyncratic private reporting of vastly increased numbers of cases.").

⁹² Kempin, *supra* note 3, at 34 n.21. Johnson's reports of New York decisions, 1799-1823 in 20 volumes, were similar. *Id.* at 34-35 n.21. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1304-05 (1985) ("Not

counsel rather than on the decisions of judges. In 1826, New York's Chancellor Kent assessed, "Even a series of decisions are [*sic*] not always conclusive evidence of what is law . . ." ⁹³ That "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute" remained supreme. ⁹⁴

How does the declaratory theory account for the concept of super-precedent? Quite well, I think. Those decisions resting upon larger commonalities in moral precept and not drawing fine differences or minor variations would count as stronger precedents. The major contours of the river, in that metaphor, or of the brooding omnipresence in Holmes' articulation, would not be variable except in cases of massive change in society. Thus in *Swift v. Tyson* ⁹⁵ Justice Story could safely rely on Lord Mansfield's decisions as unshakable evidence of the natural law of commerce: discharge of a pre-existing debt counts as consideration. ⁹⁶ Probably few such "super-precedents" exist as cases because the fundamentals of so many areas of law are too obvious or developed so long ago. For example, it seems unlikely that a researcher could discover the progenitor of the staple that one who deliberately chops off the limb of another is liable in tort. It is one of those fundamentals that a society could scarcely survive without. ⁹⁷ But some seemingly unshakeable doctrines had their origins in judicial decisions. For example, in contract law there is the prohibition on unforeseeable consequential damages established in the super-precedent, *Hadley*

a single formal manuscript opinion is known to have survived from the Court's first decade; and few, if any, may have existed for Dallas to draw upon Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work.")

⁹³ KENT, *supra* note 39, at 529.

⁹⁴ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

⁹⁵ *Swift v. Tyson*, 41 U.S. 1 (16 Pet.) (1842).

⁹⁶ *See id.* at 19:

The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord MANSFIELD in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenebit.* [There will be no other law of Rome, no other law of Athens, no other now, no other in the future, but both in all countries and in all times, one and the same law shall apply.]

Id.

⁹⁷ *See* M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQUALITY 33, 59-60 (1987). Compare this to the tort of seduction, and its early formulation in the writ of *per quod servitium amissit*, without which society continues unabated. It is obsolete today even in states with precedents surviving. *Id.*

v. Baxendale.⁹⁸ In tort there is the doctrine of “last clear chance” set down in the super-precedent *Davies v. Mann*.⁹⁹

III. LANGDELL’S QUASI-SCIENTIFIC SCHOLASTICISM

The declaratory theory did not last, of course. It could not last.¹⁰⁰ The underpinnings of the brooding omnipresence in the sky were in trouble by the early 19th century, coming under attack from pioneer positivists Jeremy Bentham and John Austin. Austin, not always boring, called it “the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges.”¹⁰¹

Urbanization along with the industrial revolution in England and immigration from diverse origins in the United States must have shaken faith in the universality of that transcendental body of law declared by judges. It was not enough to talk, as did Bacon,¹⁰² of the river of justice flowing through different topology and taking on local color. Even Blackstone doubted that the common law of England could rule in places as different as “[o]ur American plantations.”¹⁰³ If the differences in circumstance were

⁹⁸ *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Court of Exch.).

⁹⁹ *Davies v. Mann*, (1842) 152 Eng. Rep. 588 (Exch. of Pleas).

¹⁰⁰ But it never quite went away, either. Even on the most elevated of benches it occasionally finds a proponent. *See, e.g.*, *Harper v. Virginia*, 509 U.S. 86, 102 (1993) (Scalia, J., concurring). In the last century we saw much the same idea, although without the claim to universality, in the super-organic theory of culture of anthropologists Leslie White and Theodore Kroeber. Even postmodern theorists posit much the same; just substitute ‘culture’ or ‘morality’ for ‘discourse’ in the following from Michel Foucault: “In short, it is a matter of depriving the subject (or its substitute) of its role as originator and of analyzing the subject as a variable and complex function of discourse.” Michel Foucault, *What Is An Author?*, in *MODERN CRITICISM AND THEORY* 209 (David Lodge ed., 1988) (“discourse” is, in probability, a universal placeholder for whatever you like as a determinant).

¹⁰¹ AUSTIN, *supra* note 55, at 634.

¹⁰² Francis Bacon, perhaps the greatest of all jurisprudential thinkers (I reckon he was) used the image of a river explicitly in accounting for the adaptability of justice to circumstance:

And as veins of water acquire diverse flavors and qualities according to the nature of the soil through which they flow and percolate, just so in these legal systems natural equity is tinged and stained by the accidental forms of circumstances, according to the site of territories, the disposition of peoples, and the nature of commonwealths.

DANIEL R. COUILLETTE, *FRANCIS BACON* 288 (Stanford Univ. Press ed., Stanford Univ. Press 1992).

¹⁰³ Blackstone:

[I]t hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being . . . are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from

not just of geography and technological development but also of culture, the moral blueprint's universality as a source could scarcely survive: Different cultures handled stock social problems differently, and as effectively as the British upper classes.

In the United States, the federal court system was set up with a hierarchical structure. Judicial hierarchy brought vertical *stare decisis* with its compulsive power over lower courts, independently of wisdom or rationality. Supreme court decisions were not merely evidence of law, to a lower court judge they were the law, with a controlling power akin to legislation. Most states followed the federal model.¹⁰⁴ The development of a reliable system of reports facilitated judicial reliance on prior decisions.¹⁰⁵ "The movement toward official state reporters gained momentum in the 1840s and 1850s and was shortly universal."¹⁰⁶

American common law jurisprudence probably settled again only after the Civil War and the advent of the first modern law schools. Christopher Columbus Langdell, dean of Harvard Law School, and his successor James Barr Ames brought a revolution not only to legal education with the case method but also to the doctrine of *stare decisis*.¹⁰⁷ Langdell was devoted to books. Hitherto it had been thought that the best training for the legal practitioner was in practice, drawing a:

false analogy between medical education and legal education. . . . [M]edicine can be learned only from the bodies of the sick and wounded; law, on the other hand, 'is to be learned exclusively from the books in which its principles and precedents are recorded, digested, and

personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provisional judicature, subject to the revision and control of the king in council Our American plantations are principally of this latter sort And therefore the common law of England as such has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions.

BLACKSTONE, *supra* note 38, at *107-08.

¹⁰⁴ Kempin, *supra* note 3, at 36.

¹⁰⁵ Kempin records official reporting starting early in the nineteenth century. His examples are Robinson's Reports in Virginia, started in 1843, but authorized in 1820. Pennsylvania moved towards a reporting system in 1813 by requiring opinions of the Supreme Court to be filed in certain cases, and, Georgia made steps towards a reporting system in 1841. *Id.* at 35 n.23.

¹⁰⁶ *Id.* at 35-36.

¹⁰⁷ See WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 7-28 (1994) (discussing "Harvard's Transformation"); see generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

explained.’ The place to find these principles and precedents, of course, was not the courtroom but the library.¹⁰⁸

But this was not a pure reversion to scholasticism; it was scholasticism dressed up as science. If “the opinions of judges and lawyers as to what the law is *are* the law,”¹⁰⁹ then one could take those opinions as data—as a scientist might take observations or specimens or the results of experiments in the laboratory—and generate an explanation, a general law.

According to Samuel Williston . . . Ames “believed it to be the function of the lawyer, and especially of the teacher of law, to weld from the decisions a body of mutually consistent and coherent principles. To his mind there was but one right principle upon a given point, and if the decisions failed to recognize it, so much the worse for the decisions.”¹¹⁰

This is not the simplistic rule of the case of the “enactment theory”;¹¹¹ individual decisions were not law, but a collection of decisions on a topic made law of a force equivalent to a statute.

Langdell’s jurisprudence was unabashedly formalistic.¹¹² It rested on principles laid down by judges and discoverable from their opinions. “Law, considered as a science, consists of certain principles and doctrines” and “the number of fundamental legal doctrines is much less than is commonly supposed.”¹¹³ One synthesizes the relevant principles and deduces the solution to a problem. It is an inherently conservative conception: Words of decisions from the past, not present social needs and values, are the data on which the judge bases “the rule.” Thus, Langdell’s conception is so intrinsically opposed to change that even statutes fell before it. “The landmark decisions of the formalist age are those which strike down laws regulating business or protecting workers.”¹¹⁴

¹⁰⁸ LAPIANA, *supra* note 107, at 15 (quoting C.C. Langdell, *Teaching Law as Science*, 21 AM. L. REV. 123-24 (1887)).

¹⁰⁹ LAPIANA, *supra* note 107, at 19 (quoting a letter by J.C. Gray to C.W. Eliot, January 3, 1883).

¹¹⁰ WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 19 (The Univ. of Wis. Press 1982) (quoting ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 378 (Carnegie Foundation for the Advancement of Teaching 1921), and citing many judicial concurrences, including BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 14 (Yale Univ. Press 1924)).

¹¹¹ See *infra* Part IV.A.

¹¹² See Grey, *supra* note 107, at 9 (“[F]ormalism’ describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles.”).

¹¹³ C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* viii (Little, Brown, and Co. 1879).

¹¹⁴ Allen D. Boyer, *Samuel Williston’s Struggle With Depression*, 42 BUFF. L. REV. 1, 20 (1994) (citing as examples *Lochner v. New York*, 198 U.S. 45 (1905) (holding a statute limiting work hours

How does Langdell's quasi empiricist formalism account for the concept of super-precedent? At a first pass one would say "quite well." It generates rules by abstraction from sets of cases rather than particular progenitor decisions, super-precedents, but it has that in common with the declaratory theory. Those sets of cases give us the legal categories for which we have names, the analogues of species or genera: "battery," "tort" and the like. Yet *Marbury* would hold up as a super-precedent because it spawned lines of uncritical followers; taking the back-bearings from its progeny one can formulate a generalization no different from Chief Justice Marshall's: "It is emphatically the province and duty of the judicial department to say what the law is."¹¹⁵ So too would *Hadley v. Baxendale*.

The problem is rather that this theory of stare decisis would not seem able to distinguish super-precedent from common garden variety precedent or any gradation in between. Where cases from the past are in disarray on a topic, one simply could not form a rule because there would be no supportable abstraction. Between formal control of the present problem and no control at all, the theory does not provide a mechanism for introducing alternative sources of authority, such as adaptivity to current circumstances.

