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Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence

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CONSTITUTIONAL PRECEDENT VIEWED THROUGH THE LENS OF HARTIAN POSITIVIST JURISPRUDENCE*

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Lawyers and judges have long taken it for granted that precedent both does and should play a frequently decisive role in constitutional adjudication—even in the U.S. Supreme Court, and even when the controlling precedent appears to have been wrongly decided in the first instance. But this traditional assumption has recently come under attack as, more generally, precedent-based decisionmaking in constitutional law has emerged as a source of controversy among both law professors and political scientists. Attempting to provide a broad, theoretical perspective on the role of precedent in constitutional law, this Article examines American constitutional practice through the lens provided by positivist jurisprudence in the tradition of H.L.A. Hart. At the core of Hartian positivism lies the notion that law and adjudication are practices constituted by the attitudes, behaviors, and expectations of their practitioners and, in particular, by the acceptance by judges of rules of recognition establishing criteria of legal validity.

When the role of precedent in constitutional adjudication is examined from a Hartian positivist perspective, helpful light pours down on a number of perplexing and currently disputed issues. First, contrary to the claims of second-generation constitutional originalists, nonoriginalist and otherwise initially erroneous precedent can possess the status of binding law because current rules of recognition entitle some nonoriginalist

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decisions to be so treated. The original understanding matters only insofar as current rules of recognition make it relevant. Second, existing rules of recognition confer on the Justices of the Supreme Court a power, to be exercised in accord with legal standards, to determine which initially erroneous precedents to overrule. This is a large and important power—reflective of the vast scope of the Court's authority—that originalists resent but that our current law countenances. It is certainly arguable that the Justices have more power than they ought to have to reject or follow past precedents. If so, however, it is not because the incumbent Justices flout their constitutional obligations, but because current rules of recognition afford them too much power. Third, although political scientists propounding an "attitudinalist model" have established that Supreme Court Justices regularly vote in accordance with their ideological values and seldom follow precedents from which they dissented, a practice-based, positivist account of constitutional law reveals ways in which precedent matters to Supreme Court decisionmaking that attitudinalists have overlooked.

Although this Article adopts the core elements of Hartian positivist jurisprudence, it also exposes and attempts to resolve some perplexities to which Hart's conceptual apparatus gives rise. In particular, it explicates the notion of a "rule" on which claims that law and adjudication are rule-based necessarily depends, and it probes the relationship between the practice of constitutional adjudication and other, related practices of law and politics. This Article also emphasizes that rational choice and game theories, which characterize social phenomena in terms of games and equilibria, yield conclusions about American constitutional law that largely accord with those emerging from positivist jurisprudence.

INTRODUCTION

The subject of precedent-based decisionmaking in constitutional law has emerged as a stewing source of controversy and befuddlement.[1] Lawyers and judges, who are overwhelmingly educated in the common law method, have long taken it for granted that precedent both does and should play a frequently decisive role in constitutional adjudication—even in the U.S. Supreme Court, and even when the controlling precedent itself appears to have been decided wrongly.[2] But this traditional, often complacent assumption has come under assault from a number of quarters.

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1. The general literature is voluminous. Prominent contributions include Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV 1 (1989); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Prededents*, 87 VA. L. REV. 1 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); *see also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

2. *See, e.g.*, Alexander, *supra* note 1, at 4 (noting that precedent controls a judicial decision only when it results in a decision different from that which a court would otherwise have reached); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 658 (1999) ("[M]embers of

My aim in this Article is to provide a relatively broad, theoretical perspective on a number of the challenges to traditional lawyers' thinking about precedent in constitutional adjudication. I shall address three challenges in particular. One comes from constitutional originalists, textualists, and a few others who believe that because the U.S. Constitution is the "supreme Law of the Land,"[3] judicial reliance on precedent to reach conclusions other than those that the Constitution would otherwise dictate is actually unconstitutional.[4] This challenge, with its appeal to first principles, holds the aura of profundity. When one casts off the blinkers and thinks hard, how could adherence to judicial precedents that deviate from the supreme law possibly be anything other than treason to the Constitution?[5] Among the reasons to take this challenge seriously is that, in my experience, it resonates deeply with the instincts of many students and of large numbers of concerned citizens who are not lawyers.

A second, closely related source of unease about precedent-based constitutional decisionmaking arises from an awareness that although judges and Justices sometimes profess to be bound by precedent, in other cases they claim freedom to overrule it. How can precedent be both binding law—sometimes prevailing over what would otherwise be the best understanding of the written Constitution—and yet in other cases be appropriately overruled?

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the modern Court have soundly rejected the perception of error as a basis for overturning precedent."); Schauer, *supra* note 1, at 575 (noting that reasoning from precedent, as opposed to reasoning from experience, requires assigning a previous decision value despite a current belief that that previous decision was erroneous); *see also* Fong Foo v. Shaughnessy, 234 F.2d 715, 719 (2d Cir. 1955) ("Stare decisis has no bite when it means merely that a court adheres to a precedent it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the Court has come to regard it as unwise or unjust.").

3. U.S. CONST. art. VI, cl. 2.

4. For originalist arguments to this effect, see, for example, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 269 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005). For textualist objections to precedent-based constitutional adjudication, see, for example, Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 68–78 (2000) (discussing areas in which doctrine has diverged from the Constitution's text and concluding that "the document is often more normatively attractive").

5. One possible answer to this question would be that "clearly erroneous" precedents should be regarded as nonbinding and subject to judicial overruling, whereas "merely" erroneous precedents should be followed unless they were "clearly erroneous." *See* Nelson, *supra* note 1, at 3. But modern doctrine does not rest on this distinction.

In wrestling with questions such as this, some commentators have pressed a distinction between ordinary precedents and so-called superprecedents.[6] Within the terms of this distinction, ordinary precedents can be overruled under familiar standards, but superprecedents—defined by their landmark status or repeated reaffirmations—enjoy immunity from overruling.[7] So far, discussion of superprecedent has been entangled with debates about whether the Supreme Court could properly overrule *Roe v. Wade*,[8] a jurisprudential icon that the Court has reaffirmed on numerous occasions.[9] But the notion of superprecedents purports to be general. Might it explain how initially erroneous constitutional precedents could bind the Supreme Court in some cases but not others?

A third development in lawyers' and judges' debates about the role of constitutional precedent has involved the injection of acidly skeptical writing—much of it by political scientists—questioning whether stare decisis actually matters in Supreme Court decisionmaking.[10] According to studies by political scientists who have developed a so-called "attitudinal model," the Justices consistently vote in accordance with their political ideologies; their invocations of precedent are mere window dressing.[11] Jeffrey Segal

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6. *See, e.g.*, Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006); *see also* Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 364 (2007) (tracing the origin and modern usage of the term "super-precedent"); Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, § 4, at 1 (summarizing commentators' conceptions of superprecedent).

7. *See, e.g.*, Gerhardt, *supra* note 6, at 1206 ("[S]uper 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.").

8. 410 U.S. 113 (1973). For a summary of the use of the term "superprecedent" in conjunction with *Roe v. Wade*, see *infra* note 161.

9. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed."); Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 420 (1983) (reaffirming *Roe v. Wade*).

10. *See, e.g.*, HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287 (1999) ("[P]recedent rarely influences United States Supreme Court justices."). Similar expressions of skepticism have sounded from within the legal academy. *See, e.g.*, William Wayne Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 SW. L.J. 657, 666–70 (1989); Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 2–3 (1979); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1344, 1359–61 (1990).

11. For well-known statements of this "attitudinal model," see generally SPAETH & SEGAL, *supra* note 10; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) [hereinafter SEGAL & SPAETH, ATTITUDINAL MODEL]; and JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND

and Howard Spaeth thus maintain that "[t]he correlation between the ideological values of the justices and their votes is 0.76."[12] These authors further conclude that "precedent rarely influences" Supreme Court Justices.[13] Other political scientists and empirical researchers generally concur that the Justices' ideologies importantly influence their votes,[14] even though the more mainstream view among political scientists is that advancing an ideological agenda is only one of the Justices' numerous motivations and that, in order to attain their goals, they must sometimes behave strategically.[15] Complicating factors aside, are the attitudinalists right in their stark, testable claim that the Justices' ideologies better predict their votes than does the purported norm of stare decisis? If so, do lawyers and judges need to overhaul their understanding of the role of precedent?

In seeking to shed light on issues such as these, in this Article I shall pursue the general theme—which is familiar among jurisprudential scholars but has not, I think, penetrated mainstream understandings of constitutional law—that precedent-based decisionmaking in constitutional cases is part of a *practice* of constitutional law and adjudication, and that issues involving constitutional precedent in the Supreme Court can be understood only when they are analyzed within the complex, often misunderstood context of that broader practice. A practice, in the sense in which I shall use the term, is an activity constituted by the normative understandings, behaviors, and expectations of its participants.[16] Philosophers and jurisprudential writers often describe practices as rule-governed activities.[17] When they do so, however, they use the term "rule" in a very broad sense to refer not only to formally stated requirements, but also to the tacit understandings that underlie convergent judgments about what is true or false, appropriate or

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THE ATTITUDINAL MODEL REVISITED (2002) [hereinafter SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED].

12. SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 11, at 323.

13. *See* SPAETH & SEGAL, *supra* note 10, at 287.

14. *See generally* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1171–79 (2004).

15. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 9–10 (1998).

16. *See, e.g.*, ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 187–88 (2d ed. 1984); Thomas Morawetz, *The Rules of Law and the Point of Law*, 121 U. PA. L. REV. 859, 859–60 (1973).

17. *See, e.g.*, Michael Sean Quinn, *Practice-Defining Rules*, 86 ETHICS 76, 76 (1975).

inappropriate.[18] Insofar as constitutional law and adjudication are practices, their most fundamental governing rules—including those supplying the ultimate criteria for determining what the Constitution means or requires—are *necessarily* rooted in social facts involving the behaviors, expectations, and attitudes of their participants. The intentions of past generations, and even the purportedly plain meaning of the constitutional text, matter only insofar as currently prevailing norms make them relevant.

Constitutional originalists and textualists, who dislike this state of affairs, protest that the meaning of the Constitution, as the fundamental law, is necessarily unchanging, and that the practice of modern Justices, judges, and lawyers cannot legitimately alter it. As I have said, many law students and concerned citizens assume intuitively that the originalists must be correct in this jurisprudential premise. But arguments of this kind miss the point that it is impossible to say what the fundamental law *is* except in reference to the practice of Justices, judges, and other contemporary officials. To cite examples to which I shall refer often, it is doubtful, at the very least, that the Constitution would originally have been understood to permit Congress to establish a Social Security system[19] or to authorize the printing of paper money, rather than providing for coinage.[20] Nevertheless, the Social Security system and paper money are constitutionally valid today because they are recognized as such under what H.L.A. Hart classically described as practice-based "rules of recognition"[21] for determining constitutional validity, and they would remain valid even if it could be established decisively that they are incompatible with the original understanding.[22]

Although I shall stress the character of constitutional law and adjudication as practices in the philosophical sense, it is also important to my analysis that many of the central philosophical ideas are at least loosely consistent with the insights of rational choice and game theoretic models that characterize social phenomena as multiplayer "games" in which the participants adjust their conduct in response to the actual and anticipated reactions of others.[23] Indeed,

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18. *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 81 (2001).

19. *See, e.g.*, Monaghan, *supra* note 1, at 734.

20. *See* Kenneth Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389; Monaghan, *supra* note 1, at 744.

21. *See* H.L.A. HART, THE CONCEPT OF LAW 79–99 (2d ed. 1994).

22. *See* Monaghan, *supra* note 1, at 744–45.

23. *See, e.g.*, Russell Hardin, *Why a Constitution?*, *in* THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100, 102–08 (Bernard Grofman & Donald Wittman eds.,

some philosophers, including Jules Coleman and Gerald Postema, have attempted to explain how game-theoretical concepts can be incorporated into a basically Hartian, practice-based theory of law.[24] Within a rational choice or game theoretic framework,[25] what I have so far described as the rules that structure constitutional law and adjudication can be thought of as equilibria that most or all parties find it in their interests to observe.[26] Like theories that regard

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1989); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1646, 1667–68, 1675–83 (1995); Peter C. Ordeshook, *Some Rules of Constitutional Design*, 10 SOC. PHIL. & POL'Y 198, 200–01 (1993).

24. *See* COLEMAN, *supra* note 18, at 92–95; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 182–97 (1982).

25. Game theory is one of a number of theories sometimes grouped under the broader heading of "rational choice theory." *See* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE, at xi (1994) (deploying the term "rational choice theory" to include "public choice theory, social choice theory, game theory, rational actor models, positive political economy, and the economic approach to politics, among others"). Comprehensive explorations of rational choice and game theory include ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (2d ed. 1994); and RATIONAL CHOICE (Jon Elster ed., 1986). *See also* Stephen W. Salant & Theodore S. Sims, *Game Theory and the Law: Ready for Prime Time?*, 94 MICH. L. REV. 1839, 1846–63 (1996) (reviewing DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994)) (offering a brief primer on game theory concepts). For a prominent critique of rational choice theory, see GREEN & SHAPIRO, *supra*, at 10–12.

26. *See, e.g.*, McNollgast, *supra* note 23, at 1666–67; Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 147–48 (1992). For an extensive application of game theory to legal analysis, see DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 1–3 (1994). Although game theory was "slower to diffuse into legal reasoning than other economic contributions," Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1292 (1990) (book review), many scholars now use game theory to model and analyze diverse legal problems. *See, e.g.*, ROBERT ELLICKSON, ORDER WITHOUT LAW (1991); Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41, 43–47 (1994); Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 431 (1996); Maurice R. Dyson, *Playing Games with Equality: A Game Theoretic Critique of Educational Sanctions, Remedies, and Strategic Noncompliance*, 77 TEMP. L. REV. 577, 581 (2004); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1114 (1999); Moshe Hirsch, *Game Theory, International Law, and Future Environmental Cooperation in the Middle East*, 27 DENV. J. INT'L L. & POL'Y 75, 78 (1998); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 216 (1990); William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1069, 1070 (1999); Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1227 (1997); Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 67–70 (1994); *see also* Peter H. Huang, Book Note, *Strategic Behavior and the Law: A Guide for Legal Scholars to GAME THEORY AND THE LAW and Other Game Theory Texts*, 36 JURIMETRICS J. 99, 100–02 (1995) (reviewing BAIRD ET AL., *supra*) (listing examples of legal scholarship that employ game theory to analyze issues).

constitutional law and adjudication as practices in the philosophical sense, accounts of judicial behavior based on games and equilibria can explain why the role of precedent in constitutional adjudication necessarily depends on current attitudes and behaviors, which must be understood empirically, and not on inferences from the purportedly plain meaning of legal texts or the intentions of those who wrote them.[27]

For my own part, I am skeptical that the authority of law could be explained solely as the product of purely self-interested behavior in accordance with equilibrium solutions to coordination problems. Equilibria are not norms, and I doubt that law could exist in the absence of anyone having a normative commitment to obeying it. Certainly a merely equilibrium-based theory could not account adequately for the expressive function of legal discourse and its characteristic claims that people have rights and are subject to duties.[28] But once solutions to coordination problems have emerged, adherence to those solutions on the part of some, maybe many, can be explained by the adverse consequences that a deviation would predictably provoke. Furthermore, equilibria may generate expectations and reliance interests, rooted in an ideal of the rule of law, that judges and other public officials should regard themselves as morally obliged to honor.[29] The consilience between a practice-based jurisprudential theory and modern rational choice models should enhance the overall credibility of the analyses on which they converge, including the conclusion that the foundations of law necessarily inhere in currently prevailing attitudes, expectations, and patterns of behavior.

