CONSTITUTIONAL CIRCULARITY

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In supporting the invocation of stare decisis in constitutional cases, the Supreme Court has maintained that its decisions affect how the people conceptualize the government and their rights. Such an argument, which prioritizes contemporary understandings of the Constitution over both the intentions of Framers and the nuances of doctrine, suggests that constitutional decisions may affect the meaning of the Constitution itself. In this Article, Professor Abramowicz offers a positive account demonstrating that the Court has used this type of argument, which he dubs "constitutional circularity," and provides a normative critique. The positive account is relevant not only because it identifies a type of reasoning that scholars have not explored, but also because it undermines contentions by recent commentators that stare decisis is a matter of policy even in constitutional cases and therefore subject to abrogation by Congress. Normatively, constitutional circularity presents the danger that judges will find their preferences in alleged popular understandings of the Constitution, but given the indeterminacy of constitutional law, constitutional circularity need not exacerbate this problem of judicial lawmaking. At the same time, the notion of constitutional circularity reflects and may reform several areas of constitutional doctrine and strands of constitutional theory.

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INTRODUCTION

What the U.S. Supreme Court does in constitutional cases has less and less to do with the Constitution, or so one must believe if one reads law reviews. Consider, for a start, the five most recent forewords in the *Harvard Law Review*'s Supreme Court issue. Akhil Reed Amar's title, *The Document and the Doctrine*,[1] reveals his view that the Court should be paying more attention to the former. Perhaps the document is not central to the Court because of what Mark Tushnet calls "the chastening of constitutional aspiration."[2] Or perhaps the Constitution has fallen victim, as Michael C. Dorf's analysis suggests, to a common law method that produces decisions that may "nominally purport to be an interpretation" of the Constitution,[3] but that in fact bears more in common with the abstract theorizing of the

1. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

2. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999). According to Mark Tushnet, "[t]he best description of the modern Court is that it acts in ways that satisfy a rather well-to-do constituency." *Id.* at 66.

3. Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 28 (1998).

Socratic method.[4] Regardless of the reason, even defenders of the Supreme Court seem to concede that constitutional meaning is no longer paramount. Richard Fallon argues that "identifying the 'meaning' of the Constitution is not the Court's only function" and that "the Court often must craft doctrine that . . . does not reflect the Constitution's meaning precisely."[5] The Constitution's receding role may even be a virtue; as Cass R. Sunstein suggests, decisional minimalism, in which courts "leave open the most fundamental and difficult constitutional questions," can be "democracy-forcing."[6]

This is a diverse and ambitious group of scholars,[7] yet all see the Court, for worse or for better, as engaging in something other than interpretation of the Constitution. Indeed, some commentators see constitutional doctrine as so divorced from the Constitution that it does not even purport to be an interpretation of the document. For evidence, turn from Cambridge to New Haven and consider the article and the essay published in the May 2000 issue of the *Yale Law Journal*. At first glance, these pieces appear to have little in common. Michael Stokes Paulsen's article is on stare decisis in the abortion cases,[8] while Melissa L. Saunders's essay concerns the developing case law on race-conscious districting.[9] Both pieces are provocative and creative, and both involve areas of doctrine stemming from provisions of the Fourteenth Amendment.[10] The pieces, however, seem to embrace

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4. *See id.* at 33–43.

5. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997). In Professor Fallon's view, "the fidelity owed by the Justices must be defined partly in institutional terms, not simply by an abstract ideal of constitutional truth." *Id.* at 60.

6. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996). Cass Sunstein's foreword is the foundation of much of his analysis in CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

7. One facet of this diversity is the different attitudes that the scholars have to the approaches that they describe. Professor Amar urges the U.S. Supreme Court to move toward a "documentarian" approach, Amar, *supra* note 1, at 27, while Professor Fallon is an unapologetic doctrinalist. Professor Dorf, meanwhile, urges the Court to engage in an even more dynamic interpretative approach by using what he calls "provisional adjudication." Dorf, *supra* note 3, at 60–69. Professor Tushnet acknowledges that he is "deeply skeptical about the normative claims" of the "new constitutional order," Tushnet, *supra* note 2, at 33, while Professor Sunstein at least cautiously applauds the Court's minimalism, concluding that "[s]ometimes the best way for the Court to [improve democratic decision making] is by leaving things undecided." Sunstein, *supra* note 6, at 101.

8. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

9. *See* Melissa L. Saunders, *Reconsidering* Shaw*: The* Miranda *of Race-Conscious Districting*, 109 YALE L.J. 1603 (2000).

10. These considerations do not qualitatively differentiate the pieces from dozens of others published in law reviews. Indeed, the note in the same issue, though otherwise not relevant to my

quite different projects. The article is primarily normative, urging the courts to uphold a certain hypothetical statute,[11] while the essay is descriptive, reconceptualizing an existing area of doctrine.[12]

On further inspection, though, the two pieces are intimately connected. Both address Supreme Court holdings in constitutional cases that, the authors suggest, depend on something other than the Court's view of how the Constitution should be interpreted. The outcome of *Planned Parenthood v. Casey*,[13] upholding *Roe v. Wade*,[14] was not strictly a result of constitutional interpretation, Professor Paulsen maintains. Indeed, the plurality "expressed the apparent doubts of at least some of the Justices constituting the majority about the correctness of *Roe*,"[15] but voted on the basis of a "policy"[16] decision that stare decisis justified retaining its central holding. Similarly, Professor Saunders insists that *Shaw v. Reno*[17] and its progeny[18] should not be understood as finding that racial gerrymandering is unconstitutional even when no identifiable class of persons is subject to any special disadvantage.[19] Rather, the Court has struck down districts that are not drawn in accordance with traditional districting principles, regardless of whether they disadvantage members of a particular group, as a prophylactic

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concerns here, also fits this description. *See* Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669 (2000).

11. Indeed, Professor Paulsen candidly admits that his "motivation for writing . . . is one that openly reflects a desire that *Roe* be overturned." Paulsen, *supra* note 8, at 1539. Though Paulsen adds the caveat that his analysis is not intended to be "result-driven or result-bound," *id.*, the article is nonetheless an attempt to support that the Supreme Court should find a hypothetical statute abrogating stare decisis constitutional.

12. Professor Melissa Saunders scrupulously avoids taking a position on whether her reconceptualization of the race-conscious districting cases makes them more or less attractive. *See* Saunders, *supra* note 9, at 1606 ("In suggesting that *Shaw* is like *Miranda*, I do not mean to damn it by association; I take no position on the longstanding debate over the Court's authority to craft overbroad prophylactic rules to enforce the Constitution."); *see also id.* at 1636 (noting the analysis suggests that "litigants should feel free to ask courts to devise additional prophylactic rules," but also that "litigants should feel free to ask courts to carve out exceptions to *Shaw*'s per se rule").