As the basis of a teaching method, Langdell's formalism may have worked quite well; it is still in use today. But as a justification for stare decisis, it is unsatisfactory. Even though it keeps its eye fixed firmly on the past, it does not solve the problem of retroactivity. In those areas of behavior in which no ordinary denizen and no sane lawyer would check prior cases before acting, its rule of law may still come as a surprise. At first glance, it may appear to offer a modicum of certainty, reliability, and predictability, but that too is illusory. As legal historian A.W.B. Simpson wrote:

... it is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so that it is inherently impossible to state so much as a single rule in what Pollock called "any authentic form of words." ... [I]f six pundits of the profession, however sound and distinguished, are asked to write down what they conceive to be the rule or rules governing the doctrine of *res ipsa loquitur*, the definition of murder or manslaughter, the principles governing frustration of contract or mistake as to the person, it is in the highest degree unlikely that they will fail to write down six different rules or sets of rules.¹¹⁶

invalid as infringing freedom of contract); *In re Debs*, 158 U.S. 564 (1895) (upholding federal injunction against striking workers); and more).

¹¹⁵ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹¹⁶ A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77, 89 (A.W.B. Simpson ed., 2nd ed. Clarendon Press 1973).

There are indefinitely many true explanations of any set of data.¹¹⁷ Thus, indefinitely many 'laws' as Langdell saw them will fit a given set of cases or a single opinion, and none is more authoritative than another. Langdell provides no ground for choosing between any two such laws drawn from a set of prior cases. How then would a judge be constrained in her decision, or a lawyer enabled to advise a client? Finally, with the theory's focus on the past comes resistance to change, a wooden rigidity inhibiting adaptation to the needs of a changing society. Common law and stare decisis could not have endured for so long and through such varied circumstances had it been built only on such ground.

The legal world might have been excused for swallowing Langdell's theory of precedent at the time. The two to three decades following the Civil War in the United States was a period of social insecurity, not only as a consequence of the war but also from industrialization, urbanization and rapid development in technology.¹¹⁸ It was hardly surprising that the judges sought security in an extremely formalistic jurisprudence.¹¹⁹ But of course it could not last. Even as Langdell and Ames taught this jurisprudence at Harvard, their sometime junior colleague Oliver Wendell Holmes Jr. was writing subversively:

The official theory is that each new decision follows syllogistically from existing precedents. But as precedents survive like the clavicle of the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view.¹²⁰

¹¹⁷ A basic tenet in the philosophy of science. See, e.g., IAN HACKING, REPRESENTING AND INTERVENING 143 (Cambridge Univ. Press 1983) (saying this was accepted at least as early as 1894 when it was stated clearly in HEINRICH HERTZ PRINCIPLES OF MECHANICS (English trans. 1899) (1894)); CLARK GLYMOUR, THEORY AND EVIDENCE 10 (Princeton Univ. Press 1980) ("[A]n infinity of incompatible hypotheses may obviously be consistent with the evidence."); STEVE FULLER, THOMAS KUHN: A PHILOSOPHICAL HISTORY FOR OUR TIMES 177 n.76 (The Univ. of Chicago Press 1999) ("According to Ian Hacking, Heinrich Hertz's *Principles of Mechanics* (1894) was the first book to argue that the same facts can be represented in many different ways.") Conversely, no data can force one to give up a theory. WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 43 (Harvard Univ. Press 1953) ("Any statement can be held to be true come what may, if we make drastic enough adjustments elsewhere in the system.")

¹¹⁸ See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 119-20 (Marshall Jones Co. 1921); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 404 (1908).

¹¹⁹ GRANT GILMORE, THE AGES OF AMERICAN LAW 62 (Yale Univ. Press 1977).

¹²⁰ Oliver Wendell Holmes Jr., *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 630 (1879). He must also have been referring to Langdell when he referred to "the failure of all the theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from a *priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elephantia juris*, or logical cohesion of part with part." HOLMES, *supra* note 20, at 36.

Courts, according to Holmes, had power to adapt the law to “[t]he felt necessities of the time.”¹²¹ With the technological developments and their commensurate changes in social relations pressing at the beginning of the twentieth century, he had a point.

But if not Langdell’s quasiscientific scholasticism, and not the brooding omnipresence in the sky, then what?

IV. TWENTIETH CENTURY THEORIES

A. *The Enactment Theory*

One persistent, formalistic offshoot of Langdell’s theory is the “enactment theory”:

Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved.¹²²

The power of stare decisis follows simply from the decision’s making a rule. “This may be called the ‘School-rules concept’ of law, and it more or less assimilates all law to statute law.”¹²³ Despite its manifest inadequacies, the enactment theory is popular in law schools as the ‘R’ in the briefing formula “IRAC.”¹²⁴

¹²¹ HOLMES, *supra* note 20, at 1. Holmes’s successor on the United States Supreme Court, Justice Cardozo, wrote of Langdellian formalism, *inter alia*, “The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively.” CARDOZO, *supra* note 1, at 22-23.

¹²² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 110 (Gerald Duckworth & Co. 1977).

¹²³ Simpson, *supra* note 115, at 82. Similarly, but non-critically: “A legal rule established by the ratio of a case forms a precedent for application in future cases.” COLIN MANCHESTER, DAVID SALTER & PETER MOODIE, *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION* 4 (2nd ed. 2000).

¹²⁴ Nevertheless the enactment theory still has supporters, even among the higher echelons of the jurisprudential theorists; *see, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* (Duke Univ. Press 2001), FREDERICK SCHAUER, *PLAYING BY THE RULES* (Clarendon Press 1991)—and the judiciary—*see, e.g.*, SCALIA, *supra* note 88, at 7-9. Prof. Farber says “Justice Scalia’s view of precedent calls on courts to lay down clear-cut dictates whenever possible; those rules are then binding as rules on later courts until overruled.” Farber, *supra* note 4, at 1200; 7th Circuit Judge Frank Easterbrook, *The Supreme Court 1983 Term, Foreward: The Courts and the Economic System*, 98 HARV. L. REV. 4, 5 (1984) (“Judges both resolve disputes and create rules.”). Both judges and professors unquestioningly espouse the enactment theory. *See* Landes & Posner, *supra* note 12, at 249.

I shall not reiterate the manifold deficiencies of the enactment theory here,¹²⁵ but focus only on those peculiarly relevant to the concept of super-precedent. First, notice that even if there were a rule enacted in a case, nobody could say with authority what the words of that rule would be. But, as we all know from our struggles with statutes, the actual words used in a rule make vital differences. As lawyers and students of law we are entitled—*empowered*—to dispute any claim to authority in a particular formulation. But how is the poor denizen, untrained in law and unable to find the case, to find a reliable rule, be it in super or merely ordinary precedent? It is not a viable solution to suppose that a rule is created only when a court decides a case as this requires accepting both retroactivity and an intrinsic lack of notice.

Stare decisis on the enactment theory is simply explained: A case enacts a rule, and that rule governs not only behavior but future judicial decisions.¹²⁶ However, it is in this reliance on the concept of rules that the enactment theory and super-precedent find incompatibilities.¹²⁷ A rule governs until repealed (i.e., if judicially enacted, until it is overruled). But overrulings are rare, dramatic events, and new situations requiring new or different treatments abound. Distinguishing the rule from the precedent case, and creating a new rule would seem no different whether one is dealing with super-precedent or ordinary; a rule is still and only a rule.

One way the enactment theory accommodates to adaptive necessity is by allowing a subsequent court to modify—extend, narrow, create an exception to—the precedent rule of the prior case. But then not only does the rule of the prior become utterly unreliable as a guide, it is jurisprudentially inconsequential. The exigencies of the social and moral circumstances rather than the precedent “rule” determine the new case’s outcome, just as they underpin the modified rule. Thus the “R” in “I-R-A-C” stands also for “Redundant.”

¹²⁵ See Sinclair, *What is the 'R' in 'IRAC'?* 46 N.Y.L. SCH. L. REV. 457 (2002-03); Sinclair, *supra* note 69, at 726-31

¹²⁶ See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001) (“[T]he rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases.”); Schauer, *supra* note 38, at 589 (“[T]he conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand.”).

¹²⁷ To function as a prescriptive rule, a string of words should, at a minimum, be general (i.e., having at least one common noun phrase), be expressed in an accessible, identifiable and canonical verbal formula, having authority independent of the grounds for its enactment. See Sinclair, *supra* note 124, at 459-63.

To preserve any semblance of empirical accuracy or jurisprudential adequacy, enactment theory must allow subsequent courts to make new, variant rules to govern new, variant situations. From this starting point, Professor Farber argues on pragmatic grounds that the enactment theory is unworkable in itself and incompatible with the concept of super-precedent (“bedrock precedents” in his locution).¹²⁸ The proliferation of rules will, in practice, lead to “more fractured courts, with fewer majority opinions. . . . This makes rules more brittle than standards, since they cannot be bent but only broken and recast. Thus, because a rule is less flexible than a standard, it is less likely to maintain the allegiance of later judges.”¹²⁹ As a practical matter, then, “rules have a way of weathering poorly as precedents.”¹³⁰ They will tend to be reformulated at a higher level of abstraction, commonly called “standards.”¹³¹ Standards provide less precision in guidance, which “undercuts the very stability that stare decisis was supposed to provide.”¹³² Yet flexibility and adaptivity in application demand the sacrifice.¹³³ On this argument then, the enactment theory fails because on it all precedents would be enacted rules. A fortiori, the notion of super-precedent fails also. “There are limits to how much a court, especially in a constitutional case, can act like a legislature, laying down clear rules that will govern the future.”¹³⁴

On the general social level, the twentieth century society neither wanted nor needed a jurisprudence entrenched in the past. Technological and social change came apace, and the conception of precedent in judging moved with it. In 1920 Judge Cardozo was properly derisive of rule-bound conceptions of stare decisis:

Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such process, and no judge of a high court, worthy of his office, views the function of his place so narrowly.¹³⁵

¹²⁸ Farber, *supra* note 4, at 1176-81.

¹²⁹ *Id.* at 1201 (citing Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 90 (1992)).

¹³⁰ *Id.*

¹³¹ HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS* 139 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

¹³² Farber, *supra* note 4, at 1202.

¹³³ *Id.* (“[T]here is a difference between stability and rigidity.”).