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27. Although all rational choice theories, including game theory, postulate that judges and Justices are rational maximizers of their personal satisfaction, operating subject to constraints, most are either catholic or agnostic about the goals that Justices might embrace. Of specific importance for my purposes, many rational choice theories leave open the possibility that the Justices might include the satisfaction of adherence to legal norms in their personal welfare functions. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 10 (2006); RICHARD A. POSNER, OVERCOMING LAW 131, 133 (1995). Ethan Bueno de Mesquita and Matthew Stephenson go a step further—they argue that judges adhere to precedent "because they care about policy" in cases in which adherence improves the accuracy with which higher court judges can communicate legal rules to lower court judges. Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 764 (2002).

28. *See, e.g.*, Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1170 (2006) (noting law's expressive function).

29. *See* Postema, *supra* note 24, at 194–97 (discussing citizens' expectations).

When controversies involving the role of precedent in constitutional adjudication are examined within a practice-based framework, striking conclusions emerge with respect to each of the three challenges to traditional thinking that I noted at the outset. First, insofar as the ultimate principles of constitutional law necessarily reside in social facts, some initially erroneous precedents are now part of the (valid) law of the United States.[30] Objections to precedent-based constitutional adjudication that rest dogmatically on appeals to the original understanding or the purportedly plain language of Article VI have no leg on which to stand.

Second, the recognized authority of the Supreme Court to weigh considerations of practicality and prudence in determining whether to overrule originally erroneous precedents reflects the very large scope of the Justices' lawful authority. Current rules of recognition vest the Court with powers to shape and change our constitutional law, often based on social costs and benefits. As a practice-based perspective also makes clear, however, norms of constitutional practice constrain the Justices as well as empower them. In addition, the Justices' practice of constitutional adjudication is nested among related social practices of constitutional law and politics through which the Justices' obligation of fidelity to the law can at least sometimes be enforced.

When the practice of constitutional adjudication in the Supreme Court is seen to be located within a matrix of related practices, in which some Court decisions have engendered entrenched expectations and reliance interests, the claim that there are superprecedents immune from judicial overruling seems basically correct. A Court that today overruled settled precedents and held Social Security or paper money to be unconstitutional would exceed its lawful authority, even if the decisions initially upholding Social Security[31] and paper money[32] could be shown conclusively to have been mistaken—as many constitutional scholars believe to be the case.[33] By contrast, a decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed.

Third, although lawyers, judges, and law professors need to reckon with findings that Supreme Court Justices typically vote

30. *See infra* notes 84–91 and accompanying text.

31. *See* Helvering v. Davis, 301 U.S. 619, 640 (1937).

32. *See* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 547 (1871), *overruling* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

33. *See supra* notes 19–20 and accompanying text.

consistently with their ideological values in the contested cases on their docket, it does not follow that the Justices do not adhere to legal norms. Nor does it follow that precedent is unimportant in constitutional adjudication, even in the Supreme Court. Within the practice of constitutional adjudication, precedent matters enormously, even if it does not matter quite as much or in quite the ways that traditional thinking has assumed.

This Article unfolds as follows. Part I explains more fully what I mean by characterizing constitutional adjudication as a practice and introduces some of the terminology that I shall employ in looking at issues involving constitutional precedent. Part II addresses the claim that judicial reliance on past, erroneous decisions to resolve constitutional cases violates the Constitution, Article VI of which declares the Constitution, rather than mistaken judicial interpretations of it, to be the supreme law.[34] In response to that challenge, Part II follows the path blazed by Hart's *The Concept of Law*[35] in arguing that the Constitution owes its status as supreme law to contemporary practices of acceptance and rules of recognition, not to the intentions or understandings of the founding generation or the bare assertions of Article VI. As a matter of social fact, Part II argues, the Constitution that is accepted as the supreme law sometimes permits deviations from the original understanding and even from the superficially plain meaning of its language. Contentions that the law requires rigidly originalist or textualist decisionmaking reflect jurisprudential fallacies that Hart's theoretical insights help to lay bare.

Part III considers the Supreme Court's power to overrule its own precedents. In marking the limits on the Court's overruling authority that the tacit norms of constitutional practice establish, Part III argues that some precedents are de facto or de jure superprecedents. It also concludes, however, that continuingly disputed decisions such as *Roe v. Wade* do not fall within the category of cases that enjoy immunity from reconsideration.

Part IV steps back to examine the assumption, familiar among judges and law professors, that precedent plays the large role in constitutional decisionmaking that judicial rhetoric suggests. It accepts recent, important findings by political scientists establishing that Supreme Court Justices tend to decide the constitutional cases on their docket consistently with their political ideologies, but it argues

34. U.S. CONST. art. VI, cl. 2.
35. HART, *supra* note 21.

that these findings do not undermine the assumption of practice-based constitutional theories, built on Hartian jurisprudential foundations, that judges and Justices generally try to conform to fundamental legal norms.

Finally, a brief conclusion highlights the inherent contingency of legal and constitutional reasoning that is necessarily rooted in social facts that are themselves vulnerable to change. Although conclusions about the authority of precedent can surely be drawn, all rest on potentially shifting empirical foundations.

I. METHODOLOGICAL INTRODUCTION: A PRACTICE-BASED VIEW OF CONSTITUTIONAL LAW

In saying that constitutional adjudication is a "practice," I use the term in the way that philosophers sometimes do to refer to activities that are constituted by the convergent or overlapping understandings, intentions, and expectations of multiple participants.[36] Chess is a practice in this sense, as is baseball. So are promising, speaking English, and joke telling. Philosophers often say that practices have a necessary connection with, or are constituted by, rules.[37] The rules of chess constitute the game of chess. The rules of baseball give a point or purpose to the hitting and throwing of balls that would otherwise be unintelligible. Sometimes, as with chess and baseball, the constitutive rules of practices are clearly set out in propositional form. In other practices, the pertinent rules are rules only in the sense made famous by the philosopher Ludwig Wittgenstein: the term "rule" marks the existence of shared, often tacit understandings among some relevant group concerning how to "go on" in ways that will be acknowledged as appropriate or correct.[38] What makes a remark a joke—or not a joke? Within a community, there is likely to be substantial convergence in judgment, and if I am asked to tell a joke,

36. I do not mean to imply that all philosophers who appeal to the concept of a practice have used the term in precisely the same way. For influential discussions, see, for example, MACINTYRE, *supra* note 16, at 187–88; Morawetz, *supra* note 16, at 859–60; Quinn, *supra* note 17, at 76–78; John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 24–28 (1955).

37. *See, e.g.*, Quinn, *supra* note 17, at 76.

38. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS paras. 151–53, 179–83 (G. E. M. Anscombe trans., 1953); *see also* COLEMAN, *supra* note 18, at 80–81 (invoking the Wittgensteinian notion to explicate jurisprudential issues). For explorations of Wittgenstein's views about the nature of rule-following, see generally WITTGENSTEIN: TO FOLLOW A RULE (Steven H. Holtzman & Christopher M. Leich eds., 1981); and SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982).

then I follow the rules of joke telling insofar as I conduct myself in accordance with tacit norms that count as "rules" in the relevant sense. In doing so, I must hold myself open to the possibility that I have failed to conform to the standards that I set out to satisfy: maybe my intended joke failed utterly, reflecting lack of true understanding of the practice in which I meant to engage.[39]

Practices differ along multiple dimensions. One involves the extent to which practices are "closed" or "open."[40] In relatively closed practices, such as chess or baseball, the constitutive rules can be stated more or less exhaustively, and they are more or less fixed.[41] In open practices, by contrast, it will be less possible, even in principle, to furnish a comprehensive list of the pertinent rules, which may evolve over time. Speaking English is a paradigmatically open practice. Although there may be widely credited authorities concerning correct usage, their prescriptive power is limited. When popular practice diverges too far from the norms championed by experts, the experts must stand corrected.

Constitutional law and adjudication are relatively open practices, at least in some aspects.[42] The practice of lawmaking is partly constituted and made intelligible by widely accepted rules, including some that are written down in canonical form—for example, rules establishing the offices of those who gather in Washington, D.C., and in state capitols to enact laws, prescribing mechanisms of election, empowering legislators in some respects, and bounding legislative authority in others. In the aspect of constitutional law that involves adjudication, written rules establish the offices of judges and Justices, but those formal statements stop far short of specifying all that the tacit rules of judging require. For the most part, judges know how to go on, and in most actual and hypothetical cases—including the numberless "easy" cases that never get brought because their

39. *See* MACINTYRE, *supra* note 16, at 190 ("To enter into a practice is to accept the authority of [its] standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice.").

40. *See* Morawetz, *supra* note 16, at 860–64 (distinguishing open from closed practices).

41. *See id.*

42. *See generally* HART, *supra* note 21, at 79–99 (explicating the concept of law as a union of different kinds of rules). Hart's jurisprudential critic and rival, Ronald Dworkin, is even more explicit than Hart in characterizing law as a "practice," *see* RONALD DWORKIN, LAW'S EMPIRE 45–53 (1986), although he denies that the practice can be accurately described as constituted by "rules." *See infra* notes 102–03 and accompanying text (discussing Dworkin's view).

outcome would be beyond serious dispute[43]—there will be no question concerning what the rules require.

Nevertheless, the openness of the practice should not be minimized, nor should the looseness of the term "rule," if the undeniable phenomenon of broad convergence in judgment is to be characterized as rule-based at all. To be persuasive, a rule-based account must explain not only agreement, but also conspicuous and notorious disagreement—notably among the Justices of the Supreme Court—about how to resolve some constitutional issues. When the Justices disagree substantively, they also frequently disagree about how to characterize the applicable rules of adjudication or rules of recognition. They disagree, for example, about the relative weights to be given to evidence of the original understanding of constitutional language and to judicial precedent, about what count as valid distinctions of past decisions, and about the circumstances under which precedents should be overruled. This reality cannot be blinked away. Conceding both the openness of constitutional practice and methodological and substantive disagreement concerning how judges and Justices should decide some cases, a practice-based perspective in the Hartian tradition emphasizes the breadth of the shared assumptions and intuitive understandings that seem necessary to account for convergence on so many judgments and that permit reasoned disagreement even in disputed cases.

In my view, some important mysteries attend the concept of a "practice" as it functions in the legal philosophical literature, and further mysteries surround the idea that "rules" are necessary for the existence of practices. In this Article, I shall be candid about my uncertainties in deploying some of the concepts on which I shall rely. Nevertheless, I am convinced—for reasons that I shall also explain—that we cannot make sense of the phenomena of law and adjudication, or about the role that precedent plays within constitutional adjudication, without such concepts.[44]

A partly overlapping portrait of constitutional law and adjudication emerges from the conceptual framework of games and equilibria that some economists and political scientists use to analyze social, political, and economic phenomena.[45] Within that framework,

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43. *See generally* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (examining the phenomenon of "easy" cases).

44. *Cf.* HART, *supra* note 21, at 15 ("[T]he concept of a rule . . . is as perplexing as that of law itself . . . .").

45. *See supra* notes 23–27 and accompanying text. Another group of "new institutionalist" political scientists advance empirically based accounts that also would be

what philosophers term the "rules" of relevant practices would be described alternatively as the "equilibria" that emerge when the parties to a "game" adhere to patterns of behavior that sufficiently promote nearly everyone's interests so that none or almost none will wish to bear the costs of a deviation.[46] From a rational choice perspective, the Constitution is a coordinating convention that has been sufficiently accepted to provide a focal point for resolving many of the collective problems associated with the avoidance of anarchy and the creation of opportunities for mutual benefit through law.[47] The patterns of behavior of judges and others might similarly be thought to reflect equilibria that have become settled because each player anticipates that the costs of any alternative course—such as, for example, asserting broader powers or entitlements than others have previously tolerated—would be too great.[48]

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wholly consonant with my practice-based approach. *See, e.g.*, SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999); Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601 (2000) (reviewing SUPREME COURT DECISION-MAKING, *supra*, and THE SUPREME COURT IN AMERICAN POLITICS, *supra*). New institutionalists maintain that considerations of institutional role exert a deep influence on public officials and that Justices try to "make the best decision possible in light of [their] general training and sense of professional obligation." Howard Gillman, *What's Law Got To Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 486 (2001) (reviewing SPAETH & SEGAL, *supra* note 10); *see also* Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC. REV. 135, 156 (2006) (concluding that an empirical study of the Supreme Court's cases involving issues that have divided the federal courts of appeals "strongly support[s] the view that judges and justices engage in sincere efforts to find solutions that are persuasive according to a commonly held set of criteria").

46. *See, e.g.*, McNollgast, *supra* note 23, at 1666–68, 1675–83; Ordeshook, *supra* note 26, at 150–51; *see also* RASMUSEN, *supra* note 25, at 10–16 (describing and defining the basic elements of a game).

47. *See* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 82–140 (1999); *see also* Rui J. P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 J.L. ECON. & ORG. 103, 129 (2005) (creating a model of federalism that views constitutions as "self-enforcing equilibria" in federations).

48. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 28–30 (1994); McNollgast, *supra* note 23, at 1666–68, 1675–83; Ordeshook, *supra* note 23, at 206; *see also* Rasmusen, *supra* note 26, at 81–82 ("[T]he climate of expectations and the norms of judicial behavior must be carefully balanced to sustain responsible behavior as a self-enforcing equilibrium.").

II. ERRONEOUS PRECEDENT AND THE IDEA OF A WRITTEN CONSTITUTION AS LAW

Traditional thinking about constitutional law has long reflected two premises, the conjunction of which could easily appear paradoxical: (1) the Constitution is the supreme law of the United States,[49] which must prevail over all other purported sources of law; and (2) the Supreme Court should, or may even be constitutionally required to, follow precedent in cases in which doing so would conflict with the result that the Constitution would otherwise prescribe.[50] The appearance of paradox emerges most clearly in constitutional theories such as originalism that have a clear gauge of what the Constitution would mean in the absence of precedent. In cases of conflict, critics of judicial adherence to erroneous precedents say, the Constitution must prevail because—as Article VI states—it is "the supreme Law."[51]

Although constitutional theories besides originalism can generate an appearance of paradox in judicial adherence to initially erroneous precedents, originalism furnishes the most prominent foundation for attacks against precedent-based constitutional adjudication at the present time. I shall therefore treat originalism as representative of the family of critical alternatives that I wish to confront, all of which seem to assume that the very idea of a *written* constitution, entrenched against change except by supermajoritarian processes, would make no sense unless based on the premise that constitutional language has a fixed meaning that binds judges.