13. 505 U.S. 833 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

14. 410 U.S. 113 (1973) (holding that the Fourteenth Amendment protects a woman's right to abort a nonviable fetus).

15. Paulsen, *supra* note 8, at 1537.

16. *Id.*

17. 509 U.S. 630 (1993).

18. These include *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Lawyer v. Department of Justice*, 521 U.S. 567 (1997); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); and *Miller v. Johnson*, 515 U.S. 900 (1995).

19. *See* Saunders, *supra* note 9, at 1612–15. Saunders acknowledges the possibility that the Justices in the majority of *Shaw* intended to eliminate the requirement that an identifiable class be shown to have suffered some disadvantage, but notes that this "cannot satisfactorily explain the *Shaw* doctrine itself as it is currently formulated." *Id.* at 1613.

protection against such discrimination.[20] That is, the Court has adopted an overinclusive per se rule to avoid the difficulty of identifying actual constitutional violations on a case-by-case basis.[21]

Thus, Professors Paulsen and Saunders both purport to have identified areas of constitutional law in which controlling precedent depends not on the Constitution itself, but on pragmatic factors extrinsic to it. This might at first seem to be nothing new. After all, no one seriously believes that the Framers of the Equal Protection Clause had in mind the distinctions among strict scrutiny, intermediate scrutiny, and the rational basis test,[22] or that the Framers of the First Amendment consciously intended that a libel plaintiff be required to show actual malice if and only if the defendant is a public figure.[23] The problem at which Professors Paulsen and Saunders grasp, however, is not just the inevitable incongruence between doctrine and ultimate meaning. Rather, they seek to show that sometimes, rather than create or apply a doctrine that identifies whether a constitutional violation has occurred, the courts may apply a different kind of doctrine altogether, one that does not even claim to be an interpretation of the relevant constitutional provision.[24]

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20. *See id.* at 1617–19.

21. *See id.* at 1626–28.

22. Professor Paulsen himself scrutinizes the tiers of scrutiny:

> Every year I remain perplexed by the Supreme Court's "tiers of scrutiny" in various First Amendment, Equal Protection, and other contexts. To put it bluntly, I just don't get it. I've never found the levels of scrutiny anywhere in the words of the Constitution, and the Court's analysis strikes me as just so much gibberish.

Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 397 (1998). Commentators have traced the three-tiered approach not to the framing or ratification of the Fourteenth Amendment, but to a famous footnote, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *See, e.g.*, Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982) ("This footnote now is recognized as a primary source of 'strict scrutiny' judicial review."). For an argument that "classificationism" is illogical, see Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 433–36 (1997).

23. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

24. This is not merely an academic distinction, for their analyses, if correct, suggest answers to two important practical questions. First, what is the extent of the Court's power to craft doctrines that are inconsistent with the meaning of constitutional provisions? If stare decisis allows the Court selectively to ignore a provision's true meaning, and prophylactic rules allow the Court to extend a provision's true meaning, constitutional doctrine could stray far indeed. The danger that the Court might misinterpret the Constitution is troubling enough, *see, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (denouncing the Supreme Court for misinterpreting the Fourteenth Amendment), without allowing these tools into the mix.

Second, if doctrine rides on two tracks, one corresponding to constitutional meaning and one reflecting pragmatic considerations, are the Court's judgments on the second track subject to revision by Congress? The entire point of Professor Paulsen's exercise is to argue that the answer to that question is "yes," at least in the instance he is examining. Because stare decisis is a mere

The theories of Professors Paulsen and Saunders both depend on a descriptive account of Supreme Court decision making that views both the doctrine of stare decisis and the phenomenon of prophylactic rules as existing independent of constitutional meaning. They assume that in invoking stare decisis or in creating a prophylactic rule, the Court is not interpreting the Constitution, except insofar as it implicitly asserts the legitimacy of what it is doing. This assumption is hardly radical,[25] and there does not appear to exist any assertion, either in cases or commentary, that the Court is doing anything different. I will try to show, however, that the Court's decisions in these and other cases can be understood in a way that postulates no gap between interpretation and doctrine. On this account, in instances in which the Court invokes stare decisis to preserve a constitutional interpretation that may be incorrect, or in which the Court announces a rule that appears prophylactic, it may in fact be interpreting the Constitution, albeit in an unconventional way.

In describing and assessing this interpretive practice, my aim is not to insist that Professors Paulsen and Saunders in particular are wrong. Their analyses are surely as valid as the universal observation that constitutional doctrine has little to do with the Constitution. For example, their analyses accord with that in the *Duke Law Journal* of John Harrison,[26] who, like

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question of policy, Congress may pass a statute abrogating the stare decisis effect of a particular case or group of cases, he maintains. *See* Paulsen, *supra* note 8, at 1540. The courts would then need to reconsider *Roe v. Wade* de novo, without stare decisis tipping the scales. *See id.* ("A statute abrogating stare decisis does not impair that power; it merely directs courts to carry out that constitutional power without regard to nonconstitutional policy or pragmatic considerations, where Congress has legislated a different policy with respect to such considerations."). Similarly, Professor Saunders recognizes the possibility that if the Court's districting jurisprudence is a prophylactic rule, Congress might be able to develop an alternative framework supplanting the Court's. *See* Saunders, *supra* note 9, at 1637 (noting that the Supreme Court's resolution of a then-pending case might have implications for racial districting law).

The notion that constitutional doctrine and interpretation might be independent thus produces two contrasting separation-of-powers worries. The first is that the judicial branch might be able to usurp the legislative branch by creating a constitutional common law. *Compare* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (embracing the concept of constitutional common law), *with* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (arguing that constitutional common law is illegitimate). The second is that the legislative branch might be able to displace the judicial branch by voiding results in what appear to be constitutional cases. Those who are disturbed by the first may not be disturbed by the second, and vice versa, but my purpose is not to take one position or the other.

25. Though Professor Paulsen's conclusion is radical, his argument may seem plausible because of his uncontroversial premise that stare decisis is extraconstitutional. Meanwhile, commentators have seen prophylactic rules that extend beyond the Constitution as quite ordinary. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

26. *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000).

Paulsen, concludes that Congress has the power to enact a rule of stare decisis[27] and who, like Saunders, recognizes that prophylactic rules may deviate from the Constitution.[28] Instead, their theses, and Professor Paulsen's in particular, that doctrine has become wholly independent of the document, invite alternative explanations.[29] In providing such an explanation, I maintain that the gap between the doctrine and the document may be smaller than is generally supposed. To succeed in this task, I must establish that the Court may not be doing what everyone thinks it is doing.