¹³⁴ *Id.* at 1203.

¹³⁵ CARDOZO, *supra* note 1, at 20.

B. *Legal Realism: The Anti-Theory of Precedent*¹³⁶

The end of World War I ushered in a period of great confidence in the United States, and with it change in many aspects of society. “Historians have long recognized that, for better or for worse, American culture was remade in the 1920’s. Robust with business styles, technologies, educational policies, manners, and leisure habits which are identifiably our own, the decade sits solidly at the base of our culture.”¹³⁷ A confident judiciary, less interested in the security of purported stability,¹³⁸ reshaped the law to suit. Jurisprudential theory matched.

Holmes had long since laid a foundation for diminished precedential power. But the legal realist school that followed in his wake gave us not so much a theory as an anti-theory of precedent. How can a precedent case control a current decision? A case is a particular decision and from one particular, nothing follows.¹³⁹ If one tries to generalize a particular decision, there are indefinitely many ways one can do so.¹⁴⁰ For which of the particular referential expressions in the precedent does one substitute a common

¹³⁷ It is not easy to define “legal realism;” realistically it is unrealistic to try. Brian Bix, under the caption of “American legal realism,” writes:

The label for a category of legal commentators, primarily from the 1930s and 1940s, but with some significant contributions earlier and later. These commentators were ‘realists’ in the sense that they wanted citizens, lawyers, and judges to understand what was *really* going on behind the jargon and mystification of the law. . . . [J]udges portrayed their work as the deduction from simple premises or basic legal concepts, when in fact the decisions were grounded in policy preferences or the judge’s biases. Other realists argued at a more basic and abstract level that legal rules could never determine the outcome of particular cases . . . that rules were at best short-hand statements of how judges have decided issues of this sort in the past, or shorthand predictions of how they are likely to decide such issues in the future.

BIX, *supra* note 54, at 3-4. Although the term was introduced by Karl Llewellyn in 1930, see Karl Llewellyn, *A Realist Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), the origins of the movement’s basic arguments are commonly attributed to Oliver Wendell Holmes, Jr., who, for example, in 1897 wrote, “[t]he prophecies of what the law will do in fact, and nothing more pretentious, are what I mean by law.” Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 461 (1897).

¹³⁷ PAULA S. FASS, *THE DAMNED AND THE BEAUTIFUL: AMERICAN YOUTH IN THE 1920’S* 3 (1977) (conducting a detailed and comprehensive study of the change in societal values in the 1920s).

¹³⁸ See William O. Douglas, *Stare Decisis*, in *THE SUPREME COURT: VIEWS FROM INSIDE* 122, 122 (Alan F. Westin ed., 1961) (“This search for a static security—in the law or elsewhere—is misguided.” Security requires “adapting . . . to current facts.”). See also CARDOZO, *supra* note 1, at 166 (discussing the futility of seeking certainty).

¹³⁹ Radin, *supra* note 2, at 140 (citing Aristotle, *Analytica Priora*, i, 24) curiously, Radin puts it in Latin: *ex mere particularibus nihil sequitur*. [“from particulars nothing follows”] If one ignores the ‘mere’ which appears to be an English import—and ignores that Aristotle wrote in Greek, not in Latin. Still, Radin was giving a talk to judges, so it probably worked well rhetorically. Radin also quoted Lord Halsbury in *Quinn v. Leatham* [1901] A.C. 506: “I entirely deny that it [sc. the decision] can be quoted for a proposition that may seem to follow logically from it.” *Id.* at 142. n.9.

¹⁴⁰ See *id.* at 141; see also *supra* note 116 and accompanying text.

noun? Then in choosing that common noun, what generality is correct?¹⁴¹ Even the proliferation of precedents was seen as adding indeterminacy,¹⁴² as had been forecast by Chancellor Kent.¹⁴³ Jerome Frank argued that opinions seldom reveal the actual basis of decision,¹⁴⁴ so what courts purporting to follow precedent “in fact do is manipulate the language of former decisions” to suit their own, chosen ends.¹⁴⁵ But this is only harmful insofar as it is misleading, a pretense to follow precedent. Judges openly questioning past decisions is as it should be: “It is, I think, a healthy practice (too infrequently followed) for a court to re-examine its own doctrine.”¹⁴⁶

These arguments amount to a rejection of stare decisis as a source of law. How can one take guidance from past decisions when they may at any time be reinterpreted, narrowed, expanded, distinguished, or discredited by a court? As a theory it amounts to no more than saying “following precedent is what judges may say they do” but stare decisis in reality does not limit judicial discretion. Perhaps nobody actually went so far as to say quite that, but it is the output of the arguments. And of course, as a matter of reality it was never accurate. Judges did see themselves as confined by precedent, and lawyers, even devoted legal realist lawyers, continued to cite, rely on, and distinguish precedent cases in their arguments in court.

How would legal realism account for super-precedent? With skepticism, one might think, or rejection. If a judge need only be constrained by precedent when she chose, how could some precedents deny that choice? Why should it be more difficult to manipulate the language of one precedent than another? However, one suspects that there is one case that might count as the realists’ super-precedent: *Marbury v. Madison* asserts that it is for the judiciary to say what the law is. This certainly accords with the realists’ philosophy.

¹⁴¹ How large, as Professor Fredrick Schauer would put it, does one make one’s “categories of assimilation?” Schauer, *supra* note 38, at 602.

¹⁴² See Radin, *supra* note 2, at 148. With so many cases available, how does one discern the paradigmatic from the marginal?

¹⁴³ KENT, *supra* note 39, at *475 (“The evils resulting from an indigestible heap of laws and legal authorities are great and manifest. They destroy the certainty of the law, and promote litigation, delay and subtily.”). But Kent himself attributes the insight to Francis Bacon!

¹⁴⁴ JEROME FRANK, *LAW AND THE MODERN MIND* 148-50 (1930). “You are not really applying his decision as a precedent in another case unless you can say, in effect, that, having relived his experience in the earlier case, you believe that he would have thought his decision applicable to the facts of the latter case.” *Id.* at 15.

¹⁴⁵ *Id.* at 148.

¹⁴⁶ Douglas, *supra* note 137, at 132.

C. *Legal Process*

Like everything else, fashions in jurisprudence have moved more quickly and changed more rapidly since the middle of the last century. Every new fad left us with new insights. (Well, perhaps not *every* fad. The brief flare of postmodernism may have passed without, one hopes, leaving a scar.) With this rapid development, jurisprudence has become ever more sophisticated, and commensurately less informative. For present purposes, one more significant variant deserves mention.

In the 1950s we had the “Legal Process” school based on the wonderful introductory text book *The Legal Process: Basic Problems in the Making and Application of the Law* by Professors Henry M. Hart, Jr., and Albert M. Sacks.¹⁴⁷ This book looks at law from the points of view of those actively engaged in it, basically lawyers and judges. This means that its study of *stare decisis* utilizes many exemplary problems and cases followed by probing questions. But the authors do provide a capsule summary: “A Tentative Formulation of the Bases of the Doctrine of *Stare decisis*.”¹⁴⁸ It is a list of values similar to those in Part I, above, but it adds reasons peculiar to the practitioner’s viewpoint. For example:

1. *In furtherance of private ordering—*

(c) The desirability of encouraging the remedial processes of private settlement by minimizing the incentives of the parties to try to secure from a different judge a different decision than has been given by the same or other judges in the past.

On the enhancement of the legitimacy of the judiciary, it is excellent:

3. *In furtherance of public confidence in the judiciary—*

(a) The desirability of maximizing the acceptability of decisions, and the importance to this end of popular and professional confidence in (1) the impersonality of decisions and (2) their

¹⁴⁷ It was taught at Harvard Law School and had a huge influence on all who took the course. The materials were in mimeograph form, the set given to me quite uncongenial to use. It was not until 1994 that through the editorial efforts of Professors William N. Eskridge, Jr. and Philip P. Frickey the materials were published by Foundation Press, a service to all who take the time to work through them. (It must have been a busy course: I got through it all by teaching it in two upper division seminars. Both students and I came out of it much the wiser, but it is a little difficult to pinpoint just how.)

¹⁴⁸ HART & SACKS, *supra* note 130, at 568-69.

reasoned foundation, as manifested both by the respect accorded to them by successor judges and by their staying power.¹⁴⁹

However, as a theory this is limited. It shows, a posteriori, how once we had stare decisis, we continued with it, even after its initial theoretical justification was no longer viable. Because it does not show how stare decisis derives from more fundamental bases, it does not unify disparate data or distinguish the inappropriate. As we have seen, there are values countervailing those on the list. For example, would it be desirable for all disputes to be settled privately under prior, maladaptive precedents? Surely not; so there are limits on “1 . . . (c)” above. What limits? A theory should generate at least the basis of an answer. So the list of values served does not tell us how to go on from here, how to evaluate new situations. For example, what can a list of values served tell us about super-precedent?

Any candidate super-precedent begins as a landmark decision, the pioneer in its domain. How could the attorney for a party have used it in settlement negotiations? Would that landmark decision increase the “professional confidence” in the judiciary of the attorney who advised her client according to the rule it displaced? But on the other hand, once established, the super-precedent’s unshakable status serves “this end of popular and professional confidence” (“3 . . . (a)” above) and is based in “the respect accorded to them by successor judges and by their staying power.”¹⁵⁰

The legal process approach shares a problem with all the theories we have looked at in this part. It focuses too much on what lawyers and judges do, and not enough on the ordinary person. The ordinary person’s behavioral options are limited by the law. If precedent has power over legal decision-makers, then it also has power over everyone in the jurisdiction. But how is the ordinary person, without legal training, to know of or find out about a controlling precedent? Very few people in normal life are able to find cases,¹⁵¹ and only for very special decisions ought others have to hire such a person to do it for them. A person cannot be bound by a law of which he or she has no proper notice.¹⁵² How could a person follow a rule if

¹⁴⁹ *Id.* at 569.

¹⁵⁰ *Id.*

¹⁵¹ There are just over 1.1 million practicing lawyers in this country, out of three hundred million people. AMERICAN BAR ASS’N, NATIONAL LAWYER POPULATION BY STATE (2006), http://www.abanet.org/marketresearch/2006_national%20_lawyer_population_survey.pdf; U.S. CENSUS BUREAU, U.S. WORLD POPULATION CLOCKS (2006), <http://www.census.gov/main/www/popclock.html>.