This Part begins by examining originalist challenges to precedent-based decisionmaking. I then answer the originalist indictment by exposing the defects of its jurisprudential foundations. My conclusion, briefly stated, is that nonoriginalist precedent can be the valid and binding law of the United States because it is accepted

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49. *See* U.S. CONST. art. VI, cl. 2.

50. For example, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court declined to revisit the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), "[w]hether or not [the Court] would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance." *Dickerson*, 530 U.S. at 443. The Court explained that stare decisis "carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Id.* (quoting United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996) (internal quotation marks omitted)); *see also* Gerhardt, *supra* note 1, at 73 (arguing that precedents should not be overruled merely because they were wrongly decided); Lee, *supra* note 2, at 658 (noting that modern Justices "have soundly rejected the perception of error as a basis for overturning precedent").

51. U.S. CONST. art. VI, cl. 2.

as such within current practices of law and adjudication. Original understandings and even plain textual language can fix constitutional meaning only insofar as they are accepted as determinative within the contemporary practices of judges and Justices and within surrounding practices in which judicial interpretations are either accepted or acquiesced in. This reasoning may appear circular, asserting that Justices are legally justified in doing what they do simply because they do it. But the circle is broken, or at least expanded upon, by an examination of the relation between judicial and other contemporary practices and the nature of law.

A. The Originalist Challenge to Precedent-Based Constitutional Adjudication

First-generation originalists such as Judge Robert Bork and Justice Antonin Scalia treated the first premise with which I began this Part—asserting the supremacy of the written Constitution—as primary; they grudgingly accepted the second premise—involving the sometime authority of nonoriginalist precedent—only as a concession to brute necessity.[52] If tested against the original understanding of constitutional language, Judge Bork and Justice Scalia recognized, such mainstays of the legal, economic, and political order as paper money and the Social Security system might be unconstitutional.[53] As noted above, it is seriously arguable that the provision of Article I authorizing Congress to "coin Money"[54] was originally understood to preclude the issuance of greenbacks and that no constitutional provision would originally have been understood to authorize a federal social security system.[55] In cases such as these, Judge Bork and Justice Scalia maintained, the costs of returning to the original understanding might be too great, and initially erroneous precedents must therefore stand.[56] Yet Judge Bork and Justice Scalia gave no

52. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155–59 (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–40 (Amy Gutmann ed., 1997).

53. *See, e.g.*, BORK, *supra* note 52, at 155–58; *see also* Lawson, *supra* note 4, at 33 (observing that "fiat currency not immediately redeemable in precious metals is unconstitutional" as measured against the original understanding).

54. U.S. CONST. art. I, § 8, cl. 5.

55. *See supra* notes 19–20 and accompanying text.

56. *See, e.g.*, BORK, *supra* note 52, at 155 ("Whatever might have been the proper ruling shortly after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian."); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 103 (2007) (quoting Justice Scalia as comparing his own judicial

clear explanation of how the preference for precedent over the Constitution's true meaning—as they understood it—could be constitutionally lawful. Apparently uncertain on this point, Scalia once characterized stare decisis as an exception to his originalist theory, not an aspect of it.[57]

More recently, second-generation originalist theorists have gone where Judge Bork and Justice Scalia refused to venture. According to Randy Barnett,[58] Gary Lawson,[59] and Michael Paulsen,[60] the truly fundamental originalist premise is that the Constitution is the "supreme Law of the Land."[61] From this premise, they say, it follows that precedent cannot prevail over what the Constitution would otherwise mean: the objective public meaning of the constitutional text left no doubt on this score in 1787 and 1788, when the Constitution was written and ratified, and it leaves no doubt today.[62]

It is a further mark of the self-contradictory character of the current doctrine of precedent, according to second-generation originalists, that it simultaneously maintains that precedent can bind judges, requiring them to reject what otherwise would be the best interpretation of the Constitution, and that precedent does not bind judges insofar as they can overrule it.[63] As explicated by the Supreme Court, reliance on precedent is a "policy," not an inflexible command,[64] and depends on "prudential and pragmatic considerations."[65] In the view of second-generation originalists, for

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philosophy with that of Justice Clarence Thomas by observing that "I am an originalist, but I am not a nut.").

57. *See* SCALIA, *supra* note 52, at 140.

58. *See* 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) [hereinafter Barnett, *Super Precedent*]; Barnett, *supra* note 4, at 258–59.

59. *See* Lawson, *supra* note 4, at 30.

60. *See* Paulsen, *supra* note 4, at 291.

61. U.S. CONST. art. VI, cl. 2.

62. Professor Paulsen generalizes this argument by maintaining that if other constitutional theories are to maintain their integrity they too must take the same hard stand against allowing precedent to play a decisive role in constitutional adjudication. *See* Paulsen, *supra* note 4, at 289–90. He further argues that, regardless of the criteria that a theory might uphold as properly determinative of constitutional meaning, only corruption can result from requiring an otherwise justified theory to accommodate precedents that the theory must mark as mistaken. *Id.*

63. *See id.* at 291.

64. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) ("[W]e always have treated *stare decisis* as a 'principle of policy,' *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), and not as an 'inexorable command,' *Payne* [*v. Tennessee*, 501 U.S. 808, 828 (1991)].").

65. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992). The *Casey* Court explained:

Justices to decide on such bases whether to adhere to the original public understanding of constitutional language violates the most basic requirements of the rule of law, which call for the Justices, as much as everyone else, to be bound by the Constitution.

The argument that the doctrine of stare decisis is unconstitutional insofar as it displaces the plain text or originally understood meaning of the Constitution appears to cut deep. In deploying it, originalists cast themselves as defenders of the true Constitution who, almost uniquely, have the courage to place principle and the rule of law above policy preferences and expediency. Moreover, as I have pointed out already, originalism seems to be the most intuitively plausible theory of constitutional law to many thoughtful students and to most others who have never examined originalism's jurisprudential foundations.

In fact, insofar as originalists suggest that either current law or something inherent in the idea of law mandates their conclusions, their position reflects a jurisprudential mistake. Far from being defenders of our existing constitutional order, originalists are advocates of radical legal change, who should have to bear a heavy burden of normative justification. The arguments that best reveal the fallacies of originalist thinking trace to the practice-based, "positivist" explication of the concept of law famously advanced by H.L.A. Hart.[66] In the remainder of this Part, and indeed throughout the balance of this Article, I shall therefore proceed by employing a conceptual framework that is much in the Hartian tradition to analyze the issues posed by judicial adherence to initially erroneous, nonoriginalist constitutional precedents. But I shall not follow Hart dogmatically. To the contrary, my analysis will reveal a number of

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> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations .... Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e.g.*, *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 173–74 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e.g.*, *Burnet* [*v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932)] (Brandeis, J., dissenting).

Id. at 854–55.

66. *See generally* HART, *supra* note 21.

points on which his general jurisprudential framework needs to be adjusted or supplemented to be applied to the special case of the constitutional law of the United States.

B. Acceptance as the Foundation of Fundamental Law

The most basic tenet of Hart's analysis in *The Concept of Law*[67]—as of positivist jurisprudence more generally—is that the foundations of law necessarily lie in social facts that constitute a pertinent practice or practices and, in particular, in the current acceptance of criteria for identifying valid legal norms.[68] In this Article, I shall offer some arguments supporting the proposition that law must be rooted in social facts, but I shall not attempt to lay out an exhaustive case. Rather, I shall assume that Hart successfully demonstrated "the social facts thesis" to be true—as I believe that he did.[69] If so, the crucial reference point in evaluating originalist challenges to precedent-based constitutional decisionmaking must lie in current constitutional practice. And if current practice furnishes the applicable norms of legality, then the authority of at least some nonoriginalist precedents seems unassailable.

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67. *Id.*

68. *See* COLEMAN, *supra* note 18, at 161 (asserting that "the core of legal positivism" is "[t]he social fact thesis," which "holds that the existence of the criteria of legality in any community is ultimately a matter of social fact").

69. The great traditional rival to positivism was the natural law tradition, classically rendered in the claim that an unjust law is "*no law at all.*" *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. II-I, Q. 95, Art. 2, Objection 4, *reprinted in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE 132, 166 (2d ed. 1995). Although I have nothing to contribute to the natural law/positivism debate, I am persuaded by the positivist position that the distinction between legality and morality is a useful one. More recently, the leading rival to positivism has been what has been described as Ronald Dworkin's "third theory" of law. *See, e.g.*, John Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3, 3–7 (1977). Dworkin's theory expressly characterizes law as a "practice" that depends for its existence on the social facts necessary to constitute a practice, *see* DWORKIN, *supra* note 42, at 45–53 (discussing the interpretation of social practices), but it rejects Hartian positivism by claiming that law is inherently interpretive and that any interpretation necessarily has a moral component, *see id.* at 65–68. Although I find Dworkin's position to offer significant insights into American judicial practice, scholars of analytical jurisprudence appear increasingly to believe that his general attack on Hartian positivism was flawed and unpersuasive. *See, e.g.*, Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 18–19 (2003) (advancing the view, shared by "many others," that Hart has emerged as the "clear victor" in the Hart/Dworkin debate). Without purporting to contribute to the Hart/Dworkin debate, I shall simply assume for purposes of this Article that Hartian positivism survives Dworkin's attacks.

1. Rules of Recognition

Hart referred to the criterion by which law is authoritatively distinguished from nonlaw as the "rule of recognition."[70] To speak of a single rule defining the criteria of legal validity in the United States is undoubtedly misleading. This phraseology suggests that there is a simple formula for discerning what the law is, or for ascertaining which claims of legal right are true and which are false, when in fact many matters of legal interpretation abound in complexity.[71] Indeed, Hart himself so recognized[72] and occasionally used the plural formulation "rules of recognition."[73] For the most part, however, he referred to the "rule of recognition" in the singular, and I shall generally follow him in doing so.

Hart's usage might also suggest that all rules of recognition are of a single kind. This, too, is incorrect.[74] Efforts to establish claims of legal validity or invalidity typically depend on chains of reasoning that are seldom spelled out.[75] For example, *A* possesses a legal right against *B* because an Act of Congress as authoritatively interpreted by a court creates the claimed right; the Act was adopted pursuant to constitutionally specified processes (that include votes by duly elected officials in each of two Houses of Congress); it comes within a grant of congressional power under Article I of the Constitution; the authoritative interpretation of the Act was rendered by a court properly constituted under the Constitution and laws of the United States; and so on. As this abbreviated example suggests, some criteria of legal validity owe their own validity to, or can be derived from, more ultimate rules. At some point, however, the chain of legal justification necessarily comes to an end.[76] In one of its usages, Hart's "rule of recognition" refers to the ultimate, foundational,

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70. HART, *supra* note 21, at 94–95, 100–10.

71. *See* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 659 (1987).

72. *See* HART, *supra* note 21, at 101 ("In a modern legal system where there are a variety of 'sources' of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents.").

73. *See, e.g.*, *id.* at 92.

74. *Cf.* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 150 (Sanford Levinson ed., 1995) ("There is no reason to suppose that the ultimate source of law need be anything that looks at all like a rule, whether simple or complex, or even a collection of rule, and it may be less distracting to think of the ultimate source of recognition . . . as a *practice*.").

75. *See* HART, *supra* note 21, at 103–04.

76. *See id.* at 107–08.

nonderivable set of criteria of legal validity that owes its status solely to the social fact of its acceptance.[77]

2. The Status of the Constitution as Law

The illuminating power of Hart's idea of ultimate or nonderivable rules of recognition comes immediately into view if we ask why what we call the Constitution is, today, the law of the United States. The short answer is that the Constitution owes its lawful status to the social fact that it, or some nonderivable part of it, is simply *accepted* as such within a relevant social practice or practices.[78] This is a point of fundamental importance: the fact that a provision was once intended or understood to have future-binding force cannot make that provision law today unless a *current* rule of recognition accords that intent or understanding legally controlling force.[79] For example, the Articles of Confederation and the decrees of the British Parliament were once intended and understood to be binding law in part of what today is the United States. But Parliamentary decrees and the Articles of Confederation are no longer the law here because they have ceased to be recognized as such, regardless of whether the processes of their displacement were themselves lawful under British

77. *See id.*

78. *See* Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 51–53 (1994) (arguing that the "ultimate validity" of the Constitution is "not itself a constitutional question, but a political and sociological one"). It is undoubtedly possible to pose nice questions about whether all or only part of the Constitution owes its lawful status to an ultimate rule of recognition grounded in acceptance. Kent Greenawalt thus offers this formulation as a first approximation of "[a]ll or part of the ultimate rule" of recognition in the United States: "Whatever the Constitution contains, the present legal authority of which does not depend on enactment by a procedure prescribed in the Constitution, is law." Greenawalt, *supra* note 71, at 642. Amendments, for example, may be recognized as valid because they satisfy a rule of recognition that can be derived from Article V. At the very least, however, some parts of the Constitution, including Article V, are valid law solely because they are so regarded—not because they were understood or intended to have future-binding force by the Constitution's framers and ratifiers. *See id.* at 641.

It also bears noting that rules of jurisdiction and hierarchy may bind lower court judges and some other officials to accept the Supreme Court's determinations, rather than to apply the same rule of recognition applied by the Court. *See id.* at 636; Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC'Y 149, 162 (2003).

79. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 887 (1996) ("[N]o version of a command theory, however refined, can account for our constitutional practices.").

jurisprudence, the Articles of Confederation, or the constitutions and laws of the former colonies in 1787, 1788, or 1789.[80]

3. Nonoriginalist Precedent as Law

Once it is recognized that the foundations of law necessarily lie in social facts involving contemporary acceptance, the claim that judicial precedent cannot establish valid law contrary to what otherwise would be the best interpretation of the written Constitution appears in a most doubtful light. Judicial recognition of precedent as establishing the law of the United States has been a central, widely accepted feature of our constitutional practice almost from the beginning.[81] Even critics of judicial reliance on nonoriginalist precedent acknowledge that "[t]he idea that '[t]he judicial Power' establishes precedents as binding law, obligatory in future cases," began to take root no later than the early nineteenth century.[82] Since then, the Supreme Court has invoked stare decisis with great frequency, seldom if ever apologetically. So far as I am aware, no

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80. As Bruce Ackerman has emphasized, the Constitution was ratified by conventions of the people in the several states, not by the legally regular processes of the states' legislatures. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1017 (1984). The ratification process thus appears not to have satisfied preexisting legal criteria for valid enactment into law. *See id.* at 1017 n.6. Although Akhil Reed Amar argues that the "right" of the people to alter the structure of government without following prescribed legal forms was in fact recognized in every state via declarations of rights of other background norms, Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 475–87 (1994), my own tentative view is that in at least some states the asserted "right" of the people to act outside established legal forms was a moral rather than a legal right. Even if Ackerman were proved wrong, however, and if it were demonstrated that the Constitution had initially been established by legally authorized processes, past legal authorization would not have sufficed to sustain it if—as was the case with decrees of the British Parliament—the people once subject to it had, as a matter of social fact, ceased to accept its claim to authority.