For the Court, the Constitution's meaning may depend not just on traditional factors like text and enactment history, but also on how citizens, either generally or as relevant groups, have come to understand the Constitution. A decision of the Court directly changes only what the Court *says* the provision means.[30] But a decision also may have an indirect effect, changing what the people *think* the provision means. If what a provision means depends in part on what people currently think it means, then constitutional law at times can

27. Though Professor Harrison credits Paulsen in one footnote for breaking "the academic silence on this topic," *id.* at 504 n.7, he does not discuss Professor Paulsen's arguments in detail, concluding that while he "agree[s] with Professor Paulsen's answer to the question he poses," *id.*, the two articles tackle substantially different projects. Professor Harrison's article does not specifically deal with an abortion statute, and it provides a useful analysis of the nature and origins of stare decisis as applied in the federal courts. *See id.* at 506–31.

28. *See id.* at 503. Professor Harrison is more concerned with the stare decisis effect of a decision concerning prophylactic rules, *see infra* Part I.B.1, than with the prophylactic nature of such rules, *see infra* Part I.B.2. *See* Harrison, *supra* note 26, at 503 (noting that in *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court "adhered to *Miranda v. Arizona* without saying whether a majority of the Justices believed *Miranda* to have been correctly decided as an original matter").

29. Professor Harrison's analysis does not deal exclusively with the application of stare decisis to constitutional issues. *See, e.g.*, Harrison, *supra* note 26, at 509–13 (providing a general analysis of the status of precedent in judicial resolution of all types of cases). He seems to assume in passing that his analysis would apply to constitutional as well as statutory issues, but he indicates that he is troubled by potential abuse of the power in constitutional cases. *See id.* at 540 ("More troublesome is the possibility that Congress could shape rules of precedent so as to control doctrine in areas where it may not legislate, especially those governed by the Constitution."). Professor Harrison brushes this concern off by suggesting that "[t]o say that a power may be misused . . . is by no means to say that it does not exist." *Id.* Though valid, this point misses the opportunity to consider whether it is appropriate to distinguish between Congress's power to set precedential rules in statutory and constitutional cases. Because Professor Paulsen deals explicitly with stare decisis in a constitutional context, I will have more opportunity to address Paulsen's argument than to address Harrison's.

30. Of course, any decision also changes (or at least reinforces) the law, if law is understood as being what the courts say it is. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.").

be self-fulfilling prophecy.[31] An invocation of stare decisis may represent an assertion that the self-fulfilling prophecy has come true, that even if the Court was originally erroneous in interpreting the Constitution, the Constitution has come to mean what the Court said as a result of the Court's having said it. Acceptance of the theory that the Constitution's meaning depends in part on what people think it means, however, may have an additional consequence: seemingly prophylactic rules. Rules more expansive than what the Constitution would seem on an original reading to say make sense if perception outpaces jurisprudence, that is, if the people come to believe that the Constitution entails implications that tradi-tional jurisprudence would not recognize. I will call this approach to interpretation *constitutional circularity*. This label emphasizes how odd the Court's reasoning must seem from more conventional interpretive perspectives. Circular reasoning, after all, is inherently suspect. My goal, however, is neither to bury the approach nor to praise it.

I begin by presenting a descriptive account of the Court's jurisprudence and then by providing a normative evaluation. I develop the descriptive account in Part I by examining the Court's reasoning in the cases that might appear at first most consistent with the assumption that constitutional interpretation and doctrine may be independent. Part II assesses the use of public perception of a provision as a consideration in interpreting that provision. Though not without difficulties, the approach may be less offensive than it at first appears, especially in comparison to alternatives. It finds support in several areas of constitutional law as well as in various currents of constitutional theory, and identification of the approach may make strange doctrines and strange theories seem less so. The Supreme Court, of course, could abuse, and arguably has abused, the approach by claiming to find in public perception of the Constitution whatever provision the Justices wish the Framers had crafted. Nonetheless, candid acknowledgment of constitutional circularity might help discipline its application, and it might in any event be preferable than a world in which constitutional doctrine is separated from the Constitution altogether.

I. A DESCRIPTIVE THEORY

In this part, I explore the reasoning in *Planned Parenthood v. Casey* and in *Dickerson v. United States*,[32] the recent decision upholding the police

31. This does not automatically mean, as Charles Hughes has said, that the Constitution is merely "what the judges say it is." CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 120 (1928). Rather, constitutional circularity means that the Constitution is what the judges say it is, as long as the people come to believe it.

32. 530 U.S. 428 (2000).

warnings mandated by *Miranda v. Arizona*.[33] Although these decisions are insufficient to prove that the Supreme Court has deliberately and consistently acted in the way I describe, that is not my aim. Both cases show that the line between interpretation and adoption of an extraconstitutional rule can be a fine one. In addition, they show that the proposition that public understandings of constitutional provisions help determine their meanings can explain the gap between constitutional interpretation and doctrine. The two cases, along with others that I will consider briefly, demonstrate that constitutional circularity has rhetorical appeal to some Justices, and that constitutional circularity may provide a better positive explanation of the cases than alternatives previously discussed. An important caveat to this part is that I do not mean to endorse this approach to interpretation, and also do not suggest that the Court has effectively applied it. Constitutional circularity is now an undercurrent in the case law, not a developed doctrine.

A. Constitutional Stare Decisis

In advancing the claim that the courts should honor a statute removing the stare decisis effect of an earlier constitutional precedent, Professor Paulsen acknowledges that "[t]his result may well seem counterintuitive at first blush."[34] He attributes this reaction, however, to the argument's "unfamiliarity to lawyers, judges, and scholars accustomed to the common-law tradition" and retorts that "unfamiliarity does not equal unconstitutionality."[35] Thus does Professor Paulsen identify the issue of the constitutionality of the statute as being at the crux of the analysis. A judge, however, might well conclude that the courts should find constitutional a statute providing that a court shall not permit stare decisis to interfere with the decision of a constitutional controversy on the merits, and yet still find a role for stare decisis in constitutional interpretation itself. In what follows, I explain why this is so.

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33. 384 U.S. 436 (1966).

34. Paulsen, *supra* note 8, at 1542.

35. *Id.* Professor Paulsen adds that "the legal community has had such reactions before to ideas that seemed novel or radical departures from accepted convention at the time, but that are now familiar and uncontroversial." *Id.* at 1542–43. Indeed, legal provisions and institutions can evolve far beyond what originally would have seemed possible, and Professor Paulsen points out that despite initial commentary indicating that courts should not enforce severability provisions governing what to do if a portion of a statute were found unconstitutional, the practice is now widely accepted. *See id.* at 1543 & n.22 (citing John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 222 (1993)). I agree that it could become a commonplace for legislatures to abrogate precedential effect, but the possibility that such a practice would emerge does not support an argument that the appropriateness of such a statute is immanent in our existing legal tradition.