¹⁵² See AQUINAS, *supra* note 60, at Question 90, arts. 1 & 3; LOCKE, *supra* note 60, at, §§ 57, 136, at 32, 77; 1 BLACKSTONE, *supra* note 38, at 45-46; G.W.F. HEGEL, PHILOSOPHY OF RIGHT 138 (T. M. Knox trans., Clarendon Press 1952) (1821); *see also id.* at 134-136 (“If laws are to have the binding force that, in view of the right self-consciousness . . . they must be made universally known.”); BENTHAM, *supra* note 59, at 155; FULLER, *supra* note 60, at 39; *Lambert v. California*, 355 U.S. 225,

she did not know it? As Jeremy Bentham said: “That a law may be obeyed, it is necessary that it should be known . . . that it may be known, it is necessary that it be promulgated.”¹⁵³

The problems of notice and retroactivity are a general explanatory burden for theories of common law in general and *stare decisis* in particular. The declaratory theory carries the burden where everyone has access to the moral blueprint in the sky. Sure, it was really the morality of a specially trained elite that really set the standards. But the English upper classes never had any difficulty endorsing their own rectitude. Why should others be held to a lesser standard?¹⁵⁴ Since that “transcendental body of law outside of any particular State”¹⁵⁵ is the universal moral guide, it tells everyone how to behave. Legal advisors may use cases to help see it, but the brooding omnipresence is the ultimate guide. In contrast, the twentieth century theories discussed in this Part fail to cast any light on these problems.

V. THE STANDARD THEORY

Let’s step back a moment. Law has the task of reconciling the interests of the individual with the interests of society. Legislatures do this by formulating, enacting and promulgating rules, which are authoritative strings of words that confine the permissible scope of action of the individuals governed. How does common law do it? A common law decision arises out of a clash of interests of individuals, antecedent to the decision. Other than in ending a dispute, how does the decision of that private individual clash serve the interests society?

225 (1957)) (holding that a felon registration ordinance violated due process when applied to a person who had no actual knowledge of it); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (stating that a vague law which does not afford notice of prohibited activity is a violation of due process).

¹⁵³ BENTHAM, *supra* note 59, at 157; *see also* AQUINAS, *supra* note 60, at Question 90, art. (“[I]n order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.”); LOCKE, *supra* note 60, § 57, at 32 (“[N]obody can be under a law which is not promulgated to him.”).

¹⁵⁴ Robert Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1013 (1997) (In those days “[l]awyers had, as they saw it, a direct line to God’s mind through their knowledge of the principles of legal science . . .”).

¹⁵⁵ *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting.).

A. *The Need for Precedent and the Expectation of Society*

It is easy to see how one can guide one's actions by statutory law. Even if the possibility of actually finding and reading the whole of some of today's legislative products is a bit remote, it is still sufficiently possible to support the myth that one could have actual notice. You cannot say that of common law decisions. Statutes operate prospectively,¹⁵⁶ so a person contemplating action can take notice of applicable constraints. Not so for common law decisions; one acts first, and learns to one's cost of one's error much later. How can that be just?

Stare decisis tells us that a prior case, similar to the one at hand should be followed. But, except in cases of *res judicata*, no two cases are the same; one can always find a difference.¹⁵⁷ On the other hand, no two cases are completely different either; one can always find some similarity.¹⁵⁸ Whether a prior case is similar to or distinguishable from a case at hand depends entirely on the criterion of similarity.¹⁵⁹

Where does the judge find the properly applicable criterion of similarity? Professor Corbin answered with a list, similar to Holmes's most famous paragraph¹⁶⁰:

The [judge's] rules come from all possible sources—from constitutions and statutes; from the decisions of other judges; from legal writers, ancient and modern, in this and in other countries; from books of religion and morality; from the general principles of right and wrong in which the judge was trained from his youth up; from the rules of action customarily followed in the community, lately referred to by Lord Chancellor Haldane as *Sittlichkeit*; from the judge's own practice and interest and desire.¹⁶¹

"*Sittlichkeit*" is the "the prevailing sense of justice and the mores of a community,"¹⁶² or what Llewellyn called "situation sense."¹⁶³ Inescapably,

¹⁵⁶ For a discussion of a very few obnoxious exceptions, see Ricciardi & Sinclair, *supra* note 65.

¹⁵⁷ Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J 71, 72 (1928) ("No identical case can arise. All other cases will differ in some circumstance—in time, if in no other, and most of them will have differences which are not trivial.").

¹⁵⁸ Duncan Kennedy, *The Stages of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351 (1982) ("But everything has property A, so everything is X, and the distinction between X and Y has collapsed.").

¹⁵⁹ *Res judicata* applies where there is exact similarity no matter what the criterion. See SINCLAIR, *supra* note 37, at 21-22.

¹⁶⁰ See *supra* note 24 and accompanying text.

¹⁶¹ Arthur L. Corbin, *The Law and the Judges*, 3 YALE REV. 234, 240 (1914).

¹⁶² WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 31 (1973).

¹⁶³ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 60 (1960) ("Situation-sense will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfy-

Holmes and Corbin and Llewellyn all include the judge's own perceptions of propriety. How could it be otherwise? Judges' evaluations of which elements are critical and which elements among those are the most critical obviously must vary *inter se*. Otherwise there would be no dissents. Otherwise we would not take so seriously the elevation of a judge to the Supreme Court. Otherwise judges would not be human.

Criteria of similarity are reasons. Judges give reasons in their opinions, and of course in the great majority of cases they simply follow precedent. In significant cases, the ones Holmes and Corbin and Llewellyn are concerned with, the ones that set new law, the sources of those reasons are exogenous to the law.¹⁶⁴ Morality, politics, economics, social policy and technology develop outside of the law itself (even though judicial decisions can influence them), and judges have no authority over them.

In an opinion, the court recites a set of sentences as the facts of the case and for the last hundred and fifty years these facts, like the final decision itself, have been beyond dispute. But the justification connecting the two, the reasons for the decision on those facts, carries no such intrinsic authority, no horizontal power of *stare decisis*.¹⁶⁵ “[T]he unwritten law proceeds, not from the will of the judge as lawmaker, but from society speaking through him.”¹⁶⁶ The author of the opinion carries no intrinsic weight on the validity or relevance of the justificatory argument (although obviously enough great judges, who became great by their acute sensitivity to social mores and ability to articulate them well, bring persuasive power in virtue of that greatness.)

Retrospectively we substitute reasons, saying “we can reconcile—or distinguish—this case on the theory that . . .” and by ‘theory’ mean reasons for the decision. We all have the power and authority to contest the reasons

ing working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of knowledge and experience and values to see with, and to judge with.”) (emphasis omitted).

¹⁶⁴ “What really takes place, in legal evolution, is a change of effect whenever there is a change of cause; and these causes come chiefly from outside the law itself.” John Henry Wigmore, *Planetary Theory of the Law's Evolution*, in 3 *EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS* 531, 534 (A. Kocourek & J. Wigmore eds., 1918).

¹⁶⁵ Vertically, a recent argument from a court above is likely to be followed, for all the reasons that make vertical *stare decisis* so much more powerful than horizontal. See Sinclair, *supra* note 124, at 490-92.

¹⁶⁶ von Moschzisker, *supra* note 38, at 413. See also, Holmes, *supra* note 119, at 630-31 (“The very considerations which the courts most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. We mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . .”); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 163 (N. Y. 1954) (1st ed. 1832) (explaining that custom and positive morality are the “grounds of judicial decisions upon cases.”).

given in an opinion and the theory produced.¹⁶⁷ Indeed, one of the virtues of common law is its encouragement of the production of alternative explanatory theories, not only by writers in law reviews, but by advocates who must present theories to distinguish or rely on prior cases. This proliferation of theories has positive adaptive value, more readily providing for change in law to keep up with change in society. As Lord Goff put it, “common lawyers worship at the shrine of the working hypothesis.”¹⁶⁸

It is thus that the common law adapts to a changing world and serves the interests of society.¹⁶⁹ Legislators are elected to serve the interest of the public and do so—to the extent they do—through legislation. Judges in common law decisions draw on the values of society in their reasoning, and adapt that reasoning to social needs. In this way they serve the general interests of the public, even though they do it through particular decisions. “The outstanding truths of life, the great and unquestioned phenomena of society, are not to be argued away as myths or vagaries when they do not fit within our little moulds. If necessary, we must remake the moulds.”¹⁷⁰

Adapting to present needs of society does not require a judicial disregard of precedent.¹⁷¹ Rather, judges take the old rules and give them new justifications, bringing different cases under their ambit until they looked like different rules.¹⁷² Thus evolutionary drift, not revolution, is the more common method, allowing precedent to constrain judicial decisions but not too greatly in discord with the requirements of society.¹⁷³ And judges have ample means of limiting the harmful effects of cases which, when “manifestly out of accord with modern conditions of life . . . should not be followed.”¹⁷⁴

¹⁶⁷ See SCALIA, *supra* note 88.

¹⁶⁸ Lord Goff of Chieveley, *The Future of the Common Law*, 46 INT’L & COMP. L.Q. 745, 753 (1997).

¹⁶⁹ See CARDOZO, *supra* note 1, at 64 (“Life casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life.”).

¹⁷⁰ *Id.* at 127.

¹⁷¹ Although on occasion it may; see *Klein v. Marvelas*, 219 N.Y. 383, 114 N.E. 809 (1916) (Cardozo, J.) (“The needs of successive generations may make restrictions imperative today which were vain and capricious to the visions of past times.”).

¹⁷² See HOLMES, *supra* note 20, at 36 (“And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.”).

¹⁷³ Of course there were also revolutionary decisions, as called for by the changing times. See, e.g., *Oppenheim v. Kridel*, 140 N.E. 227 (N.Y. 1923) (throwing out the long-standing prohibition on a woman’s having a cause of action for criminal conversation).

¹⁷⁴ von Moschzisker, *supra* note 38, at 414.