81. *See* Lee, *supra* note 2, at 662–81 (tracing the history of constitutional stare decisis from the founding through the Marshall Court). Although the early history is less than perfectly consistent, founding-era commentators generally presupposed that constitutional precedents would be treated as authoritative, *see id.* at 718, and the Marshall Court's decisions "repeatedly adverted to the binding or controlling effect of precedent," *id.* at 684. Justice Story's influential *Commentaries on the Constitution of the United States* actually maintained that the "conclusive effect of judicial adjudications . . . was in the full view of the framers of the Constitution," 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 350 (Fred B. Rothman & Co. 1991) (1833), and thus, apparently, could be seen as part of the original understanding of the Constitution. I hasten to add, however, that I do not mean to endorse, much less stake my argument on, Story's claim. *See* Fallon, *supra* note 1, at 580 n.44 (noting that Story "diverged sharply" from leading Jeffersonians in his views on some issues of constitutional methodology due, in part, to his ardent nationalism).

82. Paulsen, *supra* note 1, at 1578 n.115.

Justice up through and including those currently sitting has persistently questioned the legitimacy of stare decisis or failed to apply it in some cases.[83]

Indeed, all of the current Justices, including the self-proclaimed originalist Justices Scalia and Thomas, have self-consciously accepted the authority of precedents that could not themselves have been justified under originalist principles.[84] It is also pertinent that all of the Justices, again including the originalists, apparently converge in recognizing as currently valid a number of past decisions that many

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83. There have been occasional complaints and expressions of doubt, including a suggestion by Chief Justice Taney that the Supreme Court might dispense with stare decisis in constitutional cases. *See* The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting). But Taney's suggestion came in a solitary dissent, and he subsequently appeared to apply a more standard position. *See* Lee, *supra* note 2, at 717–18 & n.377. Although Justices have sometimes maintained that to treat precedent as wholly conclusive would violate their oaths to uphold the Constitution, their protests have addressed the weight that should attach to stare decisis, not questioned whether the doctrine should exist at all. *See* Fallon, *supra* note 1, at 582–83. For example, Justice Scalia has frequently questioned whether the Court appropriately follows a misguided or nonoriginalist precedent in a particular case, but he has not suggested that these precedents have no weight or that the Court should never follow them. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 461 (2000) (Scalia, J., dissenting) (agreeing with the majority opinion that "the doctrine of *stare decisis* demands some 'special justification' for a departure from longstanding precedent," but claiming "that criterion is more than met" to justify overruling Miranda v. Arizona, 384 U.S. 436 (1966)); *see also* Tennessee v. Lane, 541 U.S. 509, 558–64 (2004) (Scalia, J., dissenting) (asserting dissatisfaction with the "congruence and proportionality" standard for measuring the constitutionality of legislation enacted under Section 5 of the Fourteenth Amendment, but concluding "principally for reasons of *stare decisis*" that it was appropriate to apply that standard to legislation intended to remedy racial discrimination). Justice Thomas similarly has advocated the overruling precedent in particular cases without doubting the general significance of stare decisis. *See, e.g.*, Randall v. Sorrell, 548 U.S. __, __, 126 S. Ct. 2479, 2502 (2006) (Thomas, J., concurring) (arguing that "*stare decisis* should pose no bar to overruling *Buckley* [*v. Valeo*, 424 U.S. 1 (1976) (per curiam)]" because the Court had not applied *Buckley* "in a coherent and principled fashion").

84. For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Justice Scalia's opinion for the Court, which Justice Thomas joined, relied on prior Court decisions to support its holding that the Takings Clause restricts "regulatory as well as physical deprivations" of property, despite historical evidence that the Clause was not originally so understood. *See id.* at 1028 n.15. Similarly, in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), Justice Scalia, joined by Justice Thomas, wrote an opinion in which he asserted that the dormant Commerce Clause has no historical grounding but concluded that stare decisis mandated the doctrine's continued application because the Court had "decided a vast number of negative-Commerce-Clause cases, engendering considerable reliance interests." *Id.* at 209–10 (Scalia, J., concurring). Justices Scalia and Thomas have also joined an opinion that relied on precedent to subject federal affirmative action programs to strict judicial scrutiny, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995), notwithstanding the total absence of any evidence that the pertinent constitutional provision, the Due Process Clause of the Fifth Amendment, was originally understood to bar racially discriminatory legislation.

scholars think would be difficult if not impossible to justify on originalist grounds.[85] These include decisions establishing that paper money is constitutional,[86] as is Social Security;[87] that the Equal Protection Clause bars race discrimination in the public schools;[88] that Congress has broad power under the Commerce Clause to regulate the national economy;[89] that the Due Process Clause of the Fifth Amendment, which was ratified in 1791, restrains the federal government from employing racial or gender-based classifications;[90] and that the Equal Protection Clause requires the distribution of voting rights on a one-person, one-vote basis.[91]

When the practices of constitutional law and adjudication are examined carefully, it thus seems irrefutable that under the ultimate rules of recognition now existing in the United States, the Constitution that is accepted or validated as law is a Constitution that is *somehow* compatible with results that diverge from the original understanding of constitutional language. As I have acknowledged, the reasoning by which I have supported the validity of nonoriginalist precedents and precedent-based decisionmaking may appear circular: it is lawful for Supreme Court Justices to treat precedent as decisive of constitutional issues because the Justices long have viewed it as permissible and sometimes obligatory for them to do so. As I shall explain below, more remains to be said, involving other officials' acceptance of, and the public's acquiescence in, Supreme Court practice. But there is no way to escape the circle entirely once it is recognized that the foundations of law, and ultimate criteria of legality, necessarily lie in contemporary social facts.[92]

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85. *See generally* Monaghan, *supra* note 1, at 727–39 (listing examples of prominent doctrines that are likely inconsistent with original understanding).

86. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 457 (1871), *abrogated on other grounds by* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).

87. Helvering v. Davis, 301 U.S. 619, 640 (1937).

88. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

89. *See* Gonzales v. Raich, 545 U.S. 1, 13–14 (2005).

90. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 519 (1996) (gender-based classifications); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 200 (1995) (racial classifications).

91. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 563 (1964).

92. According to the social facts view, the fact that the foundations of law lie in acceptance and that "what officials collectively and self-consciously recognize as constituting a valid law under a general criterion *is* a valid law" necessarily "rules out the possibility of officials, considered collectively, being generally mistaken about what counts as law." Himma, *supra* note 78, at 156.

4. Reconciling Originally Erroneous Precedent with the Constitution

Insofar as nonoriginalist or initially erroneous precedent is concerned, at least two conceptual accounts appear consistent with the sociologically prevailing state of affairs. First, one might say that just as some of the Constitution is law just because it is accepted as an ultimate rule of recognition,[93] nonoriginalist precedent owes its lawful status directly to an accepted rule of recognition that accords some precedents a lawful status on terms coequal with or even superior to the written Constitution.[94]

Alternatively, one can say that accepted rules of recognition call for the Constitution to be construed in light of nonoriginalist precedent.[95] On this interpretation, the relationship between the Constitution and judicial precedent is harmonious, with precedent never standing in a relationship of hierarchical priority.[96] What is of crucial importance, however, is that the Constitution that is accepted as law under ultimate rules of recognition is not an irreducibly originalist Constitution.

C. *Considering and Resolving Some Puzzles*

There is admittedly a good deal that is perplexing about the account that I have just offered, and I have no wish to conceal the perplexities. Confronting a few of them will deepen understanding of the American constitutional order and, especially, of the role of precedent-based constitutional decisionmaking by the Supreme Court.

1. The Idea of Rules in Contexts of Disagreement

Perhaps the largest perplexity—to which I have called attention already—involves what exactly it means to say that all determinations of legal validity reflect "rules." I said above that referring to rules of recognition in the way that I have done so far, following Hart,

93. *See* Greenawalt, *supra* note 71, at 641.

94. *Cf. id.* at 654 ("[T]he force of precedent . . . is an aspect of our law because of acceptance."); Steven D. Smith, *Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium*, 5 AVE MARIA L. REV. 153, 168 (2007) ("[I]t would seem that stare decisis is legally secured on the same basis as the Constitution itself.").

95. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1238–40 (1987) (discussing how, empirically, precedent affects interpretation of the Constitution's text).

96. *See* Strauss, *supra* note 79, at 899 ("[I]t is no part of our [constitutional] practice ever to 'overrule' a textual provision.").

requires using the term rule in a loosely Wittgensteinian sense.[97] In this usage, rules are norms, and convergent behavior will often support the hermeneutic inference that those who agree in identifying the law are following the same rule or rules. Within a practice-based framework such as Hart's, it poses no obstacle to this conclusion that the rules of constitutional adjudication are nowhere authoritatively written down or even that those attempting to conform to applicable norms should be unable to state them. In the words of a well-known account of rule-following that Hart embraced,[98] "the test of whether a man's actions are the application of a rule is not whether he can *formulate* it but whether it makes sense to distinguish between a right and a wrong way of doing things in connection with what he does."[99] What matters is that those participating in the practice should regard their behavior as governed by norms and that they should be open to persuasion that they have behaved mistakenly.[100]

Matters grow more complex and puzzling, however, when—as sometimes occurs in constitutional law—the rules of recognition must be inferred from current practice[101] *and* disagreement exists among those within the practice about what counts as "going on" correctly. As Ronald Dworkin rightly emphasizes, the practice of constitutional interpretation is deeply argumentative,[102] with Supreme Court Justices disagreeing recurrently about the criteria by which they should distinguish valid constitutional claims from invalid ones. If the Justices themselves are divided about the applicable rules of recognition, Dworkin believes, then it is either false or misleading to

97. *See supra* note 38 and accompanying text.

98. *See* HART, *supra* note 21, at 289.

99. PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 58 (1958).

100. *See supra* note 39 and accompanying text.

101. *See* Greenawalt, *supra* note 71, at 624 ("The reconstruction of the practices of officials tells us what the standards are for law in a society."); Himma, *supra* note 78, at 158 ("[A] correct description of the validity criteria in a legal system *S* must express those properties that, as a matter of observable empirical fact, officials collectively recognize as giving rise to legally valid norms they are obligated to enforce."). Probably the best known reconstruction effort is that of Philip Bobbitt, who has identified a variety of "modalities" of constitutional argument—one of which is a precedential argument—that are capable of establishing a constitutional claim as legally valid. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 1–119 (1982). For commentary on Professor Bobbitt's modality-based approach, see, for example, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1788–94 (1997); and Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 293–306 (1993) (reviewing PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION (1991)).

102. *See* DWORKIN, *supra* note 42, at 3–4, 13 (noting that legal practice generally is inherently argumentative).

maintain that their conduct is rule-governed at all.[103] Confronting the same phenomena, Matthew Adler concludes that there are multiple groups applying diverse rules or criteria of recognition, with at most a partial overlap among them.[104]

Although this challenge is clearly formidable, positivist legal theory in the Hartian tradition seems to me to be basically correct in inviting us to think of even the sharpest constitutional disputes as bounded and shaped by widely shared, even if tacit, normative understandings. If disagreement is temporarily put to one side, the phenomenon of "easy cases,"[105] to which I have called attention already, strongly supports this conclusion[106]: nearly everyone agrees that there is a clear, correct outcome to some actual or imaginable disputes. Relatedly, there tends to be broad consensus among lawyers and judges about which arguments are legally colorable and which are not—about which can be asserted in good faith and with a straight face, even if they are not likely to win, and which have no plausible resonance with the current understandings of most practitioners.

Against the background of broad agreement, it should occasion no surprise that disagreements, even fundamental ones, should also occur. The most basic element of rule-following is simply "understanding"[107]: one does not need to "interpret" a rule when one knows immediately and unreflectively how to go on. Yet constitutional law has always, understandably, been thought to

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103. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 39–45 (1977) (arguing that Hart's account of the rule of recognition as the "master rule" of a legal system is untenable); *see also* Andrei Marmour, *Legal Conventionalism*, 4 LEGAL THEORY 509, 513 (1998) (quoting an unpublished manuscript in which Dworkin asserts that " 'Hart's picture of law, as fixed by a conventional rule of recognition, cannot be sustained' ").

104. *See* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 730–31 (2006); *cf.* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 322 (1980) (asserting that "meanings are the property neither of fixed and stable texts nor of free and independent readers but of interpretive communities that are responsible both for the shape of a reader's activities and for the texts those activities produce" and explaining interpretive disagreement as resulting from the existence of multiple interpretive communities).

105. *See supra* note 43 and accompanying text.

106. Strikingly, even the proponents of the attitudinal model of Supreme Court decisionmaking, who insist that the Justices regularly vote in accordance with their political convictions, do not deny that "[m]any meritless cases undoubtedly exist [especially in the lower courts] that no self-respecting judge would decide solely on the basis of . . . policy preferences." SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 11, at 93. Such cases, they acknowledge, are governed by rules. *Id.* at 92–93.

107. *See, e.g.*, Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 20–21 (1993).

require "interpretation"—a reflective activity most at home in contexts that provoke uncertainty.[108] Indeed, the high stakes involved in many constitutional cases seem especially likely to trigger reflection and analysis that may, in turn, actually exacerbate doubt. Then, as analysis deepens, it should not be surprising that second-order uncertainties and debates would arise about the processes that judges and Justices should follow in resolving constitutional questions. Even in disputed cases, however, accepted rules (in the Wittgensteinian sense) typically structure and confine legal argument, even if they do not decisively determine unique resolutions on which all, or nearly all, competent practitioners will converge. Under these circumstances, one might understand the glass as being either half full or half empty, but one could surely not say that there is no glass at all or that there is nothing in the glass that constitutes the rule or rules of recognition.[109] Although the Justices of the Supreme Court have enormous authority not only to base their decisions on controversial views concerning the "best" understanding of pertinent authorities,[110] but also to "bargain" with one another about what the governing constitutional law ought to be in the future,[111] some linguistically imaginable interpretations are simply beyond the pale, and some conclusions are demonstrably correct.

Although I have arrived at this admittedly vague conclusion through jurisprudential analysis, it is significant that the jurisprudential scholarship on which I have drawn is largely consonant with the findings of a broad array of political scientists. At the forefront stand the game theorists who explain how conventions

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108. *See id.*

109. Stanley Fish argues that when the term "rule" is used in this loose a sense, it is either redundant or misleading, since competent practitioners will know how to "go on" in interpretive practice without reference to the "rules" that they are ostensibly supposed to follow. *See, e.g.*, Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1328–29 (1984). In my view, however, in law—possibly unlike other practices that call for interpretation—there is a dialectical relationship between shared tacit understandings and attempts to articulate those understandings in propositional form. As a result, appeals to "rules," and arguments about them, inform judgments and can sometimes provoke reappraisals of what counts as "going on" correctly. *See generally* Owen Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

110. *See* Himma, *supra* note 78, at 178 (asserting that the Justices' criticisms of one another for their choice of interpretive methodologies "suggest[] . . . that the Justices are practicing a recognition norm that requires the Court to ground its validity decisions in the best interpretation of the Constitution").