1. Stare Decisis as a Policy

Central to Professor Paulsen's case for a statute abrogating stare decisis is that the doctrine is one of "policy." Interestingly, Professor Paulsen does not cite *Casey* itself for this proposition, and indeed the *Casey* opinion nowhere applies this label.[36] The *Casey* Court does explain that in considering whether to apply stare decisis, the Court considers "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[37] Moreover, Professor Paulsen identifies recent cases in which the Court has explicitly used the word "policy" in discussing stare decisis.[38] The alliterative trio of "prudential," "pragmatic," and "policy" may at first seem to make Professor Paulsen's argument an easy one.

These words, however, are susceptible to a range of meanings, and the Court has never explicitly said that because stare decisis is a "policy" matter, Congress can abrogate it. The Court's language, moreover, is most easily construed as describing the content of stare decisis doctrine rather than the status of that doctrine.[39] The words all appear in the context of the Court's

36. Though the word "policy" appears several times in the joint opinion, the most directly relevant usage of it is in a quotation cited by the dissent. *See* Planned Parenthood v. Casey, 505 U.S. 833, 997 (1992) (Scalia, J., concurring in part and dissenting in part). Justice Antonin Scalia stated:

> "[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

Id. (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. NO. 101-10, at 139 (1989).

37. *Casey*, 505 U.S. at 854 (plurality opinion), *quoted in* Paulsen, *supra* note 8, at 1547.

38. *See* Paulsen, *supra* note 8, at 1547 & n.36 (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997) (indicating that stare decisis "reflects a policy judgment"); and Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (stating that the Court has "always . . . treated stare decisis as a principle of policy")).

39. Professor Harrison makes this point. *See* Harrison, *supra* note 26, at 508 (reading the courts' use of the word "policy" as indicating in part that "the rule is not absolute"). Examination of the Supreme Court's first apparent use of the word "policy" in conjunction with discussion of stare decisis seems consistent with this view:

> We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Helvering v. Hallock, 309 U.S. 106, 119 (1940), *quoted in* Harrison, *supra* note 26, at 508 n.19. *Helvering* is cited in *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), which is cited in turn in *Casey*, 505 U.S. at 854, and *Agostini*, 521 U.S. at 235. Note that the Court contrasts the phrase "a principle of policy" with "a mechanical formula." Moreover, the Court's statement that the doctrine

explaining "that the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case."[40] This emphasis on the flexibility of stare decisis indicates that judges cannot be automatons in applying it,[41] but the crafting of stare decisis doctrine as a standard rather than as a rule does not deny it a constitutional heritage.[42] Even if the Court's use of words like "policy" did indicate that it was describing the status of the doctrine, other language might militate the other way. Even Professor Paulsen acknowledges that some language in *Casey* itself could be read as elevating the doctrine to constitutional status.[43] Ultimately, the Court's

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"embodies an important social policy" is in context simply an acknowledgment that the doctrine is important to society at large, not a denigration of stare decisis as a mere policy matter. Had the Court in another case said that the First Amendment "embodies an important social policy," it would not have confused anyone as to whether Congress can abrogate the Amendment.

40. *Casey*, 505 U.S. at 854 (citations omitted); *see also Seminole Tribe*, 517 U.S. at 63.

41. The Supreme Court has made similar statements in other contexts. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 381 (1989) (describing the separation of powers as reflecting a "pragmatic, flexible view of differentiated governmental power"); *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 442 (1977) (asserting that the "pragmatic, flexible" approach that James Madison advocated in separation-of-powers questions had prevailed in the Supreme Court).

42. Kathleen Sullivan has argued, with particular attention to *Casey*, that much of the debate about stare decisis can be seen as part of a larger debate about the relative merits of rules and standards. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 70–76 (1992). Sullivan describes the *Casey* joint opinion as applying a rule of stare decisis with various exceptions stated in the form of standards. *See id.* at 71. A rule with a standard as an exception, however, is functionally a standard. Sullivan is correct that the joint opinion refused to treat stare decisis as a rule that "says 'adhere to precedent.'" *Id.* at 70. The point of disagreement among the opinions in *Casey*, however, was not so much a rule-versus-standard choice, but a choice among two different standards, one placing emphasis on whether a decision is wrong, and another placing emphasis on factors like workability and societal reliance. *Cf. id.* (stating that "[a] flexible standard says something like 'overrule when wrong,'" without acknowledging the possibility of other standards). The joint opinion's identification of "prudential and pragmatic considerations" emphasizes that the joint opinion is applying a standard, not that these considerations are of less than constitutional weight.

43. The *Casey* Court explained that "[t]he obligation to follow precedent begins with necessity" and that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Casey*, 505 U.S. at 854. I do not disagree with Professor Paulsen's statement that this "is not all that close" to "suggesting that stare decisis is a doctrine of constitutional dimension." Paulsen, *supra* note 8, at 1543. As he argues, a court might "respect" precedent without "follow[ing]" it. *Id.* at 1545. But the signals denigrating stare decisis to which he gives credence are no more persuasive than the ones that he minimizes. Professor Paulsen, moreover, acknowledges that language in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991), that the policy of stare decisis is "'of fundamental importance to the rule of law,' 'arguably creates some sort of heightened status.'" Paulsen, *supra* note 8, at 1549.

view of whether stare decisis has a basis in the Constitution cannot be deduced from boilerplate written without that question in mind.[44]

That the Supreme Court has not stated whether stare decisis is of constitutional dimension does not resolve the merits of the issue.[45] To further his case that it is not, Professor Paulsen suggests that elevating stare decisis to constitutional status would be absurd. He makes this point by considering three different possible formulations of what it might mean for stare decisis to be a question of "constitutional policy." "First, it might mean that the Constitution itself prescribes some rule of stare decisis of determinate content (be it absolute, very strong, or relatively weak)."[46] Second, it might mean that the Constitution "delegates to the judiciary discretionary power to make such rules."[47] And third, a compromise between the first two, it might mean that "the Constitution prescribes a doctrine of stare decisis, but with indeterminate content, and that the judiciary is empowered to fill in the details."[48] If this were an exhaustive list, then I might agree with Professor Paulsen that the concept of constitutional policy is unsupportable, but I believe that it omits an important possibility.

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44. It may, however, be possible to determine the views of some of the individual Justices. Justice Scalia, for example, has noted that stare decisis is inconsistent with both originalist and nonoriginalist approaches to interpretation:

> [A]lmost every originalist would adulterate it with the doctrine of *stare decisis*—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong. (Of course recognizing *stare decisis* is seemingly even more incompatible with nonoriginalist theory: If the most solemnly and democratically adopted text of the Constitution and its Amendments can be ignored on the basis of current values, what possible basis could there be for enforced adherence to a legal decision of the Supreme Court?)

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989). This view suggests that stare decisis must be seen as independent of the Constitution itself. Although this suggests that Justice Scalia would believe that Professor Paulsen's hypothetical statute would force the Court to reconsider a decision like *Roe*, his theory is also consistent with constitutional circularity, which provides an explanation for stare decisis.