“But,” comes the immediate objection, “what about the reliance interest which stare decisis serves only if strictly followed?” The first response is purely logical: Following a prior case on the criterion of similarity set down in its reasoning is stare dictis, not stare decisis.¹⁷⁵ Replace the prior opinion’s reasons with those conducive to current needs and perhaps the so-called precedent will be seen as distinguished, or will find a more congenial set of progeny. Stare decisis is not mechanical; that a case stands as precedent requires justification, and again on values exogenous to the immediate law.¹⁷⁶

B. *The Value of Reliance and the Progression of Social Needs under the Standard Theory*

The more cogent approach is to recognize the importance of reliance as a societal value, where it actually is relevant a societal value. Too often we proffer it as though it were universal,¹⁷⁷ where in very many cases it is not. Think of commonplace interpersonal interaction or everyday contracting like the stuff of basic tort law and Article II contracts. Only a very small proportion of those engaged in such behavior know of the governing cases (or the statute governing sales of goods), and among that few, who thinks of the law? Does anyone consult counsel about whether one may negligently inflict emotional distress? So, we should distinguish those behavioral domains in which we do rely on the law in choosing a course of action—“reliance domains”—from those in which we do not and should not have to—“non-reliance domains.”¹⁷⁸

In reliance domains, notice taken from precedent cases and relied upon is a significant value in judicial decision-making. Lord Mansfield:

¹⁷⁵ Stare decisis pays respect to decisions; stare dictis is paying precedential respect to the dicta in opinions, including the reasoning and the sources upon which it is based. *See* *People v. Trimarco*, 846 N.E.2d 1008, 1014 (Ill. App. Ct. 2006) (“The expression *stare decisis* is but an abbreviation of *stare decisis et non quieta movere* (to stand by or adhere to decisions and not disturb that which is settled) . . . The doctrine is not *stare dictis*. It is not ‘to stand by or keep to what was said.’”).

¹⁷⁶ *See* CARDOZO, *supra* note 1, at 64 (“[T]o determine to be loyal to precedents and to the principles back of precedents does not carry us very far up the road. Principles are complex bundles. It is well enough to say that we shall be consistent, but consistent with what?”).

¹⁷⁷ *See* *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.”).

¹⁷⁸ *See* SINCLAIR, *supra* note 37, at 8-9.

In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.¹⁷⁹

Mercantile transactions are paradigmatic reliance domains. Justice Douglas adds other planning areas: “Uniformity and continuity in law are necessary to many activities . . . [including] contracts, wills, conveyances and securities. . . . Stare decisis provides some moorings so that men may trade and arrange their affairs with confidence.”¹⁸⁰ In such cases courts are, as they should be, very reluctant to make retrospective changes.¹⁸¹ The appropriate course of action is not to overrule, but to note the maladaptivity and say it is the prerogative of the legislature to make a change in such settled law.¹⁸² Appropriate reliance is a very powerful social interest.

However, reliance is not a value of significance in non-reliance domains. Where people act according to societal decencies, custom, and mores, without seeking legal guidance, they should be held only to the standards current in the society. “The constant assumption runs throughout the law that the natural and spontaneous evolutions of habit fix the limits of right and wrong.”¹⁸³ In such behavioral domains, a judge serves societal interests by resolving an interpersonal dispute according to the standards of decency that prevailed at the time and place of the action giving rise to the dispute.

But on this account, what is the use of stare decisis? Are not courts simply to decide according to the standards prevalent in society at the time, including reliance as an important standard where appropriate? Well no, and that is because there are differences among judges, just as among all the rest of us, as to what are the more important values and standards of behavior. If decisions were unconstrained by precedent, then each judge could decide according to her perception of propriety in social intercourse.

¹⁷⁹ *Vallejo v. Wheeler*, (1774) 98 Eng. Rep. 1012, 1017 (K.B.); cf. *Burnet*, 285 U.S. at 406-07 (Brandeis, J., dissenting) (not limiting the value of reliance to “all mercantile transactions” (i.e., to reliance domains)).

¹⁸⁰ Douglas, *supra* note 137, at 123.

¹⁸¹ When there has been justified reliance on prior decisions, courts have on occasion resorted to the expedient of announcing a decision as prospective only. This may be theoretically dubious, akin to legislating, but it is nevertheless effective. Thus, for example, when the Massachusetts Supreme Court faced the exploitation of an old decision, *Kerwin v. Donaghy*, 59 N.E.2d 299 (Mass. 1945), to subvert a fundamental tenet of estate planning—a reliance domain—it made its decision changing the old rule prospective only: “We announce for the future that, as to any inter vivos trust created or amended after the date of this opinion, we shall no longer follow the rule announced in *Kerwin v. Donaghy*.” *Sullivan v. Burkin*, 460 N.E.2d 572, 577 (Mass. 1984).

¹⁸² *But see* von Moschzisker, *supra* note 38, at 419 (noting in contrast that when vested interests would not be impaired, the court should overrule).

¹⁸³ CARDOZO, *supra* note 1, at 63.

In other words the judge could decide differently from a prior judge simply because she disagreed, or thought herself wiser, smarter, more moral, or better informed. If that were the case, then we would truly have a government of men and not of laws. But under *stare decisis*, a judge may not justifiably modify or overrule a precedent unless she can show that the world has changed in a manner relevant to the behavior in question. *Stare decisis* thus provides a presumption that a precedent will be followed unless the court demonstrates sufficient exogenous change in the relevant social world to overcome the intrinsic values of stability, continuity, and uniformity.

Here is a simple and clear example. To be valid, a patent must be “novel” as defined in the statute¹⁸⁴ and embody an original idea. Accordingly, it must not have been anticipated in a “printed publication.”¹⁸⁵ But what is a printed publication for these purposes? In particular, would a microfilm of a German patent application on file in the Library of Congress count? In 1958 the Court of Customs and Patent Appeals (now called the Federal Circuit) faced that question in *Application of Tenney*,¹⁸⁶ but with the additional fact that the relevant microfilm had been wrongly indexed in the library’s catalogue.¹⁸⁷ The court held that “printed publication” meant as in books, journals and the like, requiring considerable production expense and to provide a reasonably substantial circulation.¹⁸⁸ Microfilm was a similar price per copy (regardless of the number) so it did not require and, in this case, did not receive wide distribution. It was held not to count as “printed publication.”¹⁸⁹ Notice that the erroneous indexing is of no relevance to the reasoning as only circulation counted.

A mere eight years later in *I.C.E. Corp. v. Armco Steel Corp.*,¹⁹⁰ the district court for the southern district of New York faced the very same question, except that the microfilm this time had been correctly indexed. On the reasoning of *Tenney*, the indexing was irrelevant and the decision would be the same. Under the enactment theory or Langdell’s theory the outcome is easy: The microfilm is not a “printed publication.” But that was not the result. In the eight years separating the cases, the technology of distribution of microfilms had sufficiently advanced to make Library of Con-

¹⁸⁴ 35 U.S.C. §102(b) (2002); the relevant statute at the time of this example was 35 U.S.C. §102(b) (1952); although the example involves statutory interpretation, the determination of the meaning of the words “printed publication” is a common law process, just as is constitutional interpretation.

¹⁸⁵ *Id.*

¹⁸⁶ *Application of Tenney*, 254 F.2d 619 (C.C.P.A. 1958).

¹⁸⁷ *Id.* at 621.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 627.

¹⁹⁰ *I.C.E. Corp. v. Armco Steel Corp.*, 250 F.Supp.738 (S.D.N.Y. 1966). Note that the Court of Customs and Patent Appeals outranks this court as circuit court outranks district court, so this is a question of vertical as well as horizontal *stare decisis*.

gress microfilm patent applications more readily and widely accessible. Were this not to count as a printed publication a person might take such an idea, gain a patent, and reap where he has not sown.¹⁹¹ Accessibility is the key to the reasoning. *Tenney* is easily distinguished by the fact—irrelevant to its decision—that the microfilm had been erroneously indexed, thus not discoverable.¹⁹² The change in the technological world of microfilm accessibility brought with it a change in the court's reasoning and a change in the meaning of "printed publication" for these purposes.

How big a change is necessary? Of course we fight over the answer; it differentiates conservatives (in the traditional sense) from liberals (in the American sense.) This is the tension between wisdom handed down from the past and the rationality of the present.¹⁹³ But generally that tension is not very great. Most of our law is very stable. Basic torts have been with us for our entire history and we just expand into new fields as we recognize new harms or the social significance of old ones. Basic contract law is similar. The above example is especially apt because the relevant change was technological, large, and in a short period of time. Most societal change is relatively sedate. Think of the change in sexual mores and society's willingness to interfere that has brought the changes in our constitutional right to privacy in interpersonal relationships. Beginning with *Griswold v. Connecticut*¹⁹⁴ in 1965, it has taken nearly forty years to work through to the constitutional protection of sodomy.¹⁹⁵

The conundrums of common law notice and retroactivity are similarly resolved. In reliance behavioral domains, where a party has, with or without professional assistance, taken notice of and acted in reliance on prior decisions, that reliance is a significant and often overwhelming value. Those are the kinds of action in which "one of the first things for a court to remember is that people care more to know that the rules of the game will be stuck to, than to have the best possible rules."¹⁹⁶ But in all that everyday interpersonal behavior in which we act without thinking of the law and in which it would be utterly inappropriate to consult statute or precedent, we take our standards from the prevailing culture. In other words, we take notice from society, and we should only be held to have violated the law when we have transgressed society's standards of reasonable decency. Those are exactly

¹⁹¹ *Id.* at 743.

¹⁹² Otherwise the district court judge in *I.C.E. Corp.* would have needed rather more courage and determination to defy the court of appeals above and reach the correct decision.

¹⁹³ See text *supra* Part I.

¹⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁹⁵ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁹⁶ Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Feb. 8, 1908), in *THE ESSENTIAL HOLMES* 200, 201 (Richard A. Posner ed., 1992).

the standards that judges, too, should draw upon in deciding cases,¹⁹⁷ whether by determining the application of precedent or by reasoning from basic principles and values. There is no retroactivity in such a decision.¹⁹⁸

C. *Super-Precedent under the Standard Theory*

How does the standard theory account for the concept of super-precedent? A super-precedent is one where the change in society would have to be very, very great for it to come into question. *Marbury v. Madison*¹⁹⁹ is paradigmatic. The change in socio-legal culture necessary for *Marbury* no longer to suit our needs would be so great that we would no longer recognize it as the United States.²⁰⁰ *Brown v. Board of Education*²⁰¹ should be another. Unlike *Marbury v. Madison*, the contrary of *Brown* is easy to envision; we just have to look to our history before it. But society now recognizes the moral abhorrence of that state of affairs, and would surely find a return to it socially repulsive. *Erie Railroad v. Tompkins*,²⁰² is another example, nicely illustrating the fundamental change in societal thinking since “the collapse of the authority of theology and scholastic metaphysics.”²⁰³ No longer could morality, politics and law be founded in the universal brooding omnipresence of *Swift v. Tyson*,²⁰⁴ so the universal federal common law had to go. To reverse that change would require a revolution in social epistemology of Enlightenment scale.²⁰⁵ *Miranda v. Arizona*²⁰⁶ is another example. In 1974, then Justice Rehnquist, writing for a

¹⁹⁷ See Arthur L. Corbin, *The Law and the Judges*, 3 YALE REV. 234, 250 (1914) (“That judge is just and wise who draws from the weltering mass the principle actually immanent therein and declares it as the law. This has always been the judicial function in all countries, and for its performance the judge must bear the responsibility.”).