111. *See* COLEMAN, *supra* note 18, at 100 (characterizing the rule of recognition in the United States as a conventional "framework for bargaining" that may frequently "involve moral or political arguments" about "how to go on" in a way that all might come to accept as a basis for stable future cooperation).

and equilibria can emerge from and then shape the strategic interactions of multiple parties. Indeed, as I have noted, some jurisprudential theorists in the Hartian tradition have incorporated game theoretic concepts into their accounts of the nature of legal rules, including the rule of recognition.[112] In a slightly more surprising convergence, my conclusion that legal rules or equilibria may often bound disagreement even when they do not uniquely dictate outcomes is not inconsistent with, and indeed might help to explain, the findings of attitudinalist political scientists who predict Supreme Court Justices' voting behavior based on their political ideologies.[113] If the Justices are authorized to make judgments about what would be best from a moral or policy-based perspective within the bounds established by shared understandings of the constitutionally colorable, then practice-based theorists in the Hartian tradition can embrace, rather than reject, the attitudinalists' central conclusions.

One more point of comparison may also bear noting. Whereas my conclusion that applicable constitutional rules, including rules of recognition, give the Justices a significant authority to shape the law accords with the analyses of many political scientists, it will disturb other observers, including constitutional orginalists, who hold an ideal of the rule of law that calls for more legal determinacy. I shall discuss this concern more fully below.

2. Identifying a Practice and Its Practitioners: Whose Acceptance Matters?

I have said that among the challenges confronting practice-based theories of law is to sketch the lines that distinguish the relevant practice and its practitioners from other, possibly related practices and those who engage in them.[114] In explicating the idea of a rule or rules of recognition, Hart thought the relevant practices were those of law-applying officials, especially judges.[115] Any application of Hartian

112. *See supra* note 24 and accompanying text.

113. *See, e.g.*, Ruger et al., *supra* note 14, at 1171–79. This conclusion is consistent with the attitudinal model even if there is no necessary agreement on how the Justices actually reason to their conclusions—a point of potential dispute that I shall take up below. *See infra* Part IV.

114. Matthew Adler offers one of the best and most challenging explorations of this question. *See generally* Adler, *supra* note 104. Professor Adler concludes that rather than there being one rule of recognition definitively fixed by one identifiable group (such as by judges, for example), there are multiple "recognition groups" accepting multiple, largely but not perfectly, overlapping rules of recognition. *See id.* at 730–31.

115. *See* HART, *supra* note 21, at 256 ("[T]he rule of recognition . . . is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts."); *see also id.* at 116 ("[R]ules of recognition

positivist theory to the legal system of the United States must therefore emphasize the central role of Supreme Court Justices. But that emphasis should not be exclusive—a point that can be brought out by asking whether it follows from a practice-based account that the constitutional law of the United States is whatever the Justices say that it is. As I have suggested, in the view of some, perhaps many, the prospect that the Constitution might mean no more than what the Justices say it means is a nightmare sufficiently frightening to inspire a flight to originalism, which promises to bind the Justices to unchanging law.

Hart himself rebuffed the suggestion that the Constitution means whatever the Justices say that it means in terms that still seem largely correct:

> At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system. . . . The adherence of the judge is required to maintain the standards, but the judge does not make them.[116]

Despite my basic agreement, I would differ from Hart with respect to a point of emphasis, and I would also introduce a supplemental explanation. With respect to emphasis, it should be made explicit that although Supreme Court Justices are bound by legal rules, the pertinent rules either have a broader area of open texture than Hart's formulation might suggest or vest the Justices with considerable responsibility for making important practical judgments.[117] It matters enormously who sits on the Supreme Court, where legal rules bind, but shared understandings often fail to determine ultimate conclusions.

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specifying the criteria of legal validity and [the legal system's] rules of change . . . must be effectively accepted as common public standards of official behaviour by its officials."). By contrast, Hart said, "[t]he ordinary citizen manifests his acceptance largely by acquiescence." *Id.* at 61.

116. *Id.* at 145–46.

117. For current purposes, I put to one side the important, much mooted question of whether the rule of recognition observed by officials is better characterized as a "social rule," *see id.* at 55–61, 254–59; a "convention" or "Lewis-convention," *see, e.g.*, Adler, *supra* note 104, at 730–31 (explicating but not endorsing this view); a "shared cooperative activity," *see, e.g.*, Scott J. Shapiro, *Law, Plans, and Practical Reason*, 8 LEGAL THEORY 387, 394–401 (2002); a "constitutive rule," *see* Marmour, *supra* note 103, at 521–27; or in some other terms.

With respect to supplemental explanation, I would maintain that even if the Justices might otherwise be disposed to deviate from ultimate rules of recognition, they would be constrained to some extent by *others'* practices of recognition in ways that rational choice and game theoretic accounts that employ the notion of multiple equilibria help to illuminate.[118] Although I shall not attempt to identify the diversity of actors who have roles in constituting and supporting our constitutional regime, the Justices' practices are nested among, and are almost necessarily sensitive to, a variety of legal and political practices involving nonjudicial officials and the concerned public.[119]

The claim that the Justices' practices are sensitive to the practices of nonjudicial officials is most straightforwardly empirical and predictive, and is supported by strategic speculations. Supreme Court decisions can be efficacious only insofar as they are accepted as legally legitimate by other public officials without whose cooperation judicial decrees would go unenforced. Justices who care about the implementation of their rulings thus have a reason to regard other officials' potentially defiant reactions as a constraint on their decisionmaking.[120] Also pertinent to understanding the role of the Supreme Court in applying and sometimes adapting ultimate rules of recognition is the Court's need to maintain the support, acceptance, or at least the acquiescence of a broader public within a structure of government that creates multiple levers of influence on the Court's size, its composition, and its jurisdiction.[121] Justices of the Supreme

118. Although Hart emphasized the importance of the practice of judges in observing the rule of recognition, he did not wholly ignore the patterns of acceptance or acquiescence by other officials and, ultimately, by ordinary citizens necessary to "the complex phenomenon which we call the existence of a legal system." HART, *supra* note 21, at 61.

119. *See* Himma, *supra* note 78, at 154 ("Since the legal authority of the courts is constrained by the acceptance of other officials, the existence and content of the rule of recognition depend on the joint practices of both judges *and* other officials."); *cf.* McNollgast, *supra* note 23, at 1666–68, 1675–83 (noting how attitudes and likely responses of other institutional actors, including Congress and the lower courts, may influence Supreme Court decisionmaking).

120. *See* Himma, *supra* note 78, at 154; *see also* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1341–42 (2006) (discussing effects of "implementation concerns" on Supreme Court decisionmaking); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295–308 (2005) (discussing the effect of need to secure compliance from lower court judges on Supreme Court decisionmaking).

121. *See* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021 (1996). In suggesting that the Supreme Court's practices of recognition are constrained by and in some respects take account of public opinion, I need to be careful not to overstate my claim. Pursuant to applicable rules, the Supreme Court can—and sometimes may be legally required to—pronounce judgments that many of the public may

Court are nominated by the President and confirmed by the Senate with the acceptability of their general views very much in mind.[122] Congress also has the power to adjust the size of the Court[123]—a power that it has used in the past in order to achieve policy goals[124]—and possesses at least some authority to control the Court's jurisdiction.[125] Under these circumstances, Supreme Court Justices who want to maintain the long-term efficacy of their own rulings must recognize dominant public sentiment—typically as manifest through elections and the political branches—as a constraint on this authority to shape constitutional law, at least with respect to matters of high public salience.[126]

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think mistaken, even outrageous. Insofar as individual decisions are concerned, the Court is a countermajoritarian institution, charged to enforce the law even when enforcing the law is not popular. As recent political science literature has confirmed, the Court enjoys a reservoir of "diffuse support" that is little threatened by particular decisions. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1828–33 (2005). Nevertheless, the Court must not get too far out of line with dominant currents of public opinion if its rulings are to prove efficacious.

122. *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 93–105 (1985); Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2182–91 (2006); *see also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 801–02 (2006) ("[I]n the last fifty to eighty years the Court has come to be seen as a more important player than ever before in effectuating political and social change. As a result, the political views of individual Justices have become correspondingly more important." (citation omitted)); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2368 (2006) ("[I]t is precisely under strongly unified governments that the political branches are most able to constrain the Court and over time to exercise further control by appointing a number of Justices.").

123. Over the course of American history the number of seats on the Supreme Court has been as low as six and as high as ten. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 35 & n.43 (5th ed. 2003).

124. *See, e.g.*, *id.* (noting that Congress in 1863 reduced the size of the Supreme Court to just seven Justices "to keep President Johnson from filling vacancies").

125. *See id.* at 319–57 (discussing jurisdiction-stripping efforts and the issues that they present).

126. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 15, at 157–59. Probably the best measure of the Court's sensitivity to the public acceptability of its decisions lies in its historic pattern of decisionmaking. As Robert Dahl documented more than fifty years ago, the Supreme Court has seldom been seriously out of touch with aroused political majorities for any sustained period. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957); *see also* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 190 (1989) ("[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 224 (1960) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 687 (2006) ("We live in a nation where our

In describing the Supreme Court as constrained, I have thus far spoken in an empirical or strategic vein, without explaining how the constraints that I have identified relate to legal norms. The problem here seems to me to be a deep one—in ways that the Wittgensteinian notion of a rule helps to bring out though not ultimately to resolve. Looking at the Supreme Court's long-term pattern of decisions, I would surmise that the Justices have internalized the constraint that the Court must conduct itself in ways that the public will accept as lawful and practically tolerable as an element of the rules of recognition applicable to constitutional cases: the Court's interpretations of the Constitution must be likely to be accepted and enforced by at least a critical mass of the officials normally counted on to implement judicial decisions, and they should not trigger a strong and enduring sense of mass outrage by political majorities that the Court has overstepped its constitutional powers.

The Court, I must emphasize, has never stated explicitly that such a rule exists. Moreover, the one opinion of which I know in which the Court suggested that public attitudes should influence it—*Planned Parenthood of Southeastern Pennsylvania v. Casey*,[127] in which it said that it must consider public sensibilities in determining whether to overrule its most iconic precedents[128]—triggered protests not only from commentators, but also from the dissenting Justices.[129] Nevertheless, it is easy to point to cases, tracing as far back as *Marbury v. Madison*,[130] in which the Court has adhered to a rule (in the Wittgensteinian sense) of prudential avoidance of decisions likely to provoke executive branch defiance that would be backed by public

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Supreme Court follows the presidential and senatorial election returns and frequently overrules major precedents, invoking the constitutional text as its reason for doing so."). *But see* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 11, at 424–28 (arguing that Supreme Court decisions generally correspond with public opinion not because the Justices take public opinion into account, but because public opinion influences who is nominated and confirmed to sit on the Court).

127. 505 U.S. 833 (1992).

128. *Id.* at 867–69.

129. *Id.* at 996–1001 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated."); *see also* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1031–38 (2003) ("The Court in *Casey* ... says the most monstrous thing imaginable: that the Court should adhere to even clearly wrong decisions, and especially to its most egregiously wrong decisions, so that it can avoid damage to its own legitimacy and maintain its power.").

130. 5 U.S. (1 Cranch) 137 (1803).

opinion.[131] Although *Marbury* spoke assertively of judicial power, Chief Justice Marshall's opinion in fact reached a result crafted to avoid a showdown that the Court could not have won.[132] Since *Marbury*, the Court has exhibited a recurrent strand of prudential decisionmaking in which it has seldom entered rulings that it could not expect federal officials, centrally including the President, to obey. Under these circumstances, I believe that a tacit understanding exists among the Justices and the legal profession that just as the Constitution should not be so interpreted as to make it a "suicide pact,"[133] neither should the Justices adopt positions that put the Court's long-term authority seriously at risk.

Positing an internal connection between the rules of recognition applied by the Supreme Court and public practices of recognition of judicial decisions as legitimate or illegitimate helps to explain why—as I have emphasized—it is virtually unimaginable that the Justices could ever renounce long-settled precedents around which public support and entrenched expectations have developed. A Supreme Court that held that paper money and Social Security were unconstitutional, that *Brown v. Board of Education*[134] was wrongly decided, or that states need not adhere to one-person, one-vote principles would be rightly denounced by the public as committing grave constitutional errors—even if the Court could demonstrate compellingly that its rulings reflected the original understanding in every case. The gravamen of the complaint against the Court would

131. *See, e.g.*, Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 16–20, 27–33 (2003) (describing *Marbury* as a prudent response to the nation's political context and discussing the continuing existence of prudential decisionmaking). *Naim v. Naim*, 350 U.S. 985 (1956), in which the Court refused to decide a challenge to the constitutionality of a state statute prohibiting interracial marriage, *id.* at 985, provides one notorious example of prudential avoidance of a judicial decision likely to provoke resistance. *See* Fallon, *supra*, at 29–30. For another example of prudential decisionmaking driven by political necessity, see David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 70 (1984) (describing the "political exigencies" that motivated the Court's decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), as well as the Court's awareness that "efforts to coerce the states to pay their debts would prove unenforceable").

132. *See, e.g.*, Fallon, *supra* note 131, at 16–20 (describing *Marbury* as reflecting "judicial prudence tinctured with guile" in its recognition that "the Court must sometimes recede from conflict with the political branches or with aroused public opinion in order to maintain its prestige and thus its power"); *see also* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 182–86 (2005) (discussing the political circumstances motivating the Court's opinion in *Marbury*).

133. Terminiello v. City of Chi., 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

134. 347 U.S. 483 (1954).

be that the Constitution that is the fundamental law of the United States is not an exclusively originalist Constitution. Rather, it is a Constitution under which the Court can and sometimes must accept settled precedents around which strong public reliance interests and expectations have developed. If the Justices should suddenly abandon the long-accepted rules of recognition that validate some nonoriginalist precedents as legally authoritative, they would not be following the law that it is their duty to uphold, but attempting a jurisprudential if not a political revolution—the judicial analogue to a coup d'etat. There is reason to doubt whether the Court could get away with it.

D. The Critics' Objection Restated—and Re-Answered

Although I have now taken a considerable jurisprudential excursion, my aim has been to establish a single main point: originalist protestations notwithstanding, it is simply false that the idea of "interpretation" of a written Constitution commits interpreters to deciding cases in accordance with the originally intended meaning or original public understanding of constitutional language. Correspondingly, it is simply true that nonoriginalist precedent sometimes prevails *as a matter of law* over what would otherwise be the best interpretation of the written Constitution. The Constitution necessarily draws its meaning from the interpretive practice or practices in which it is situated. Within our current interpretive practices, what is accepted and enjoys the status of law is not the unglossed original Constitution—as it would be read in light of the original understanding or its plain language—but a Constitution capable of being interpreted in light of judicial precedent.