45. Indeed, Professor Paulsen conversely recognizes that even if stare decisis "is a doctrine of judicial policy," it might still be "a matter of 'constitutional policy,' as it were." Paulsen, *supra* note 8, at 1549.

46. *Id.* Professor Paulsen contends that "[s]uch a view would be difficult to take seriously," because "there is no 'stare decisis clause' in the Constitution or anything that can fairly be read as creating one." *Id.*

47. *Id.* at 1550. This claim is rejected on similar grounds. *See id.* ("There is no more textual basis for such a claim than there is for the claim that the Constitution itself prescribes a rule of stare decisis."). This is ultimately a claim about whether such a power inheres in "[t]he judicial Power." *Id.* at 1570; *see id.* at 1570–82 (concluding that it does not); *see also* Harrison, *supra* note 26, at 513–25; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 28–32 (1994) (arguing that application of stare decisis may sometimes be beyond the judicial power of federal courts).

48. Paulsen, *supra* note 8, at 1550.

In all three of these enumerated possibilities, stare decisis operates as an independent principle affecting whether the courts honor precedent or the Constitution. Yet precedent may be relevant to what the best interpretation of a provision is, not just what is done with that interpretation. Professor Paulsen assumes that stare decisis is irrelevant in determining whether a doctrine is correct; to him, it is relevant only in determining whether the courts should perpetuate precedential error.[49] The closest Paulsen comes to examining this assumption is in acknowledging the argument that "the judiciary surely must have the power to treat precedents, where they exist, as *evidence* of the best understanding of these provisions."[50] Even if this is so, Paulsen maintains, it would be difficult to conclude that judges enjoy, independent of congressional interference, "a penumbral structural autonomy . . . to devise second-order 'evidence-of-what-the-law-is' rules as a means for carrying out the power to decide and interpret."[51] But this does not quite recognize the point. Precedent may not be merely evidence of "the best understanding of these provisions." The existence of precedent may in fact be part of what determines the best understanding.

In ignoring this possibility, Professor Paulsen may be shortchanging what he calls the "'disposition' function" of precedent, which he contrasts to the "'information' function."[52] The latter, he explains, "relieves courts of the need to reinvent the interpretive wheel (since some thinking on the issue has occurred before),"[53] but this cannot translate into an obligation to

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49. *See, e.g., id.* at 1556 ("Only if a past constitutional decision is adhered to because the judges believe it is substantively *correct* can it be said that the judiciary is purporting to impose a limitation derived from the Constitution and not from mere policy."). Paulsen never explicitly denies that precedent may be part of what makes a doctrine correct, but he does not acknowledge the possibility either.

50. *Id.* at 1579.

51. *Id.* Professor Paulsen counters this structural argument with another one:

> If the basis of the argument is a supposed structural inference from the Constitution's system of separation of powers, its toleration of an uncheckable judicial power to prescribe rules at variance with the Constitution is fundamentally at odds with the regime of separation of powers that is thought to yield it. . . . When an asserted "structural" constitutional argument generates a conclusion at odds with the Constitution's most fundamental structural postulate, something is amiss. That is the case with the asserted structural inference of an uncheckable judicial prerogative to prescribe a doctrine of precedent that gives precedent decision-altering weight in opposition to the judiciary's best understanding of what the law is.

Id. at 1581. The last sentence of this passage again reveals Professor Paulsen's apparent assumption that the "judiciary's best understanding of what the law is" cannot itself be a function of precedent.

52. *Id.* at 1544 ("Precedent can be seen as potentially performing two quite different functions—an 'information' function (providing prior and potentially persuasive thinking to a present interpreter) and a 'disposition' function (dictating, to some degree, a present interpreter's action).").

53. *Id.*

follow the precedent. Fair enough; if stare decisis is simply about feeding information to the judiciary, then it is difficult to see how it could overcome persuasive contrary evidence in determining constitutional meaning. Paulsen sees, meanwhile, that the disposition function may "dictat[e], to some degree, a present interpreter's action."[54] To him the point of this is the achievement of "efficiency gains of a different sort, resulting *not* from having the benefit of prior thinking, but *from not having to think very much at all* past a certain point."[55] The disposition function, however, could be characterized more broadly than this.[56] Perhaps courts dispose of cases as they have been disposed of in the past not merely as a time saver, but because the fact that a constitutional provision has been thought to have a given meaning, even without relying on the assumption that prior decisionmakers were more likely right than wrong, provides warrant to conclude that it does have this meaning. That people have had a particular understanding of a constitutional provision, may, by the definition of "meaning," indicate that the provision has that meaning.[57]

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54. *Id.*

55. *Id.*

56. One theory of stare decisis that might be classified as within Professor Paulsen's disposition function is Maxwell Stearns's. *See* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1356–57 (1995). Professor Stearns argues that stare decisis is a device for countering the social choice pathology of "cycling," in which a decisionmaker changes repeatedly its choice from three or more policy options, depending on which two the decisionmaker faces at a particular time. *Id.* at 1356. One reason that cycling may be undesirable is because it consumes excessive decision-making resources, and stare decisis allows the courts to settle on an interpretation quickly. But cycling also may be undesirable because it is destabilizing or because it undermines confidence in decision-making institutions. On this formulation and surely on many others, stare decisis thus reflects more than the information function and the disposition function as Paulsen conceives them. Not only does stare decisis allow for the propagation of wisdom and for savings of resource costs, it also supports adherence to a particular doctrine because the fact that the court previously announced that doctrine, even if the court's reasoning was flawed, is itself a reason to follow the precedent.

57. One dictionary's first definition of "meaning" is "[s]omething that is conveyed or signified; sense or significance." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1116 (3d ed. 1992). If a person has a particular understanding of a constitutional provision, then the provision can be said to signify that understanding. The word "meaning," though, is, as one linguist put it, "triply or even four-ways ambiguous." Northwestern Univ./Wash. Univ. Law and Linguistic Conference Proceedings, 73 WASH. U. L.Q. 769, 825 (1995). Michael Moore, for example, argues that legal interpretation should depend on the "meaning words possess in natural languages such as English," noting that "[s]uch meanings exist antecedently of any interpretive enterprise in law, and thus a theory of interpretation in law is free to incorporate such ordinary meanings or not." Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 288 (1985). The difference between Professor Moore's perspective and mine is that he emphasizes the meaning of words, while I emphasize the meaning of provisions and of the Constitution itself. Though consisting of words, these may take on meanings that the constitutive words would not seem to justify.