¹⁹⁸ This is why Bentham’s wonderful analogy to dog training, *supra* note 59, is wrong.

¹⁹⁹ *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁰⁰ Two hundred years ago the administrative state as we know it today did not exist, so the question of administrative agency interpretation of statutes delegating rule-making authority did not arise; one can only speculate on Chief Justice Marshall’s reaction to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its progeny, requiring judicial deference in may circumstances.

²⁰¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁰² *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁰³ ISAIAH BERLIN, *POLITICAL IDEAS IN THE ROMANTIC AGE* 260 (Henry Hardy ed., 2006).

²⁰⁴ *Swift v. Tyson*, 41 U.S. 1 (1842).

²⁰⁵ BERLIN, *supra* note 202, at 11 (“It was certainly the largest step in the moral consciousness of mankind since the end of the Middle Ages, perhaps since the rise of Christianity. No step of comparable magnitude has occurred since—it was the last great ‘transvaluation of values’ in modern history.”).

²⁰⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

minimal majority in *Michigan v. Tucker*,²⁰⁷ had been overtly hostile to *Miranda*, minimizing its impact. By 2000, however, without changing his own view he had to concede that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture”²⁰⁸ and thus immune from overruling, that is, a super-precedent.

One question, so far unaddressed, is very clearly answered by the standard theory: Could the Supreme Court itself declare a case to be super-precedent? In a word, “No.” Nevertheless it might try. As Judge Luttig has noted,²⁰⁹ the Court in *Stenberg v. Carhart*²¹⁰ purported to elevate the precedential stature of *Roe v. Wade*²¹¹ and *Planned Parenthood v. Casey*²¹²:

This Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman’s right to choose. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). We shall not revisit those legal principles.²¹³

This could have and has had no more consequence than the Court’s attempt to deny precedential value to its decision in *Bush v. Gore*²¹⁴ (“Our consideration is limited to the present circumstances”²¹⁵), as the many subsequent cases relying on and distinguishing the opinion attest. These attempts are at best dicta, at worst circular, relying on the principle they purport to modify.²¹⁶ Only by denying review can the Court avoid revisiting questions that continue to nag society. Indeed, the scope of a woman’s right to choose is before the Court this term.²¹⁷ The underlying justifiability and contours of that right will inescapably be revisited.

²⁰⁷ *Michigan v. Tucker*, 417 U.S. 433 (1974).

²⁰⁸ *Miranda*, 384 U.S. at 443.

²⁰⁹ See *supra* note 15 and accompanying text.

²¹⁰ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

²¹¹ *Roe v. Wade*, 410 U.S. 113 (1973).

²¹² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²¹³ *Stenberg*, 530 U.S. at 921.

²¹⁴ *Bush v. Gore*, 531 U.S. 98 (2000).

²¹⁵ *Id.* at 109.

²¹⁶ Just as, as has so often been pointed out, the principle of *stare decisis* itself could not be created by precedent (notwithstanding the House of Lords attempt to do so in *London Tramways Co. v. London County Council*, [1898] A.C. 375, and to negate its excessive force in its 1966 “Practice Statement,” [1966] 1 W.L.R. 1234 (H.L.)). See, e.g., SALMOND, *supra* note 25, at 187; Stone, *supra* note 25, at 1164.

²¹⁷ See *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006) (granting writ of certiorari); *Gonzales v. Planned Parenthood Federation of America, Inc.*, 126 S. Ct. 2901 (2006) (granting writ of certiorari).

It is sometimes said that when a case is affirmed many times, that increases its value, even makes it a super-precedent.²¹⁸ This would fit Langdell's theory of precedent. But it is wrong. A case is only affirmed or upheld when it comes into question. As Max Radin said, "Indeed, the fact that a case is in the reports is in itself evidence that when the situation arose, the law was uncertain, in spite of generations during which stare decisis has been dominant."²¹⁹ Being upheld many times means the precedent has been questioned many times. Being cited many times does not.²²⁰ A case may be cited for many reasons, including the intellectual honesty of acknowledging a foundational presupposition. *Marbury v. Madison* for example, has been a foundational icon for two hundred years, unchallenged and unchallengeable. (Indeed, challenging it would be seen as a *reductio ad absurdum* on one's argument.) It may be often cited, but only because it is a presupposition of so many arguments; it is never challenged and so does not get upheld. *Erie Railroad v. Tompkins*, although somewhat younger, is similarly foundational, citable, and cited.

Here one can see the idea of super-precedent as the extreme of precedential power. A super-precedent stands for a fundamental pillar of social or legal structure. Other cases may be powerful, but not of that stature. According to the substantiality of change in society necessary to bring it into question, a case could be evaluated on a gradation, from weak, temporary, ad hoc, through major to super-precedent.

Does *Calder v. Bull*²²¹ (interpreting the Constitution's ban on retroactivity²²² to apply only to criminal legislation) count as super-precedent? It was a problematic decision when made and its justice and efficiency have been suspect ever since.²²³ Still, it has been used and relied upon by legislatures for more than two centuries.²²⁴ Changing it would not greatly disturb reliance interests in the general public, but on the other hand it has worked itself into the fabric of our law. It must be marginal, powerful but not unshakable. Would *Federal Baseball Club v. National League of Professional*

²¹⁸ It was said by Judge Samuel Alito before the Senate Judiciary Committee on January 11, 2006, although he would not say "super-precedent;" it was said in the New York Times' lead editorial on January 12, 2006. Editorial, *Judge Alito, in His Own Words*, N.Y. TIMES, January 12, 2006, at A30. ("When offered a chance to say that Roe is a 'super-precedent' because it has been upheld so often, he refused . . .").

²¹⁹ Radin, *supra* note 2, at 148.

²²⁰ But see Landes & Posner, *supra* note 12.

²²¹ *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

²²² U.S. CONST. art. I, §9, cl.3 and art. I, §10, cl.1.

²²³ Ricciardi & Sinclair, *supra* note 65, for a history of retroactive legislation and the jurisprudential arguments about it.

²²⁴ See, e.g., *United States v. Carlton*, 512 U.S. 26 (1994) (upholding a retroactive tax statute that cost Carlton's cestui, who had relied on the old law, over \$600,000).

*Baseball Clubs*²²⁵ (holding baseball not to be a business, thus not in violation of anti-trust laws for its many restraints on trade) count? The Supreme Court itself seemed to think so, but perhaps only because of the legislature's thirty years of acquiescence.²²⁶

Of course this discussion arises in the context of the right to terminate a pregnancy and the status of *Roe v. Wade*²²⁷ and its successor in principle, *Planned Parenthood v. Casey*.²²⁸ Some would like the sequence to be considered unchallengeable. But there is a significant portion of the population ardently against permitting a woman to control her own reproductive function, significant enough to influence elections. Judicial sensitivity to societal demands thus puts the adaptivity of *Roe v. Wade* in question as it is repeatedly challenged in state legislation. Thus it should not be called a super-precedent.

Gregg v. Georgia,²²⁹ the 1976 decision in which the Supreme Court reinstated the death penalty as constitutional, has had a similar history. It has survived at least as many appellate challenges as *Roe v. Wade*, and yet we would not be inclined to call it a super-precedent. These challenges, coming not from legislatures but from the significant proportion of society seeing the retributive killing of criminals as a moral blot on our system of justice, similarly show *Gregg v. Georgia* to of uncertain adaptivity to the needs of present society.

VI. SUPER-PRECEDENT IN SENATORIAL HEARINGS

Stare decisis was on the minds of the Senate Judiciary Committee when it interrogated Judge Roberts on September 12-15, 2005. Chairman Specter even went so far as to rehearse quotable definitions, to which Roberts added, making a thorough list of the doctrine's virtues.²³⁰ The point was

²²⁵ Fed. Baseball Club v. Nat'l. League of Prof'l. Baseball Clubs, 259 U.S. 200 (1922).

²²⁶ See, e.g., Toolson v. N.Y. Yankees, 346 U.S. 356 (1953) (providing an illustration of changing *ratio decidendum*, a judge's expression of opinion on a point of law which is not essential to his decision on the matter at issue). See also Flood v. Kuhn, 407 U.S. 258 (1972). But football and boxing did not make it to such a pinnacle. See Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (holding that the NFL does not enjoy the same antitrust immunity that Major League Baseball did); United States v. Int'l Boxing Club, 348 U.S. 236 (1955) (Frankfurter, J., dissenting) ("Congress, on the other hand [i.e., of the judiciary], may yield to sentiment and be capricious, subject only to due process.").

²²⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

²²⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming a woman's core right to chose but with a shift in rational).

²²⁹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²³⁰ *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. 1, 141-42 (2005) [hereinafter *Roberts Hearings*]:

to probe the nominee's attitude to *Roe v. Wade* and *Planned Parenthood v. Casey*, but Judge Roberts would not budge from a refusal to comment on the status of those cases as precedent, let alone super-precedent. When pressed about preserving stability, expectations, and the Court's legitimacy by not overruling the core holding of *Roe*, the candidate's strategy²³¹ was to segue quickly to *Brown v. Board of Education*'s²³² overruling of *Plessy v. Ferguson*.²³³ It was rhetorically effective.²³⁴ Jurisprudential theory was not going to be expounded in great depth in a senatorial hearing.