In response to this claim, originalists might attempt any of three jurisprudential counterarguments. The first would merely apply a jurisprudential label to, and supply a historical pedigree for, the originalist assumption that the framers' and ratifiers' understanding of constitutional language fixes its meaning irrevocably. According to the theory of law articulated by John Austin, the "commands" of the sovereign define the law.[135] Invoking this theory, originalists might say that in the case of the United States Constitution, the framers and ratifiers are the relevant sovereign whose commands (as originally

135. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), *reprinted in* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE, at xxv, 13–14 (Isaiah Berlin et al. eds., 1954).

understood) therefore establish the Constitution's enduring meaning.[136] As H.L.A. Hart demonstrated, however, the command theory of law is a bankrupt jurisprudential theory. The commands of a would-be sovereign can count as law only insofar as they are accepted as such as a matter of sociological fact.[137]

A second jurisprudential counterargument might attempt to portray the Constitution as a contract among the American people that must be interpreted in accordance with the objective meaning of the contract's words at the time of its adoption.[138] On this view, past wayward practices—involving nonoriginalist decisionmaking and adherence to initially erroneous precedents—could not alter the terms of a historical meeting of the minds. The difficulty, of course, is that the Constitution is not and never was a contract.[139] Not everyone agreed, or would have agreed, to be bound by the Constitution at the time of its ratification.[140] No one alive today has ever been asked to agree to its unglossed original meaning as part of a fair, uncoerced bargain. Any claim that the Constitution should be regarded as a contract is therefore misguided.[141]

A third jurisprudential response would be more subtle. Embracing Ronald Dworkin's claim that theories of law are necessarily "interpretive,"[142] it would concede that the foundations of law lie in the social facts of contemporary practice, but it would claim that originalism offers the "best" account—as measured by criteria of "fit" and normative attractiveness—of the interpretive approach that the norms of our current practice require.[143] An originalist who adopted this line of defense would begin by emphasizing that existing practice has an indisputable originalist strand, with many cases decided in accordance with the original understanding (or at least with a majority account of the original understanding). An originalist who accepted Dworkin's interpretive theory of jurisprudence would

136. *See id.*; *see also* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2064–65 (1995) (identifying the "command theory of law" as a constitutive principle of "classical" legal positivism).

137. *See* HART, *supra* note 21, at 50–61.

138. *See generally* HARDIN, *supra* note 47 (developing and debunking this argument).

139. *See id.*

140. The originalist Randy Barnett so acknowledges. *See* Randy Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 123 (2003) ("The Constitution was not approved by a unanimous vote, nor even by a majority of all persons in the country at the time.").

141. *See* Barnett, *supra* note 140, at 123–25.

142. *See, e.g.*, DWORKIN, *supra* note 42, at 87 (arguing that "[l]aw is an interpretive concept" and that disagreements among judges are "interpretive" disagreements).

143. *See id.* at 229–32.

then need to acknowledge that our current practice also includes nonoriginalist elements, but would insist that the best interpretation of our practice would characterize precedents claiming judicial authority to adhere to nonoriginalist decisions as "mistakes."[144]

Although surely imaginable, this purported "interpretation" of our existing practice seems to me to fail with respect to both of Dworkin's criteria of "fit" and normative attractiveness. I shall briefly discuss normative arguments in favor of originalism, and indicate why I think those arguments unpersuasive, below.[145] With respect to fit, my arguments to this point will already have suggested that too many strands of nonoriginalist decisionmaking are too deeply entrenched in our existing constitutional practice for any theory that dismissed them as mere mistakes to qualify as an "interpretation" of existing practice rather than as a reform proposal.[146]

E. Practice Within Practices and the Puzzling Phenomenon of Metarules

Despite originalism's implicit jurisprudential mistake in failing to acknowledge that the foundations of law lie in current practices of acceptance, originalists are right about one important thing, which is crucial in understanding how our constitutional practice works. Many originalists shrewdly grasp, at least intuitively, that our existing practices of constitutional adjudication and argument have multiple levels. Those practices are, moreover, open and reflexive, permitting and even inviting arguments about what *ought* to count as good first-order constitutional arguments even if they are not, now, widely credited as such. Exploiting the potential fluidity of current understandings, at least some originalist claims can be interpreted not as assertions about what current law requires, but as calls for now-prevailing rules of recognition to be *changed* for the future so that interpretations supported by the original understanding of constitutional language would always prevail. And, significantly, originalists' arguments for adopting exclusively originalist rules of recognition count as ones that deserve to be taken seriously (within broadly shared tacit understandings) in a way that an argument for interpreting the Constitution to accord with the teachings of, say, Plato, Hobbes, or Lenin would not.

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144. *Cf.* DWORKIN, *supra* note 103, at 118–23 (discussing the need for legal theories to dismiss some past decisions as "mistakes").

145. *See infra* note 149 and accompanying text.

146. *See supra* notes 81–92 and accompanying text.

To frame the point specifically in terms of the legal status of nonoriginalist precedent, those who argue for a rejection of constitutional stare decisis advance a reform agenda, but one that can be supported by colorable (even if mistaken) arguments within the second-order rules (or shared tacit understandings) of our complex, multilayered constitutional practices. Second-generation originalist Randy Barnett seems to recognize as much when he laments that most judges and Justices are not originalists[147] and when he says expressly that the goal of originalists should be to "achiev[e] a change in the law, however gradual."[148]

Although I have little personal sympathy for the orginalists' reform agenda,[149] I shall not pause here to engage in sustained normative argument. My goals in this Article are analytical, not prescriptive. Nonetheless, it is important to understand that our

147. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13–15 (2006) (arguing that Justice Scalia is not an originalist and citing illustrative examples); Barnett, *Super Precedent*, *supra* note 58, at 1247 ("[There are] seven full-time non-originalist Justices and one faint-hearted (and part-time) originalist Justice.").

148. Barnett, *Super Precedent*, *supra* note 58, at 1247.

149. Assuming the burden of expressly normative argument, Barnett argues that reform is in order because it is only through the adoption of an originalist rule or practice of recognition that we could get a "legitimate" Constitution, by which he means one that would deserve adherence. *See* Barnett, *supra* note 147, at 16–19. In my view, we do have a Constitution that is "legitimate" in the moral sense of deserving adherence, but it is crucially pertinent that ours is in considerable part an eighteenth-century Constitution, the moral attractiveness of which depends largely on its adaptability. It would not be a morally attractive Constitution if it dictated, for example, that paper money was unlawful and therefore worthless, that Social Security was unconstitutional, and so forth—or even if it made the constitutional status of such institutions and decisions depend on the uncertain outcomes of ongoing historical investigations. Among other things, to make constitutional validity turn entirely on historical research—in a context in which the Constitution is so hard formally to amend—would create enormous pressure for the Supreme Court to engage in less than wholly candid analysis in order to guarantee publicly and politically acceptable outcomes. I can think of no good reason to create strong incentives for the Justices to cast themselves as historians and then to falsify the historical record. *See generally* Shapiro, *supra* note 117 (asserting a judicial obligation of candid legal analysis); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299 (2005) (arguing in favor of interpretive methodologies that encourage candor).

In arguing that the Constitution's legitimacy requires the originalist assumption that constitutional meaning is fixed and unchanging, Barnett also maintains that authorizing the judiciary to distinguish permissible and desirable adaptations from impermissible and undesirable ones represents an unfair and imprudent allocation of political power. *See* Barnett, *Super Precedent*, *supra* note 58, at 1247. In responding to this argument, I do not mean to overstate my claims, for it is not my view that our current constitutional regime is ideal. I do, however, have a Burkean sense that we are probably wiser to continue on with the very old Constitution that we now have—which necessitates adaptive interpretation—than to accept the hazards of attempting to reach agreement on a better constitution under our current political circumstances.

constitutional practice includes second-order arguments about what the rules of recognition ought to be as well as about how the existing rules apply to particular cases. Especially in light of the openness of our constitutional practices to second-order arguments, it is also important, in thinking about the legal status of initially erroneous precedents, to understand the contingency of the foundations on which current law necessarily rests. Today it is unthinkable that paper money could be unconstitutional. But in a possible future world in which all financial transactions occurred via wireless networks, a declaration that greenbacks are unconstitutional might not be impossible. If a future government succeeded in creating a strong enough system of individual retirement accounts, it is not unimaginable that at some point a court might knock the last legs from under the Social Security system by ruling it constitutionally invalid. And if skin color ever became as socially irrelevant as eye color, then the judicial validation of the 1964 Civil Rights Act might come to be seen as a legal mistake explicable only by the pressures to which the Supreme Court was subject in the 1960s. Changes such as these might appear only to alter the status of particular precedents as beyond overruling with the ultimate criteria of legal validity remaining unchanged. But the relevant contingencies run deeper. In a world in which originalist decisionmaking upset few deeply settled expectations, originalism might take root. However stable current rules of recognition may appear, any sound theory of precedent in constitutional adjudication must acknowledge the inescapable possibility of change.

III. DECISIONS TO OVERRULE PRECEDENT AND THE CONCEPT OF SUPERPRECEDENT

So far I have discussed whether it is legally legitimate in principle for the Supreme Court ever to base its rulings on precedent in constitutional cases in which it would otherwise reach different conclusions. In this Part, I want to discuss the overruling of precedent.

A. Precedent and Paradox

Beyond issues of constitutional supremacy under Article VI, the doctrine of precedent might appear to contain a further paradox to which I have called attention already: the traditional doctrine maintains both that past, erroneous decisions can bind the Justices, requiring them to reject what would otherwise be the best

interpretation of the Constitution, and that prior judicial mistakes are not binding insofar as the Justices might decide to overrule them. The question thus arises whether the doctrine of precedent rests on a contradiction involving the status of precedent as binding law.

Although Michael Paulsen has argued that the answer to this question is yes,[150] I believe that he is mistaken for reasons that once again emerge from a practice-based, positivist understanding of constitutional law. The meaning of the Constitution is partly a reflection of the practice that the Constitution inhabits, and the practices of the most immediately responsible officials—judges and especially Justices—call for judges and Justices to exercise judgment in determining which initially erroneous precedents to uphold. As the Justices themselves have put it, reliance on precedent is a policy, not an inflexible rule.[151] As I would put it, an ultimate rule of recognition authorizes the Justices to treat otherwise erroneous precedents either as binding or not on the basis of case-by-case considerations, some of which are "pragmatic" and "prudential."[152]

In stating this conclusion, I need to stress, once again, that the Justices' powers are broad and important. As Hart emphasized, any sophisticated legal system needs power-conferring rules authorizing some institutions or officials to change the law. Within American constitutional practice, the rules of recognition that structure Supreme Court decisionmaking are not always sharply distinguishable from power-conferring rules authorizing the Court to effect legal change. Sometimes the Justices appeal to the Constitution's original meaning or to its plain language to reverse precedents that they regard as erroneous.[153] But sometimes, too, the Court overrules past decisions that could plausibly appear consistent with the Constitution's plain language or original understanding in order to reach results more consonant with the Court's own precedents. *Lawrence v. Texas*,[154] in which the Court reversed an earlier decision in *Bowers v. Hardwick*[155] and held that the Due Process Clause of the Fourteenth Amendment confers a right on consenting adults to engage in private acts of sodomy,[156] falls within the latter category.

150. *See* Paulsen, *supra* note 4, at 291.
151. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996).
152. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).
153. *See* Calabresi, *supra* note 126, at 637.
154. 539 U.S. 558 (2003).
155. 478 U.S. 186 (1986).
156. *Lawrence*, 539 U.S. at 578.

In effecting legal change through constitutional adjudication, the Supreme Court remains subject to rules (in the Wittgensteinian sense)[157] that limit its lawful powers, including rules that require it to pay heed to entrenched expectations and public acceptability. To repeat now familiar examples, the Court would be wrong to invalidate Social Security or paper money because of the settled expectations that have developed around them. By contrast, among the considerations that made the overruling of *Lochner*-era precedents permissible was that by the late 1930s they had become unacceptable to reigning political majorities.[158] Again, however, any honest, practice-based account of the authority of the Supreme Court either to follow or overrule initially erroneous precedent must acknowledge the large scope accorded to the Justices' practical judgment—another conclusion that is consistent with the findings of attitudinalist political scientists[159] and that some normative theorists will think disturbing. I also believe that any good practice-based account should reflect or at least be consistent with the insights of game theorists who emphasize that the Court must decide cases in light of the anticipated reactions of lower courts, Congress, and ultimately the public for its rulings to prove durable and effective.[160] This latter set of considerations acts as a constraint on the Justices' capacity to shape the law—within the boundaries established by applicable legal rules including rules of recognition—in accordance with their normative preferences.

B. Superprecedents

In saying that some precedents have generated settled expectations that preclude their being overruled, I am making claims similar to those asserted by champions of the idea that our jurisprudence includes "superprecedents." Admittedly, the notion of superprecedents does not refer to any category of legal analysis that the Supreme Court has ever formally invoked. As I have emphasized,

157. *See supra* note 38 and accompanying text.

158. In suggesting that overruling was "acceptable," I do not mean to be taking a stand on whether or to what extent the unacceptability of the prior regime was the principal driver of the Supreme Court's reversal of course, as suggested, for example, by William Leuchtenburg, *see* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 142–43, 216–20 (1995), or whether the rejection of *Lochner* and its progeny reflected the culmination of gradually unfolding doctrinal developments that were at least partly independent of surrounding political currents, *see, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 45–46, 84–105 (1998).

159. *See supra* notes 11–14 and accompanying text.

160. *See, e.g.*, McNollgast, *supra* note 23, at 1666–68.

however, the norms of a practice such as constitutional interpretation need not be formally stated in order to count as rules in the relevant sense. If explications of the concept of superprecedent cogently summarize the tacit norms of existing practice, then the term might be a useful one.

To date, the concept of superprecedents has most frequently been deployed, and indeed appears to have originated, in discussions of whether *Roe v. Wade* should be viewed as immune from overruling on the ground that the Supreme Court has reaffirmed it against multiple challenges over more than three decades.[161] As applied to continuingly controverted decisions such as *Roe*, however, the label of superprecedent seems inapt.[162]

If I understand the tacit norms of our constitutional practice correctly, for judicial decisions to qualify as superprecedents, they would need to satisfy at least two criteria. First, and most important, they would need to have established a rule of law around which strongly held, settled expectations or reliance interests have developed. These expectations and interests would need to be sufficiently strong that the Supreme Court's abandonment of its prior holding would cause widespread dislocation and predictable, potentially successful, political efforts to rebuke the Court and to undo its overruling decision.

A necessary second criterion of a superprecedent, in my view, would be that it deals with matters that no longer occasion broad, ongoing, unstable contestation in American law and politics. To be sure, a bare five to four majority of the Justices said otherwise in *Casey*, which gave as a reason for not overruling *Roe* that for it to do so "under fire" would put the Court's "legitimacy" at risk.[163] But to

161. The notion of superprecedents first appears to have been articulated in a judicial opinion by Judge Michael Luttig, who once characterized *Roe v. Wade*, as having achieved "super-*stare decisis*" effect through repeated reaffirmations by the Supreme Court. Richmond Med. Ctr. for Women v. Gilmore, 219 F.3d 376, 376–77 (4th Cir. 2000). Senator Arlen Specter next picked up the term when he asked John Roberts during his Supreme Court confirmation hearings whether Roberts believed in "super-duper" precedents in constitutional law. *See* Rosen, *supra* note 6, at 1 ("The term superprecedents first surfaced . . . when Senator Arlen Specter . . . asked [Roberts] whether he agreed that certain cases like Roe had become superprecedents or 'super-duper' precedents—that is, that they were so deeply embedded in the fabric of law they should be especially hard to overturn."). For sympathetic discussions, see generally Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006); Gerhardt, *supra* note 6; and Sinclair, *supra* note 6.