2. The *Casey* Court's Stare Decisis

That precedent may be relevant to meaning provides a justification for stare decisis, but it does not necessarily provide the justification for the application of the doctrine by the Supreme Court. Nothing I have said contradicts the possibility that for the Court stare decisis is independent of constitutional meaning, rather than a direct factor in the interpretation of constitutional provisions on par with text and history. The Court, indeed, might even be inconsistent, sometimes using precedent as a consideration in determining what a constitutional provision means, and sometimes invoking stare decisis to avoid doctrine reflecting the correct meaning of a constitutional provision. Even in the same case, stare decisis plausibly could have different meanings. If this is so, then the analysis of a statute purporting to abrogate stare decisis may depend on the role stare decisis would play in a particular case in the absence of such a statute.

To assess how the Supreme Court has invoked stare decisis, it may be useful to scrutinize the policies underlying stare decisis, as examined in *Casey*.[58] Part of the purpose of this exercise is to contribute to an assessment of whether Professor Paulsen is correct—whether the Court, if it remains true to its principles, would agree to consider *Roe* de novo if Congress passed a statute purportedly abrogating stare decisis. The exercise, though, has a larger purpose: to demonstrate that it is often difficult to distinguish arguments that are relevant in determining constitutional meaning from arguments about whether to determine constitutional meaning. This caveat should emphasize the point that this discussion of *Casey* provides only a window onto stare decisis, and that the analysis for other cases could be different.[59]

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58. These factors, examined in *Planned Parenthood v. Casey*, 505 U.S. 833, 854–61 (1992), are discussed also in Paulsen, *supra* note 8, at 1551–67. For other works examining the use of stare decisis in *Casey*, see Michael J. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENT. 67 (1993); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1115–20 (1995); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2034–36 (1996); David K. Koehler, Comment, *Justice Souter's "Keep-What-You-Want-and-Throw-Away-the-Rest" Interpretation of Stare Decisis*, 42 BUFF. L. REV. 859 (1994); and Kenji Yoshino, Note, *What's Past Is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471, 496–506 (1994).

59. Consider, for example, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), which Professor Paulsen mentions as another possible candidate for stare decisis abrogation. *See* Paulsen, *supra* note 8, at 1539 n.12. That case includes the following interesting passage:

> It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity . . . . But consideration of that question must proceed with fidelity to this century-old doctrine. The dissent, to the contrary, disregards our case

a. Workability

The first factor that the *Casey* plurality considers is whether a decision has proven unworkable. The plurality's explanation of that factor is so brief that its purpose in considering workability is difficult to discern.[60] Professor Paulsen suggests that "to the extent that workability is a pure policy consideration—that is, a reason for adhering to or departing from a precedent *apart* from a belief that it is right or wrong—it should be open to Congress to adjust that policy."[61] He concedes in a footnote, however, that "unworkability may also be a signal that something is amiss with the precedent decision on the merits—that is, that the precedent may be wrong."[62] Indeed, the sole case that the *Casey* plurality cites in this passage, *Garcia v. San Antonio Metropolitan Transit Authority*,[63] supports the notion that unworkability is itself

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law in favor of a theory cobbled together from law review articles and its own version of historical events.

Seminole Tribe, 517 U.S. at 68. This initially might be seen as an unscholarly grab at power by author Chief Justice William Rehnquist. The law review articles to which he alludes, after all, presumably provide information and analysis relevant to assessment of historical and textual arguments. *Cf.* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 25 (suggesting that the Chief Justice was "[w]riting with the freedom given by five votes"). More charitably, the Chief Justice may simply have been indicating that the jurisprudential history of the Eleventh Amendment is relevant to determining its meaning. Chief Justice Rehnquist's reference to a "century-old doctrine" seems to reflect that the Constitution has come to embody a broad principle of state sovereign immunity even if it did not always have that meaning. One might argue that doctrinal argument is a particularly important factor in interpretation when text and history are unusually complicated. For a sense of the complexity of the Eleventh Amendment question, see generally William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1273 (1998); and Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

60. The Court notes simply:

> Although *Roe* has engendered opposition, it has in no sense proven "unworkable," representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

Casey, 505 U.S. at 855 (citation omitted). This passage explains why *Roe* should not be considered unworkable, but it does not explain why workability is relevant to the stare decisis analysis.

61. Paulsen, *supra* note 8, at 1552 (footnote omitted).

62. *Id.* at 1552 n.46.

63. 469 U.S. 528 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)), *cited in Casey*, 505 U.S. at 855.

a proxy for incorrectness.[64] When a precedent is wrong, the gravitational pull of the correct constitutional interpretation may make judges eager to distinguish the precedent, thus producing intricate and unworkable doctrine.[65] While administrative considerations are undoubtedly part of the reason for considering workability,[66] this suggests that stare decisis may assist in identifying the correct interpretation.

Professor Paulsen might argue, however, that while concerns about workability helps explain why an unworkable doctrine should be overturned, they do not recommend keeping a bad precedent simply because it is workable.[67] This potential disagreement may be a matter of presumptions. To Professor Paulsen, the correct interpretation is presumptively valid, and the existence of an incorrect but workable interpretation is irrelevant. Yet it may be that the Supreme Court believes that its prior interpretations are presumptively correct, absent some evidence, such as workability, that they are flawed. The mere fact that the courts have applied a doctrine in a relatively orderly way suggests not only that courts find the doctrine to be clear, but also that

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64. The *Garcia* Court explained:

> We believe, however, that there is a more fundamental problem at work here, a problem that explains why the Court was never able to provide a basis for the governmental/proprietary distinction in the intergovernmental tax-immunity cases and why an attempt to draw similar distinctions with respect to federal regulatory authority under *National League of Cities* is unlikely to succeed regardless of how the distinctions are phrased. The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society.

Garcia, 469 U.S. at 545–46.

65. The *Garcia* Court does not articulate this theory, but its statement is consistent with it. If no distinction "that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society," *id.*, then courts supportive of that role may blur the distinction to accommodate their intuitive sense of federalism with the doctrine announced by the Supreme Court.

66. I do not, however, accept without reservation the conclusion that if administrative considerations are the sole basis for considering workability, then this prong of the stare decisis inquiry is not about constitutional meaning. It may be that the courts are concerned about unworkable doctrine because if a doctrine is unworkable, individual judges may exercise discretion that arrogates power from the executive or legislative branches. Differently stated, separation of powers may imply a need to make doctrine administrable, so that courts do not exceed the bounds of their roles. The only problem with this logic is that the legislative and executive branches have little power to discipline such encroachments by the judicial branch, thus leading to an emphasis in separation-of-powers case law on encroachments of the judicial branch rather than vice versa. *Cf.* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 367–77 (1982) (emphasizing the role of judicial review in policing separation-of-powers violations).