Shortly after introducing the topic of the doctrine of precedent, Senator Specter raised the idea of super stare decisis, attributing it to Judge Luttig²³⁵ and referring also to Professors Farber and Estrich, and asked: "Do

[Sen. Specter] I begin collaterally with the issue of stare decisis and the issue of precedents. Black's Law Dictionary defines stare decisis as "let the decision stand, to adhere to precedents and not to unsettle things which are established." Justice Scalia articulated, "[t]he principal purpose of stare decisis is to protect reliance interests and further stability in the law." Justice Frankfurter articulated the principle, "[w]e recognize that stare decisis embodies an important social policy. It represents an element of continuity in law and is rooted in the psychological need to satisfy reasonable expectations." Justice Cardozo in a similar vein, "no judicial system could do society's work if each issue had to be decided afresh in every case which raised it." In our initial conversation, you talked about stability and humility in the law. Would you agree with those articulations of the principles of stare decisis as you had contemplated them, as you said you looked for stability in the law?

[Judge Roberts] Yes, Mr. Chairman, I would. I would point out that the principle goes back even farther than Cardozo and Frankfurter. Hamilton, in Federalist No. 78, said that, "[t]o avoid an arbitrary discretion in the judges, they need to be bound down by rules and precedents." So even that far back, the Founders appreciated the role of precedent in promoting evenhandedness, predictability, stability, adherence of integrity in the judicial process.

Id. They continued with a discussion of the importance of not disturbing "settled expectations" and reliance. *Id.*

²³¹ This strategy was first used by Senator Brownback, who stated: "I would note that the Supreme Court frequently has overruled prior precedents. A case founded in my State, *Brown v. Board of Education*, which overruled *Plessy v. Ferguson*, fits within a broad pattern of revising previous decisions since the founding." *Id.* at 46 (testimony of Sen. Brownback). Judge Roberts picked up the theme early in his exchanges with Senator Specter; *see id.* at 144 (testimony of Sen. Specter).

[Sen. Specter] An overruling of a prior precedent is a jolt to the legal system, it is inconsistent with principles of stability and yet . . .

[Judge Roberts] . . . [T]he principles of stare decisis recognize that there are situations when that's a price that has to be paid. Obviously, *Brown v. Board of Education* is a leading example, overruling *Plessy v. Ferguson*.

Id.

²³² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²³³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²³⁴ But it shows cleverness rather than reasoning, and the need for at least one more follow-up question. A super-precedent is not one that cannot be changed but one whose change would work a fundamental shift in who we are as defined by what went before. So in effect Judge Robert's rhetorical move can be seen as an admission that overruling *Roe* would be of the same magnitude as overruling *Plessy*—something which entails a judicial redefinition (or at least affirmation) of who we are. Presumably that would be difficult for someone who is against judicial activism.

²³⁵ *See* text accompanying note 15.

you think that the cases which have followed *Roe* fall into the category of a super-stare decisis designation?”²³⁶ Of course Judge Roberts, having refused to say any more in the discussion of ordinary stare decisis, was not going to bite:

[Judge Roberts] I think one way to look at it is that the *Casey* decision itself, which applied the principles of stare decisis to *Roe v. Wade*, is itself a precedent of the Court, entitled to respect under principles of stare decisis. . . . And under principles of stare decisis, that would be where any judge considering the issue in this area would begin.²³⁷

Would iterated affirmation make a decision super-precedent? Senator Specter produced a chart showing “38 occasions where *Roe* had been addressed, not with a specific issue raised but all with an opportunity for *Roe* to be overruled” and asked “would you think that *Roe* might be a super-duper precedent in light [Laughter] of 38 occasions to overrule it?”²³⁸ Judge Roberts did not make the contrary argument, that such frequent examination suggested maladaptivity rather than super-precedential qualities,²³⁹ but simply ducked, reiterating that *Casey* “. . . I think is the decision that any judge in this area would begin with.”²⁴⁰ Toward the end of the hearings Senator Specter took the opportunity to try this argument on Professor Charles Fried, who agreed that, despite being “wrongly decided initially,” *Roe v. Wade* had, by repeated affirmance, become a super-precedent.

[Chairman Specter] Only super with 38 chances to reverse it?
 [Professor Fried] Super duper, if you wish.
 [Chairman Specter] Oh, I do. Thank you very much.²⁴¹

²³⁶ *Roberts Hearings*, *supra* note 229, at 144.

²³⁷ *Id.* at 145.

²³⁸ *Id.*

²³⁹ In the Alito hearings, Senator DeWine came prepared with a brief against the super-precedential status of *Roe v. Wade*, arguing: “. . . from the start, *Roe* has been criticized by lawyers, scholars and judges, whether Democrats or Republicans and, to date, it does remain controversial. . . . In other words, super precedent is precedent that is so firmly entrenched in our legal system that people simply don’t question it.” *Confirmation Hearing on the Nomination of Samuel Alito to be Associate Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1, 391 (2006) [hereinafter *Alito Hearings*].

²⁴⁰ *Roberts Hearings*, *supra* note 229 at 145.

²⁴¹ *Id.* at 525. Fried then added, expounded, using other super-precedent bases:

[Professor Fried] It is not only that it has been reaffirmed as to abortion, but that it has ramified, it has struck roots, so it has been cited and used in the *Lawrence* case, the homosexual sodomy case, in some of the opinions in the right-to-die cases, in the *Troxall* case, which is the grandparent visiting right case. So it is not only that it is there and it is a big tree, but it has ramified and exfoliated, and it would be an enormous disruption.

Id. ‘Exfoliated’ brought some humorous byplay. *Id.*

What about the passage of thirty-two years with stable expectations of a right to abortion, so central to *Casey*? Senator Specter cleverly connected this with Judge Roberts' characterizing the "overruling of a prior precedent [as] a jolt to the legal system . . . inconsistent with principles of stability."²⁴² The late Chief Justice Rehnquist overtly opposed *Miranda*²⁴³ in 1974,²⁴⁴ but acquiesced in *Dickerson*²⁴⁵ twenty-five years later precisely because "it became 'so embedded in routine police practice to the point where the warnings have become a part of our National culture.'"²⁴⁶ Judge Roberts (correctly) doubted that the late C.J.'s personal "views of the underlying correctness of *Miranda* had changed,"²⁴⁷ but then evaded, refusing to face the analogy. He did not, as he easily might have, cite the time between *Plessy* and *Roe*, or point out that *Miranda* had not been under the constant hostile fire suffered by *Roe* in those thirty-two years.

Surprisingly, there is something to be learned about the concept of super-precedent in this rhetorical fencing, and it also is suggestive of the (then) future Chief Justice's attitude to it. For Senator Specter, clearly durability and surviving attacks add to a case's stature, enhancing its claim to be a super-precedent. If the concept ever gains common currency in law talk, these factors will presumably be intrinsic to it. But the future Chief Justice would have none of it. As he was fond of repeating, a precedent is a starting point to be considered deferentially and with modesty.²⁴⁸ Super-precedent would not seem to have a place in this jurisprudence.

²⁴² Or, as Professor Fried was later to put it, "this is something that is so well understood that it would be really extremely disruptive and unfortunately disruptive to overrule it." *Alito Hearings, supra* note 236, at 722.

²⁴³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁴⁴ *Michigan v. Tucker*, 417 U.S. 433 (1974).

²⁴⁵ *United States v. Dickerson*, 530 U.S. 428 (2000).

²⁴⁶ *Roberts Hearings, supra* note 229 at 147 (quoting *Dickerson*, 530 U.S. at 443).

²⁴⁷ *Id.* (under questioning by Chairman Specter).

²⁴⁸ *See, e.g., id.* at 56 (" . . . and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench."); Judge Roberts responding to an encomium from Senator Hatch:

[Judge Roberts] Like most people, I resist the labels. I have told people when pressed that I prefer to be known as a modest judge . . . It means an appreciation that the role of the judge is limited, that a judge is to decide the cases before them, they're not to legislate, they're not to execute the laws. Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of stare decisis. Part of that modesty has to do with being open to the considered views of your colleagues on the bench.

Id. at 164 (under questioning by Senator Hatch). Senator Schumer took up the notion of modesty with Judge Roberts:

[Senator Schumer] But when you have the conflict, a past error decision that was fundamentally immodest, let us say, and then years and years of it being on the books, stability argues keep it on the books, and even modesty, with its respect for precedent argues keep it on the

Other senators recurred to the topic, but none with the thoroughness or determination of Senator Specter. Senator Hatch was “not sure that a super-duper precedent exists”²⁴⁹ but nevertheless worked on undermining the concept as it might apply to the *Roe–Casey* line by counting votes: “There were only a few votes to simply reaffirm *Roe*, were there not, in the *Casey* case?”²⁵⁰ If super-precedent becomes common currency, quite possibly the solidity of the Supreme Court justices in a decision could become a factor.

Senator Hatch then went to work on the relative weakness of constitutional precedents as further undermining the possibility of ascribing super-precedent to them.²⁵¹ It is a valid point. Even if legal literature tends to focus on constitutional cases, foundational common law cases are likely to provide better examples of super-precedents; think of cases like *Hadley v. Baxendale*²⁵² or *Dickinson v. Dodd*²⁵³ in contracts, or foundational negligence cases like *Brown v. Kendall*²⁵⁴ in tort.

Although Judge Roberts would not acknowledge super-precedents when pressed by Senator Specter, he later acknowledged different levels of precedential value—different “planes”—putting *Marbury v. Madison* and *Brown v. Board of Education* on a higher plane than commerce clause precedents. Senator Schumer had been questioning him on the sequence of *Wickard v. Filburn*,²⁵⁵ *United States v. Lopez*,²⁵⁶ and *Gonzales v. Raich*.²⁵⁷ The candidate Chief Justice’s response illustrates exactly the distinction that casts doubt on *Roe–Casey* and *Gregg v. Georgia* as super-precedents.

books. How do you draw that? Can you just elaborate a little bit on how you weigh those two different concepts of “modesty?”

Id. at 409 (under questioning by Senator Schumer). Roberts’ reply added to his prior discussions of stare decisis that a modest judge recognized that “we’re not smarter than our fathers who laid down this precedent,” a thought he attributed to Professor Ford. *Id.*

²⁴⁹ *Id.* at 159 (under questioning by Senator Hatch).

²⁵⁰ *Id.*; Judge Roberts, in response, explained the opinions in *Casey*. *Id.*

²⁵¹ See *Roberts Hearings*, *supra* note 229, at 164 (“Is precedent equally authoritative in, for example, regulatory or statutory cases as in constitutional cases?”) Judge Roberts agreed it was not. *Id.* (under questioning by Senator Hatch) (“The Court has frequently explained that stare decisis is strongest when you’re dealing with a statutory decision. The theory is a very straightforward one that if the Court gets it wrong, Congress can fix it. And the Constitution, the Court has explained, is different. Obviously, short of amendment, only the Court can fix the constitutional precedents.”).