162. *Cf.* Gerhardt, *supra* note 6, at 1222 (observing that "persistent challenges are indicia of the failure of precedents to achieve super precedent status").

163. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992).

accept *Casey*'s dictum as authoritative would be both bold and imprudent. As the *Lochner* era illustrates, for the Supreme Court to fail to renounce a sufficiently reviled decision could itself have devastating consequences for its perceived legitimacy. It is highly doubtful that the *Casey* dictum either stated an enduring normative commitment of the Justices or expressed a widely shared public understanding by which a future Court would feel constrained.

Once again, public attitudes are likely to matter in ways that rational choice theories that emphasize the multitude of games bearing on constitutional law can help to bring out. If the rules of constitutional adjudication can be characterized as or are supported by equilibria, it seems plain that legal equilibria are likely to remain stable in the long run—not varying with Supreme Court nominations and confirmations—only insofar as they are acceptable to prevailing alignments of political forces. Social Security, paper money, and the 1964 Civil Rights Act are now entrenched politically as well as legislatively. By contrast, *Lochner* could not remain stable amid the turmoil of the 1930s that culminated in an enduring political realignment and led to the reshaping of the Supreme Court. Although shifts in the political ground since 1973 have not so far made *Roe* untenable, the multiple factors needed to support it remain too fragile for the label of superprecedent to reflect more than wishful thinking by *Roe*'s supporters.

IV. A SKEPTICAL CHALLENGE: THE ATTITUDINAL MODEL

Although I have now claimed that the tacit norms of constitutional practice leave a large ambit for Supreme Court Justices to exercise ideologically influenced judgment, I have also maintained that precedent matters to their decisionmaking, binding them in some cases and empowering them in others to extend a precedent's reach. I have also assumed more generally that the Justices adopt an "internal point of view"[164] toward the rules of recognition that lie at the foundation of our legal system: they regard rules of recognition as "common standards of official behavior and appraise critically their own and each other's deviations as lapses."[165] Obviously, the claims that precedent matters to the Supreme Court and that the Justices regard the law from an internal point of view both invite challenge. And prominent among current challenges are those that come, or might appear to come, from the attitudinal model of Supreme Court

164. HART, *supra* note 21, at 117.
165. *Id.*

decisionmaking,[166] which maintains that the Justices' ideological values determine their decisions. The best-known proponents of the attitudinal model, Jeffrey Segal and Harold Spaeth, assert that precedent has no significant influence on the Court.[167] In support of this claim they adduce evidence that Justices who dissent in one case typically persist in refusing to acknowledge that decision's controlling authority in future cases.[168]

In light of work to date, champions of the attitudinal model seem almost indubitably right that ideology predicts the Justices' votes with considerable accuracy and that precedent has less effect on the Court's decisions than law professors have often assumed.[169] Accordingly, I think it important for law professors to come to grips with the findings that support the attitudinal model, as I shall attempt to do at the end of this Part. As I shall explain first, however, the evidence supporting the attitudinal model furnishes no good reason to abandon the assumptions that constitutional adjudication is a rule-based practice and that the Justices characteristically attempt to conform to rules of recognition. Nor, I shall argue, have attitudinalist scholars shown that precedent does not matter to the Justices. The principal adjustment that attitudinalist scholarship should provoke involves an acknowledgement that Supreme Court Justices, operating within the rules that define the practice of constitutional adjudication, are indeed policymakers who are much influenced by their policy views—but in ways that only a practice-based theory can explain fully.

A. Internal and External Points of View

Following H.L.A. Hart, I have assumed that it is a necessary condition for the existence of practices of constitutional law and adjudication that a critical mass of officials, especially Supreme Court

166. *See supra* notes 10–15 and accompanying text.

167. *See* SPAETH & SEGAL, *supra* note 10, at 287.

168. *See, e.g.*, SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 11, at 298–310; SPAETH & SEGAL, *supra* note 10, at 287–315; *see also* Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 739 (2000) ("Regardless of whether or not she was a member of the majority in the precedent, a justice would strongly tend to follow her decision rather than the precedent itself.").

169. *See, e.g.*, Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 302 (1997) (reviewing scholarship on judicial motivation); Friedman, *supra* note 120, at 273–74, ("Virtually all positive scholars agree with attitudinalists that ideology plays an important role in the decision of cases . . . ."); *id.* at 331 (observing that the challenge to normative theorists is "to develop an understanding of judicial review that builds upon and incorporates positive understandings of how judges behave").

Justices, should accept the practices' constitutive rules and use them as guides to conduct. In the wake of attitudinalist scholarship, however, the question arises whether evidence that the Justices routinely vote in accord with their ideological preferences refutes the claim that the Justices accept and attempt to adhere to the tacit norms of adjudication.

The answer is no. As Hart argued in *The Concept of Law*, legal norms can be viewed from multiple perspectives. In one application of Hart's terminology, the "external point of view" is that of an observer who aims solely to identify regularities that predict future behavior.[170] In this use of the term, assertions made from an external point of view make no claims about how the subjects of observation think, only about how they act.[171] Another perspective reflects what Hart called the internal point of view.[172] Although Hart did not use this term consistently,[173] in the most pertinent sense the internal point of view is that of someone who "accepts" a practice's constitutive norms by using them as guides for conduct, criticism, and self-criticism.[174]

Interpreted charitably, the attitudinal model asserts the paradigmatically external claim that we can best predict the Justices' decisions if we assume that they will always vote in accordance with their ideological values. "[O]ur concern is with the votes of the justices, and thus the behavioral components of attitudes," Segal and Spaeth write, even as they acknowledge that "attitudes" also "have cognitive [and] affective . . . components."[175] Or, as Segal and Spaeth

170. *See* HART, *supra* note 21, at 89. Hart appears to have used the term sometimes to refer to the outlook of someone concerned only with predicting behavior and wholly unconcerned with motivations, *see id.* at 89–91, and sometimes to refer to the hermeneutic perspective of a person who grasps the rule applied by an identifiable group but does not accept or endorse it, *see id.* at 98–99. For a lucid brief discussion of Hart's varying conceptions of the external point of view, see generally Shapiro, *supra* note 28.

171. *See* HART, *supra* note 21, at 89–91.

172. *See id.* at 98; *see also id.* at 56–57 (noting the "internal aspect" of social rules). This term implicates notorious complexities. For discussions, see generally Shapiro, *supra* note 28; and Brian Z. Tamanaha, *A Socio-Legal Methodology for the Internal/External Distinction: Jurisprudential Implications*, 75 FORDHAM L. REV. 1255 (2006).

173. *See* Tamanaha, *supra* note 172, at 1263–65.

174. Hart thus says that to accept a social rule is to treat the rule as a "*reason* and *justification*" for action, HART, *supra* note 21, at 11, and as a "basis for claims, demands, admissions, criticism, or punishment," *id.* at 90. In another usage, an observer adopts an internal point of view when attempting to grasp the thoughts or outlook of those participating in a practice. *See* Shapiro, *supra* note 28, at 1160–61 (referring to this as a "hermeneutic" point of view and describing it as reflecting Hart's own methodological approach).

175. SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 11, at 69.

state elsewhere, their stance is one of "agnosticism" on whether Justices have any "self-awareness" of the influence of their ideological preferences on their votes; their sole concern, they say, is with whether "the justices' ideology directly influences their decisions."[176] Passages in which Segal and Spaeth praise the attitudinal model for yielding testable predictions also support the conclusion that it only identifies behavioral regularities, not the Justices' perceptions of or attitudes toward legal rules.[177]

Among the reasons not to interpret the attitudinal model as making claims about the Justices' cognitive understandings or psychological commitments is that any such claims would be untenable. Denials that the Justices adhere to rules of recognition might take either of two forms. First, attitudinalists might maintain that there are no rules of recognition or that the Justices fail to accept any such rules as giving them reasons for action, grounds for criticism of others, and so forth. But this position is almost self-evidently unsustainable.[178] It is, for example, nearly impossible to imagine a Justice who did not accept that she was one of a limited number of people who were as entitled as she to exercise the role of a Justice; that eight others, in common with herself, occupied that rule-defined station in virtue of applicable rules of recognition; that a decision supported by five Justices counts as a decision of the Court, whereas a decision supported only by a minority of the Justices does not; that certain other people are members of Congress possessing authorities unique to that office; that acts voted by Congress and signed by the President count as law whereas directives voted by other groups do not; and so on.[179]

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176. SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 11, at 433.

177. *See, e.g.*, SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 11, at xv–xviii, 32.

178. *Cf.* Rawls, *supra* note 36, at 26 ("To engage in a practice, to perform those actions specified by a practice, means to follow the appropriate rules. If one wants to do an action which a certain practice specifies then there is no way to do it except to follow the rules which define it."); W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1485 (2006) ("[T]he possibility of a judge regarding the rule of recognition as non-obligatory is incoherent, in the same way that it would be impossible to imagine an actual basketball player who did not accept that the rule prohibiting double dribbling imposed valid obligations on him.").

179. Segal and Spaeth so acknowledge:

> [W]e have regularly noted that the justices are not completely free agents. Their jurisdiction is limited; . . . a plurality may not render an opinion of the Court; four Justices may not overrule five; authoritative decisions should be accompanied by an opinion that is larded with citation to previously decided cases. . . . But these limitations overwhelmingly pertain to the rules of the judicial game, not to its outcome.

Alternatively, attitudinalists might claim that although the Justices of the Supreme Court accept pertinent rules of recognition in a weak sense, they are always, or almost always, prepared to cheat whenever they can advance their ideological interests by doing so.[180] The problem with this account, as applied to ultimate rules of recognition that include rules of constitutional interpretation, is that such rules can exist only insofar as they are accepted as a matter of social fact.[181] To say that all of the Justices cheat in their application of the rules of recognition all or nearly all of the time is thus to say that there really are not any rules of recognition at all. Again, however, this claim seems transparently false. Justices are recognized as Justices, Congress and the President are acknowledged to possessive distinctive powers, and so forth—all in conformity with rules of recognition. If the Justices invariably cheat, the invariant cheating would need to be confined just to some rules of recognition. It is perfectly coherent to say that some or even all of the Justices cheat some of the time. It is not coherent to say that all of the Justices ignore ultimate rules of recognition virtually all of the time.

This analysis confirms my judgment that a different conclusion should be drawn from Segal and Spaeth's empirical observations: as I have suggested, the ultimate rules of recognition that are recurrently tested in disputed Supreme Court cases are sufficiently vague, indeterminate, or open-textured so that the Justices relatively seldom understand themselves as constrained from deciding in accordance with their ideological predilections.[182] In contrast with the other possibilities that I have canvassed, this one seems wholly imaginable. Indeed, it draws significant support from the not infrequent phenomenon of unanimous Supreme Court opinions.[183] Unanimous opinions provide strong evidence that Justices of otherwise diverse

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SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 11, at 360.

180. *See* Quinn, *supra* note 17, at 78–80 (arguing that definitions of practices as rule-governed behavior must acknowledge the possibility of cheating).

181. *See supra* notes 78–80 and accompanying text.

182. *See* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 110 (2005) (observing that the Justices' political preferences are likely to correspond to, rather than provoke a departure from, the Justices' "best interpretive judgments"); Tamanaha, *supra* note 172, at 1272 (explaining that correlations of judicial decisions with a Justice's ideology do not establish that a judge is not "rule-bound in the only sense that this can be humanly achieved").

183. From the 1994 Term through the 2003 Term, 35.5% of the Supreme Court's decisions were by unanimous vote. *See Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 520 tbl.IV (2004) (charting statistics on "Unanimity and Dissent").

ideological outlooks acknowledge an obligation to follow applicable rules when such rules clearly apply. For better or worse, however, not all cases come within clearly applicable rules—as is suggested by the fact that the Court's docket consists largely of cases that have divided the lower courts.[184] To establish that the Justices' ideology tends to predict their votes in contestable cases by no means proves that pertinent rules of recognition would not yield clear outcomes, which the Justices would accept, in most or all of the "easy" cases that never come before them, or indeed never come before any court at all.[185]

B. Does Precedent Matter?

As I have said, Segal and Spaeth seem to establish quite conclusively that precedent matters less in constitutional cases in the Supreme Court than many, probably most, law professors have assumed. But their findings do not prove, or even suggest, that precedent is unimportant. One can accept Segal and Spaeth's findings that the Justices tend to vote consistently with their political ideologies and that they rarely accept the authority of precedents from which they dissented and yet continue to believe that precedent influences Supreme Court decisionmaking in other ways.

First, the leading studies supporting the attitudinal model fail to measure what might be called a precedent's "indirect" effect. As I have argued, the anticipated public unacceptability of an overruling decision that would upset reliance interests and entrenched expectations can act as a significant constraint even on the Supreme Court. In some cases, moreover, the relevant expectations will have developed partly as a result of a prior judicial ruling. For example, reliance interests today surround paper money, Social Security, and the 1964 Civil Rights Act largely because past Court decisions encouraged reliance to occur. By generating public expectations, at

184. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 245–52 (1991) (noting that the Supreme Court often grants certiorari to resolve questions that have divided lower courts).

185. *See* Cross, *supra* note 169, at 285–90 (collecting evidence tending to support the proposition that there is a large category of easy cases in which judges strongly tend to concur in their analysis); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 913 (2005) (noting the political scientists who emphasize the role of ideology in judicial decisionmaking erroneously "discount the fact that the Supreme Court's docket consists of hard cases"). Segal and Spaeth so acknowledge. *See* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 11, at 93.

least some Supreme Court decisions thus constrain the Court from overruling them.[186]

Second, notwithstanding the evidence amassed by Segal and Spaeth, I think it entirely reasonable to surmise, as Lee Epstein and Jack Knight have argued, that the Justices feel constrained from overturning too many past decisions—however loose the notion of "too many" might be—by an apprehension that the public would find too much instability in constitutional law to be unacceptable.[187]

Third, and most important, precedent achieves deeply consequential effects by anchoring judicial reasoning in a way that separates it from purely political reasoning and thereby limits the Justices' flexibility relative to other public officials.[188] The job of Supreme Court Justices is not merely to vote on who wins disputed cases, but also to write reasoned opinions that can act as guides to conduct for lower court judges, other public officials, and private citizens. In other words, any case that the Court decides will *be* a precedent, binding on the lower courts,[189] and the Supreme Court is constrained by the need to create only such precedents—as defined partly by the reasoning of its opinions—as will have acceptable future consequences.[190]

An example of how the Justices are constrained by a felt responsibility to leave the overall body of precedent in a rationally comprehensible and practically acceptable state emerges from Commerce Clause doctrine. Since the New Deal, leading cases have

186. *See* Knight & Epstein, *supra* note 121, at 1021–22 (noting the need for courts to follow stare decisis in order to respect established public expectations). Cases challenging precedents such as those upholding paper money, Social Security, and the 1964 Civil Rights Act will of course tend not to come before the Supreme Court, because the Justices would not agree to admit them to their docket. Accordingly, these precedents lie beyond the formal reach of Segal and Spaeth's claims, which cover only the votes of the Justices in cases decided on the merits. Sometimes, however, attitudinalists seem to imply more, as, for example, when Segal and Spaeth stress the absence of enforceable constraints against the Justices due to their life tenure and say that the Justices are freer than members of Congress simply to vote their personal policy preferences. *See* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 11, at 298–99.