67. Indeed, Professor Paulsen states, "The mere fact of workability is not a strong argument in favor of retaining a precedent." Paulsen, *supra* note 8, at 1552. My claim, of course, is not necessarily that workability is a strong argument; but that it is an argument, and perhaps a stronger one than Professor Paulsen acknowledges.

courts, and perhaps by extension litigants, accept that it is the doctrine, just as incoherence in doctrinal application suggests a judicial resistance to the initial interpretation.[68] This type of acceptance provides a reason, though perhaps on its own not full justification, to conclude that the provision has come to mean what the courts have said it means.

b. Reliance

The second factor discussed in *Casey* is reliance, and Professor Paulsen understandably has trouble with the plurality's explanation that "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society in reliance on the availability of abortion in the event that contraception should fail."[69] This statement, Professor Paulsen aptly observes, has "little relevance . . . to questions of reliance in any *vested*, 'sunk-cost' sense."[70] This seems to advance his argument that a legislative finding that there has been no reliance on the right to abortion would be eminently reasonable.[71] The observation, however, may backfire in a more subtle way: If it does not make sense to think of reliance in the abortion context in a sunk-cost sense, then the Supreme Court might have been emphasizing reliance in some other sense. In particular, the Court might well have been using the concept of reliance to emphasize that stare decisis is part of interpretation rather than separate from it.

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68. This theory implies that if judges chafe in applying the doctrine, that provides a reason not to apply it, whether or not the judges think the doctrine is unworkable. For example, when the Third Circuit heard *Casey*, it stated, "In sum, Justice O'Connor's undue burden standard is the law of the land, and we will apply that standard to all provisions of the Pennsylvania Act at issue in this appeal." Planned Parenthood v. Casey, 947 F.2d 682, 698 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992). Reading between the lines, this type of statement indicates a judicial incredulity about the correctness of the original decision, an expression of doubt that could be made by the Supreme Court as well as by a lower court. Arguably, the *Casey* plurality's comment that "[a]lthough *Roe* has engendered opposition, it has in no sense proven 'unworkable,'" *Casey*, 505 U.S. at 855, suggests that the Court does not believe that acceptance is relevant to workability, and this provides some ammunition to the position that the Court's workability analysis is about administrability.

69. Paulsen, *supra* note 8, at 1555 (quoting *Casey*, 505 U.S. at 856).

70. *Id.*

71. Paulsen explains:

> The general point is simply this: To the extent that the policy of stare decisis rests on the policy of (sometimes) protecting reasonable reliance interests, Congress can weigh mere social-reliance interests and determine that they should not be given controlling weight as against correct resolution of a vitally important constitutional question by the courts.

Id.

No legal pyrotechnics are required to interpret *Casey* this way. Indeed, the plurality's argument makes clear that it does not conceptualize reliance in a conventional sunk-cost sense. The Court begins by noting that "one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract."[72] After relaying the argument,[73] the Court objects that "[t]o eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity."[74] This provides context for the sentence that Professor Paulsen quotes, as does the critical sentence that immediately follows: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[75]

This context suggests that the Court did not consider reliance to be a pragmatic factor influencing whether or not correct doctrine should be followed. Rather, the Court seems to be arguing that Americans' very conception of democracy, and of their places in society, is predicated on the continuing legality of abortion. Women have come to understand that the Constitution protects their right to democratic participation, and statutes preventing them from having abortions would conflict with this understanding. In short, the emphasis on the relation between people and society suggests that the Court finds reliance persuasive when people have come to understand their government, and thus the Constitution, to embody specific rights and protections. Therefore, in considering reliance, the plurality can easily be read as implying that the abortion right must be preserved because people believe that the Constitution protects it.[76] The Court's unmistakable emphasis on society supports the conclusion that for it, constitutional interpretation involves not just questions of text and eighteenth century history, but also

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72. *Casey*, 505 U.S. at 856.

73. The plurality undermines the argument, but only slightly, by stating that "[t]his argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." *Id.*

74. *Id.*

75. *Id.* (citing ROSALINDA POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 109, 133 n.7 (rev. ed. 1990)); *see also* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (arguing that prohibitions on abortion are totalitarian and thus unconstitutional, because they force women's lives down certain paths that they have not chosen).

76. This understanding, moreover, may be only on an unconscious level. Professor Paulsen suggests that "[r]ational actors should rely on a decision's remaining the rule *only to the extent that it can be predicted that the courts will adhere to the decision as correct.*" Paulsen, *supra* note 8, at 1554. Surely, any observer of presidential politics realizes that it is conceivable that *Roe* could be overturned (or at least that it was at the time *Casey* was decided). But the Court may be claiming that *Roe* has led people generally or women specifically to adopt certain assumptions about their relation to society, assumptions that they do not recognize would be undermined by *Roe*'s reversal but would in fact be so undermined.

questions of what in the twentieth century people believe the Constitution means.

c. Remnant of Abandoned Doctrine

The third factor the *Casey* plurality identifies as part of the stare decisis calculus is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[77] Professor Paulsen begins by offering a cynical spin: "It is okay to overrule precedent if you do it in two (or more) steps."[78] Taking the factor at face value, Professor Paulsen concludes that *Roe* is now ripe for such two-step overruling. In *Washington v. Glucksberg*,[79] decided after *Casey*, the Court refused to find a right to physician-assisted suicide protected by the Due Process Clause. In stating that any claimed substantive due process right must be "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty,"[80] the *Glucksberg* Court undermined the doctrinal foundations of *Roe*.[81]

As Professor Paulsen recognizes,[82] though, this argument by itself suggests only that the Court should find *Roe* overruled regardless of whether Congress passes his suggested statute, or at least find that the third factor militates toward overruling.[83] To support such overruling, Professor Paulsen

77. *Casey*, 505 U.S. at 855 (citation omitted).

78. Paulsen, *supra* note 8, at 1557.

79. 521 U.S. 702 (1997).

80. *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted).

81. Professor Paulsen advances his argument that *Glucksberg* undermines *Roe* by quoting a footnote in *Glucksberg* that rejects Justice David Souter's substantive due process analysis and emphasizes the *Casey* plurality's "'emphasis on stare decisis.'" Paulsen, *supra* note 8, at 1559 (quoting *Glucksberg*, 521 U.S. at 721 n.17). Professor Paulsen concludes: "[T]he *Glucksberg* footnote firms up what was already reasonably clear from *Casey* itself: The reaffirmation of *Roe* in *Casey* turned on stare decisis, not on a broad view of substantive due process that would have established *Roe* as correct on the merits." *Id.*

82. *See id.* at 1560 ("[T]he Court should reconsider *Roe*. . . . But in what way does the retreat in *Glucksberg* from the reasoning underlying *Roe* and *Casey* affect the permissibility of a congressional statute abrogating stare decisis in substantive due process cases?").