²⁵² *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Court of Exch.) (holding that consequential damages are limited to those foreseeable by the parties—and not even by their agents—at the time of contracting).

²⁵³ *Dickinson v. Dodds*, (1876) 2 Ch.D. 463 (holding that an option contract is no different with respect to enforceability than any other contract).

²⁵⁴ *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850) (entrenching fault as the basis of our tort system, not strict liability).

²⁵⁵ *Wickard v. Filburn*, 317 U.S. 111 (1942).

²⁵⁶ *United States v. Lopez*, 514 U.S. 549 (1995).

²⁵⁷ *Gonzales v. Raich*, 545 U.S. 1 (2005).

[Judge Roberts] Nobody in recent years has been arguing whether *Marbury v. Madison* is good law. Nobody has been arguing whether *Brown v. Board of Education* was good law. They have been arguing whether *Wickard v. Filburn* is good law. Now, it was reaffirmed in the Raich case and that is a precedent of the Court, just like *Wickard*, that I would apply like any other precedent. I have no agenda to overturn it. I have no agenda to revisit it. It's a precedent of the Court. But I do think it's a bit much to say it's on the same plane as a precedent as *Marbury v. Madison* and *Brown v. Board of Education* . . . [o]r *Griswold*. The fact that it was just reconsidered and reargued last year in the Raich case suggests that it's not that same type of case.²⁵⁸

It also suggests that even if the Chief Justice does not use the nascent jargon, he recognizes the superiority of some precedents.²⁵⁹

The confirmation hearings for Judge, now Justice Samuel Alito, in January of 2006,²⁶⁰ included much discussion of precedent and super-precedent, but did not add anything of interest. For the most part the Senators' questions were designed to induce the nominee to agree or disagree that the *Roe-Casey* line of cases was super-precedent or "settled law", or, more often, to pronounce loudly the questioner's position. Judge Alito, like Chief Justice Roberts four months earlier, was not going to say any more than that it was precedent entitled to respect as such. And, again like the Chief Justice before him, Judge Alito was prepared to produce a set piece on *stare decisis* at a moment's notice and as often as possible.

As to Judge Luttig's neologism, Judge Alito also would have none of it. In response to questioning by Senator Specter, he iterated the factors making the doctrine of precedent important, but gave special emphasis to reliance.²⁶¹ When Senator Specter ran through the grounds on which he had posited *Casey* and its progenitor, *Roe v. Wade*, as super-precedent,²⁶² and

²⁵⁸ *Roberts Hearings*, *supra* note 229 at 262-63 (under questioning by Senator Schumer).

²⁵⁹ He had earlier recognized the *inferiority* of a precedent. *See, e.g.*, "It's one of those cases that I don't think it's technically been overruled yet, but I think it's widely recognized as not having precedential value." *Id.* at 241 (responding to a question from Senator Feingold about *Korematsu v. United States*, 323 U.S. 214 (1944)).

²⁶⁰ *Alito Hearings*, *supra* note 236, at 109-277.

²⁶¹ *See id.* at 319:

[Judge Alito] Well, reliance is . . . one of the important foundations of the doctrine of *stare decisis*. It is intended to protect reliance interests, and people can rely on judicial decisions in a variety of ways. There can be concrete economic reliance. Government institutions can be built up in reliance on prior decisions. Practices of agencies and Government officials can be molded based on reliance.

Id. Judge Alito also later states: "Different Justices and different judges have different views about *stare decisis*, but my view is that you need a special justification for overruling a prior precedent and that reliance and reaffirmation are among the factors that are important." *Id.* at 601.

²⁶² *Id.* at 321:

[Chairman Specter] Judge Alito, the commentators have characterized *Casey* as a super precedent. Judge Luttig, in the case of *Richmond Medical Center*, called the *Casey* decision super *stare decisis*. In quoting from *Casey*, Judge Luttig pointed out, the essential holding of *Roe v. Wade* should be retained and once again reaffirmed. Then in support of Judge Luttig's conclusion that *Casey* was super *stare decisis*, he refers to *Stenberg v. Carhart*, and quotes

asked explicitly: “Do you agree that Casey is a super-precedent or a super stare decisis as Judge Luttig said?” Judge Alito simply rejected the classification. “Well, I personally would not get into categorizing precedents as super-precedents or super duper precedents.”²⁶³ He expressly rejected iterated reaffirmation as creating super-precedent, although said it was “a factor that should be taken into account in making the judgment about stare decisis,”²⁶⁴ especially as it enhanced reliance.²⁶⁵ And he added that “when a precedent is reaffirmed on the ground that stare decisis precludes or counsels against reexamination of the merits of the precedent, then I agree that that is a precedent on precedent.”²⁶⁶

In the hearings, the terms super-precedent and “super stare decisis” were often used but hardly accepted as established jargon. To the contrary, they were often treated with skepticism:

[Senator Cornyn] . . . Roe v. Wade, and some have suggested, law professors and maybe others, that somehow that is a super-precedent, or in the words of our inimitable Chairman, a super-duper precedent. I think we are introducing new words to the legal lexicon as this hearing goes on.²⁶⁷

Or humor:

[Senator Feinstein re *Roe-Casey*] as Senator Specter has said, that super-precedent is really in play? I think I even heard him once say super-duper precedent. Could that be?
[Chairman Specter] I said super-duper in the context of some 38 occasions when the Court has had the Roe issue before it and they could have overruled Roe had they decided to do so—
[Senator Feinstein] Right.
[Chairman Specter] —so it became a super-precedent. With the reaffirmation, it may become a super-duper or maybe even more, super-duper-duper—
[Laughter.]
[Senator Feinstein] Super-duper-duper—

the Supreme Court, saying, “[w]e shall not revisit these legal principles.” That is a pretty strong statement for the Court to make, that we shall not revisit the principles upon which Roe was founded, and the concept of super stare decisis or super precedent arises as the commentators have characterized it, by a number of different Justices appointed by a number of different judges over a considerable period of time.

Id.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 455 (“[W]hen a decision is challenged and it is reaffirmed that strengthens its value as stare decisis for at least two reasons. First of all, the more often a decision is reaffirmed, the more people tend to rely on it. . . .”).

²⁶⁶ *Alito Hearings, supra* note 236, at 321 (without mentioning the problem of vicious circularity in that statement).

²⁶⁷ *Roberts Hearings, supra* note 229, at 270.

[Chairman Specter] –38 times over.²⁶⁸

An exception was Senator DeWine, who gave a detailed account of super-precedent as he saw it,²⁶⁹ including all the arguments from the Roberts hearings. His purpose was to deny that *Roe v. Wade* would count, and for the most part his speech was tailored for reading, for the record rather than for the moment. But he adopted the neologism, giving *Marbury v. Madison* as an example.²⁷⁰

CONCLUSION

Super-precedent really just names one extreme end of a range of precedential power we have long recognized. The variety in precedential force and its having a nameable extreme is a natural consequence of the declaratory and standard theories of *stare decisis*, fitting easily and coherently into their explanatory schema. It does not fit as easily with Langdell's quasi-empiricism or the enactment theory; this is hardly surprising in light of the inadequacy of these theories as accounts of the doctrine of precedent. Legal realism could account for the empirical fact of our treating some cases with greater reverence but, as a denial of the power of precedent to constrain decisions, it could hardly explain it. Examining the intelligibility of Judge Luttig's neologism in the context of these theories casts some light on both super-precedent and the theories themselves.

Will super-precedent catch on? Will it become a part of ordinary legal usage? It did not at its first introduction by Landes and Posner in 1976.²⁷¹ That might suggest it is merely classificatory, and not especially useful analytically. Yet classifications can be useful. The Linnaean system may be merely classification but it has greatly facilitated the advance of biology and the storing and communication of knowledge. Might a systematic classification of precedential power serve such a purpose?

At one end of the scale would be super-precedents, at the other end, perhaps, "mini-" or "micro-precedents." That does not look very plausible, or useful. We already have a vocabulary of intuitive descriptions for the purpose: "inconsequential," "fragile," "narrow," "easily avoided" for ex-

²⁶⁸ *Id.* at 505.

²⁶⁹ *Alito Hearings*, *supra* note 233, at 390-92.

²⁷⁰ *Id.* at 392 ("*Marbury v. Madison*, the case establishing the power of judicial review, is super precedent. It is so well settled that litigants do not challenge it in court. In fact, it is one of the fundamental assumptions upon which our constitutional system is built." (quoting Landes & Posner, *supra* note 12)).

²⁷¹ See Landes & Posner, *supra* note 12.

ample, contrasting with Professor Farber's "bedrock precedent," "foundational," "settled" and the like. We can easily express the variety in precedential force without creating a linear gradation.

Super-precedent suits powerful precedents of which we approve. "Black hole" might be better for those of which we do not. Think for example of *Dickinson v. Dodd*,²⁷² the progenitor of the law that an option contract is simply a contract on all fours with any other, thus requiring consideration (or, where recognized, justifiable reliance) to be enforceable. It might be described as a black hole because it has such gravity that it sucks in everything in its vicinity, including light. Perhaps one should say "especially light"—it comes as a surprise to neophytes, as it should. But it has such power that even the drafters of the Uniform Commercial Code, setting many things right in common law contracts, would only defy it in a narrowly hedged, formalistic exception.²⁷³

That some cases should be more solidly ensconced and of more determinate consequence than others is hardly surprising. To overrule such a case should be viewed by society as particularly momentous and hence something to be done circumspectly. As we have seen, some such cases are structural features of our legal system, others fundamental to our moral conception of ourselves and our society. Perhaps super-precedent might usefully capture that quality, even if obscuring the variety of bases for it.

Yet we already have suitably ordinary and unsystematic ways to talk about qualities of precedents, suggesting the superfluity of Judge Luttig's neologism. If it comes into common usage it will be because of its intuitive appeal and not because it purports to formal consequence or analytical significance. I am sure Judge Luttig—and Landes and Posner a quarter century before him—intended no more. The informal, unpretentious usage of Senator Specter fits this mould.

²⁷² *Dickinson v. Dodds*, (1876) 2 Ch.D. 463.

²⁷³ U.C.C. § 2-205.