187. *See* Knight & Epstein, *supra* note 121, at 1021–22.

188. The Justices not only make precedent the predominant mode of justification in their opinions, but they also rely heavily on precedent in trying to persuade one another at conferences. *See* EPSTEIN & KNIGHT, *supra* note 15, at 165–67 (1998).

189. *See* Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 526 (2006) ("A number of political scientists have . . . found that Supreme Court doctrine does appear to drive subsequent lower court opinions.").

190. *See* Schauer, *supra* note 1, at 589 ("If the future must treat what we do now as presumptively binding, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of other . . . cases.").

recognized congressional authority to regulate any activity with substantial, even if only indirect, effects on interstate commerce.[191] Obviously resisting the idea that congressional power might be wholly unlimited, a five-Justice majority invalidated federal statutes as beyond Congress's authority in *United States v. Lopez*[192] and *United States v. Morrison*.[193] Revealingly, however, *Lopez* and *Morrison* overruled no previous cases, not even the New Deal decisions that had laid the foundation for pre-*Lopez* speculations that congressional power was wholly unbounded. For the Court to have pressed substantially further would have raised doubts about the constitutionality of legislation now so thoroughly accepted in American law and life that its overruling would have provoked a firestorm of protest and calls to reconstitute the Court at the very least. Statutes whose constitutional validity would have been thrown into doubt would have included the 1964 Civil Rights Act, which the Supreme Court had upheld as a valid exercise of congressional power under the Commerce Clause.[194] Within the shared norms of the current governing consensus, it is almost unthinkable that the 1964 Civil Rights Act might be unconstitutional—and a Court that must acknowledge Congress's power to enact that statute has relatively little room for maneuver in overruling decisions establishing the broad regulatory authority that Congress invoked when it passed that landmark legislation.

Once again, I do not mean to put my point too strongly. Accepted techniques of legal reasoning undoubtedly afford the Justices significant latitude in distinguishing, and thus avoiding the need either to overrule or to be bound by, past decisions. Indeed, evidence accumulates that distinguishing cases, rather than overruling them, may emerge as a hallmark of the Roberts Court. Chief Justice Roberts has called for the Court to make decisions on narrow

191. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 138–43 (2001); Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 447–49 (2000).

192. 514 U.S. 549 (1995); *see* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (characterizing the Court's decision in *Lopez* as "revolutionary").

193. 529 U.S. 598 (2000).

194. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that Congress acted within its power to protect commerce in extending Title II protection to restaurants); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (holding that the 1964 Civil Rights Act is a valid exercise of power under the Commerce Clause as applied to public travel accommodations).

grounds whenever possible,[195] and a decision distinguishing a prior case is almost inherently narrower than a decision to overrule the precedent altogether. Recent cases in which the Court distinguished prior decisions involving abortion,[196] standing to challenge government support for religion,[197] and the constitutionality of campaign finance regulation[198] all reveal the possibility of exceedingly fine distinctions—distinctions so fine that even concurring Justices have doubted their tenability.[199] Nevertheless, the Court's capacity to distinguish cases is not boundless. As I have argued, Justices of the Supreme Court, in particular, manifestly accept an obligation to write opinions that furnish intelligible guidance to lower courts, government officials, and the public at large.[200] As is true with nearly every point that I have made, rational choice models of judicial behavior reinforce this conclusion: as my colleague Matthew Stephenson has written, Justices who care about policy will want to write clear opinions giving coherent guidance to the lower courts as a means of maximizing their influence over lower court decisions.[201] In doing so, the Justices will be constrained by precedent.

C. *The Supreme Court as a Policymaking Institution*

Long before the development of the attitudinal model, legal realists debunked the notion that constitutional adjudication was a mechanical process.[202] Other predecessors of the attitudinal model in the critical legal studies movement pushed the realist claim one step further by insisting that judicial decisionmaking was political to the

195. *See* Bill Barnhart, *Roberts Strives for Consensus on Court*, CHI. TRIB., Feb. 2, 2007, at 1.

196. *See* Gonzales v. Carhart, 550 U.S. __, __, 127 S. Ct. 1610, 1624 (2007) (distinguishing Stenberg v. Carhart, 530 U.S. 914 (2000)).

197. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. __, __, 127 S. Ct. 2553, 2571–72 (2007) (distinguishing Flast v. Cohen, 392 U.S. 83 (1968)).

198. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. __, __, 127 S. Ct. 2652, 2674 (2007) (distinguishing McConnell v. FEC, 540 U.S. 93 (2003)).

199. *See, e.g.*, *Hein*, 551 U.S. at __, 127 S. Ct. at 2573 (Scalia, J., concurring) (criticizing the majority's "creation of utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently").

200. *See supra* notes 189–90 and accompanying text.

201. *See* de Mesquita & Stephenson, *supra* note 27, at 764. Eric Rasmusen similarly argues that self-interested judges may follow existing precedent "in the hope that the new law they create interstitially will be obeyed by future judges." Rasmusen, *supra* note 26, at 81 (creating a model to assess how judges who desire influence will behave with regard to following precedent).

202. *See generally* AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993) (presenting the central themes of legal realism).

core.[203] Nevertheless, Segal and Spaeth's data-based demonstration of the correlation between the Justices' ideological values and their votes makes it more undeniable than ever before that the Court, in their phrase, is a "policy maker."[204] In my view, the challenge is to give an account of the senses in which the Court is a policymaker that, equally importantly, acknowledges the ways in which *judicial* policymaking differs from that of executive officials and legislatures. Too casual references to "policy making" can easily prove misleading.

Unlike Congress, state legislatures, and executive officials, the Supreme Court can act only by deciding cases. In addition, under well-established rules (in the Wittgensteinian sense),[205] the Justices have little capacity to establish affirmative mandates. They cannot declare wars, set income tax rates, cut the budget, or establish welfare, education, or environmental programs. For the most part, the Court can only articulate constitutional norms to which other officials must then adhere in pursuing their chosen ends (though the Justices can, to be sure, hold that some ends are constitutionally forbidden). If the Court gets to make policy, it is thus mostly interstitial policy.

More generally, the Court can make policy only by linking its judgments to accounts of the meaning of the Constitution or laws of the United States that other officials and the public will accept. Furthermore, the Court can lawfully do so only insofar as is permitted by rules of constitutional practice that cabin, even if they do not always determine, its final decisions.

To put the same points slightly differently, the agenda of the Supreme Court is vastly different, and necessarily so, from the agenda of Congress, even if both agendas are in some sense policy agendas.[206] The issues are different. The applicable criteria of wise and unwise, lawful and unlawful decisionmaking also diverge radically.

Nonetheless, one should not protest too much against the claim that the Supreme Court establishes national policy. In determining when to overrule or to follow initially erroneous precedents, in particular, the Court has proclaimed that it takes pragmatic criteria

203. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 191–92 (1988) (discussing possible political motives behind legal doctrine).

204. *See* SEGAL & SPAETH, ATTITUDINAL MODEL, *supra* note 11, at 1–27.

205. *See supra* note 38 and accompanying text.

206. *See* Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 8–12 (2006).

into account.[207] And Segal and Spaeth's findings highlight that the Justices routinely exploit reasonable disagreement about the implications of existing rules as they attempt to push the law in directions that accord with their ideological outlooks (subject to rule-based constraints).[208] Against the suggestion that the Justices are legally empowered but also constrained policymakers, a variety of objections might be raised. I shall briefly discuss just two.

First, for decades Ronald Dworkin has eloquently insisted that the essence of the judicial role is interpretation.[209] Justices, in his view, must decide which interpretation of legal materials puts them in the best "moral" light,[210] and in making this judgment their ideological beliefs necessarily come into play.[211] But in assessing what is best, Dworkin says, judges must—in order to be true to their institutional roles—limit themselves to rendering judgments of "principle," or backward-looking assessments of fairness, and must eschew policy, or forward-looking calculations of social advantage.[212]

In my view, a fair-minded, nonidealized examination of constitutional practice will not sustain Dworkin's picture. By their own account, the Justices take policy into account in determining whether to overrule established precedents.[213] As scholars as diverse as Larry Sager and Henry Monaghan have shown, the Supreme Court sometimes employs doctrinal tests that either underenforce or overenforce constitutional norms, with the Court making its choices largely on instrumental grounds.[214] More generally, the Justices

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207. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations . . . .").

208. *See supra* notes 12–13 and accompanying text.

209. *See supra* note 69.

210. RONALD DWORKIN, FREEDOM'S LAW 2 (1996); *see also* DWORKIN, *supra* note 42, at 255 ("Judges who accept the interpretive ideal of integrity decide hard cases by trying to find . . . the best constructive interpretation of the political structure and legal doctrine of their community.").

211. *See* DWORKIN, *supra* note 42, at 254–58.

212. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 69 (1985) ("T]he Court should make decisions of principle rather than policy . . . ."); DWORKIN, *supra* note 103, at 82–84 (distinguishing principles from policies and contending that judicial decisions should be based on the former, not the latter).

213. *See supra* notes 64–65 and accompanying text.

214. *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 18–30 (1975) (discussing rules of constitutional common law that confer prophylactic protections); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–28 (1978) (discussing underenforcement). *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (categorizing decision

frequently weigh social costs and benefits in determining which doctrinal formulae, rules, or tests to use to implement vague constitutional values such as those underlying the Constitution's guarantees of freedom of speech, free exercise of religion, and the equal protection of the laws.[215] If Dworkin meant only to maintain that the Justices do not make policy in the same way or the same sense as Congress, he would be right, but his broader claim that policy is not a proper judicial concern at all goes untenably far.

Another objection to the portrayal of Supreme Court Justices as policymakers would insist that the Justices do not consciously weigh competing considerations of cost and benefit, but instead simply see or experience certain interpretations of texts as indubitably correct.[216] According to this view, there is admittedly a multiplicity of interpretive communities, each defined by its way of seeing or interpreting, but those with divergent views engage in no instrumental calculation.[217] Although this account of interpretation illuminates conflicting judgments with respect to many matters, constitutional adjudication in the Supreme Court appears to me to involve a good deal of self-conscious calculation of relative costs and benefits.[218] Such calculation seems all but inevitable after intuitive and unreflective "understanding" has been shattered—if it ever existed at all—and the Justices must struggle and occasionally bargain with one another concerning how to go in contestable terrain.

CONCLUSION

In this Article, I have sought to make sense of the role of precedent in constitutional adjudication by emphasizing the extent to which law is a rule-governed practice that is both made possible and constituted by rules of recognition that are rooted in social facts of contemporary acceptance. The notion that the foundations of

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rules that over and underenforce the Constitution as part of a taxonomy of constitutional doctrine).

215. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 26–44 (2001) (discussing the Court's role not only to interpret, but also implement, the Constitution); *see also* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 33–37 (1988) (describing the role of policy analysis in common law adjudication).

216. *See, e.g.*, STANLEY FISH, DOING WHAT COMES NATURALLY 386–87 (1989) ("To think *within* a practice is to have one's very perception and sense of possible and appropriate action issue 'naturally' .... Someone who looks with practice-informed eyes sees a field already organized in terms of perspicuous obligations, self-evidently authorized procedures, and obviously relevant pieces of evidence.").

217. *See id.* at 141–42.

218. *See* FALLON, *supra* note 215, at 5–8, 28–34 (discussing factors the Court has considered when interpreting the First, Fourth, and Fourteenth Amendments).

constitutional law lie in contingent social facts will not prove congenial to everyone. Among other things, a practice-based jurisprudential theory implies that constitutional law does not rest on deductive foundations immovably fixed by historic acts of lawmaking.[219] To understand our constitutional practice, we must accord particular attention to the rules of recognition presently accepted and applied by judges and especially Supreme Court Justices, but we must do so with awareness that their practices are situated within broader patterns of official acceptance and public acquiescence to which the Court is predictably and perhaps necessarily sensitive.

Although the main line of my analysis of precedent-based constitutional decisionmaking has employed concepts drawn from jurisprudential literature, I have also emphasized that rational choice theories that characterize social phenomena in terms of games and equilibria provide an alternative, sometimes illuminating conceptual apparatus with which to understand our constitutional practice. The immanent rules of constitutional practice can be thought of as equilibria that nearly all parties in a social-ordering game have good reasons to observe. But the pertinent rules or equilibria may sometimes structure and bound the processes by which judges and Justices develop and seek to persuade others to adopt their positions without determining uniquely correct answers to constitutional questions. In the absence of a more determinate network of rules or equilibria than now exists, the practice of constitutional adjudication is relatively open to argument and change, especially in the kinds of cases that come before the Supreme Court.

When the role of constitutional precedent is examined from a practice-based perspective, helpful light begins to pour down upon a number of controverted issues. First, it becomes clear that initially erroneous Supreme Court decisions can possess the status of binding law because the rules of recognition currently applied by the Justices and others entitle some such decisions to be so treated.

Second, existing rules of recognition confer on Supreme Court Justices a power, to be exercised in accord with legal standards, to determine which initially erroneous precedents to enforce and which to overrule. This is a large and important power, reflective of the Supreme Court's vast authority, that originalists resent but that our current law countenances. Yet the Court's power, though broad, is

219. *See* Fallon, *supra* note 121, at 1852–53 (explaining the contingent foundation of constitutional law and practice).

not unlimited. Once again, the Court is hemmed in by rules—in what I have characterized as the Wittgensteinian sense of that term—that limit its authority. The term "superprecedent" calls attention, however inelegantly, to the Court's obligation to adhere to precedents that support broadly shared and deeply entrenched interests. For example, a Supreme Court that held Social Security or paper money or the 1964 Civil Rights Act to be unconstitutional would act lawlessly and would be held to account for doing so, even if it could demonstrate irrefutably that its conclusion correctly reflected the original understanding of constitutional language. By contrast, *Roe v. Wade* can be legally secure in the long run only insofar as the political forces that drive Supreme Court nominations and confirmations support or accept it. The Court's practice of constitutional adjudication exists among related practices of legal and political debate, and the boundaries that separate legal from other social norms are often permeable.

Third, although the proponents of an attitudinal model of Supreme Court decisionmaking are right about some things, a practice-based account of constitutional law reveals ways in which precedent matters to the Justices that attitudinalists have largely overlooked. Among other avenues of influence, precedent constrains the Court by fostering entrenched expectations and reliance interests that the Court must thereafter respect. Perhaps even more important, precedent constrains the Court because the constitutive norms of constitutional practice require the Justices not only to vote for results in particular cases, but also to explain how current decisions fit together with past rulings to form a coherent pattern. As game theory suggests, a Court that failed to take precedent seriously in crafting its opinions—and also at the stage of determining which opinions to write—would severely diminish its capacity to guide future decisionmaking by the lower courts. In the ordinary run of Supreme Court cases, precedent may not matter as much as, or in precisely the ways that, law professors have tended to assume. But it matters deeply, nonetheless, in a practice of constitutional adjudication by the Supreme Court that is nested within, but also is distinct from, other practices of law and politics.