83. Even this argument may not be persuasive on a careful reading of *Casey*. The *Casey* plurality noted the possibility that "one could classify *Roe* as sui generis," and stated that "[i]f the case is so viewed, then there clearly has been no erosion of its central determination." Planned Parenthood v. Casey, 505 U.S. 833, 857 (1992); *cf.* Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 1044 (suggesting that the creation of an undue burden test in *Casey* supports the notion that the right to abortion is sui generis). On this reasoning, the doctrine allowing a right to abortion is not simply a by-product of some other doctrine, such as doctrine concerning "liberty relating to intimate relationships," *Casey*, 505 U.S. at 857, or doctrine concerning "personal autonomy and bodily integrity," *id.*, both of which the Court discusses separately. If this is so, the right to abortion is unmoored to any other line of doctrine and therefore could never be a "mere survivor of obsolete constitutional

offers the following account of stare decisis: "When earlier Precedent A (or line of cases) is inconsistent with later Precedent B (or line of cases), either one may be overruled."[84] The remnant-of-abandoned-doctrine factor, on this view, is just a recognition that if precedents or lines of precedent collide, a court will have no choice but to discard one of them, and this inevitably prompts an exception to stare decisis.[85] If Professor Paulsen is right, though, a congressional statute is superfluous. Whenever such a collision occurs, a court must make a choice, and Professor Paulsen indicates that a court will and should make this determination on the basis of "*which* of two cases or lines of cases is correct."[86] For him, the "remnant of abandoned doctrine" factor essentially does the same work as his hypothetical statute and thus is beside the point.[87]

This argument proves too much.[88] If it were right, then stare decisis would amount only to delaying the inevitable. If a holding depends on an

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thinking." *Id.* *Glucksberg*, an assisted suicide case, may then have nothing to say about *Roe*, an abortion case. Perhaps Professor Paulsen ignores this paragraph because it seems quite perplexing: How can the Court look for remnants of abandoned doctrine to overrule and yet reserve the possibility that a rule of law does not stem from any doctrine whatsoever? There are at least two possible interpretations of what the Court meant, one unprincipled and one principled. The unprincipled possibility is that the plurality anticipated a *Glucksberg* and sought to insert into *Casey* a doctrinal hook that would allow a future Court to conclude that *Roe* was not a remnant of abandoned doctrine. The principled possibility is that the Court was hinting that the right to abortion may in fact be a free-standing right "retained by the people" under the Ninth Amendment. *Compare* Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 837–38 (1994) (arguing that the Ninth Amendment does not create a right to abortion), *with* Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) (arguing that the Ninth Amendment does protect a preexisting common law right to abortion). *See generally* CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995).

84. Paulsen, *supra* note 8, at 1561.

85. This becomes clearer in Professor Paulsen's elaboration:

> If the Court chooses to overrule Precedent A, it is because Precedent B has undermined it; this supplies a "special justification" for departing from the policy of stare decisis (with respect to Precedent A). If the Court instead chooses to overrule Precedent B, it is because Precedent B departed from the earlier understanding of Precedent A; this supplies a "special justification" for departing from the policy of stare decisis (with respect to Precedent B).

Id.

86. *Id.*

87. Professor Paulsen does offer a mop-up argument. If the "remnant of abandoned doctrine" factor is not "just a disguised inquiry into whether or not the prior decision was correct," *id.* (citation omitted), then it is not a legal question and must be a policy question, and "Congress may resolve the policy question in favor of directing the Court always to decide legal issues on their merits, independent of the policy of stare decisis." *Id.* This assumes that if a consideration is not strictly legal, then it must be a policy consideration within Congress's power.

88. Of course, Professor Paulsen's point may simply be that this factor should not be part of the stare decisis calculus. If he believes that this factor really amounts to nothing more than the

incorrect argument, someday a case probably will arise that repudiates this argument, and the Court's duty would be to wait for this to occur and then overrule the original holding. This is perverse, serving only to lengthen the period of time in which the old doctrine can cause damage. An alternative, and in my view superior, explanation of the "remnant of an abandoned doctrine" factor is that the Court is seeking out the lesser of two evils: overruling a case or allowing a precedent whose foundations have been undermined to stand. When a doctrine is a mere remnant, the balance is on the side of overruling.

The interesting questions are what the nature of these two evils is and what distinguishes a remnant from a venerable doctrine. The plurality makes the costs of overruling clear enough elsewhere in the opinion.[89] But what is the evil in allowing an undermined precedent to stand? The plurality's analysis seems akin to the workability factor,[90] as the joint opinion assesses whether preserving *Roe* might damage *other* aspects of substantive due process jurisprudence.[91] What is striking, however, is that the *Casey* plurality never suggests that there is an evil in leaving an erroneous precedent in place, independent of the effects that this doctrine might have in related areas. This silence is telling. The Court seems to be concerned more

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notion that the Court can overrule itself in two steps, then it should be abolished and should thus pose no obstacle to his proposed statute. In my view, however, that his interpretation of the factor makes for an absurd doctrine should lead us to look for alternative interpretations before concluding that it is the doctrine and not the interpretation that is absurd.

89. *See* Planned Parenthood v. Casey, 505 U.S. 833, 864–69 (1992) (discussing the Court's legitimacy); *infra* Part I.A.2.e.

90. Indeed, the two factors developed in the case law together. In mentioning the "remnant of an abandoned doctrine" factor, *see Casey*, 505 U.S. at 855, the *Casey* plurality cites the following passage from *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989):

> Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws . . . .

Id. at 173 (citations omitted).

91. This concern manifests itself in the following passage:

> Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty. . . . If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example.

Casey, 505 U.S. at 858–59. In other words, the Court sees little danger of perpetuation of bad doctrine, because the state interest in fetal protection has no relevance outside the abortion context. *See id.* at 859 ("[B]ecause *Roe*'s scope is confined by the fact of its concern with postconception potential life . . . any error in *Roe* is unlikely to have serious ramifications in future cases.").

about the effects of originally incorrect precedent than about the incorrectness itself. One might imagine that the plurality would conclude that because abortion is so important an issue,[92] it should be especially important for the Court to arrive at the "correct" answer. Yet nowhere does the Court indicate that this is even a consideration.

It may be that this is a disingenuous omission, that the authors of the joint opinion did not want to admit that they were risking the perpetuation of a major error. The very phrase "remnant of abandoned doctrine," however, suggests that the bigger the issue, the less it can be considered a remnant that is easily discarded. The Court thus seems more concerned about small inconsistencies dwarfed by large doctrinal change than by major doctrinal mistakes. This may seem to be a puzzle, but a solution to it lies in recognizing that "[e]ven on the assumption that the central holding of *Roe* *was* in error,"[93] the plurality may not believe that the central holding *is still* in error. The very existence of *Roe* may have affected what the Justices in *Casey* believed was the best interpretation of the Constitution. The greater the importance of a decision, and the greater the legal or general public's awareness of the holding, the better the claim that decision has to being a paradigm case that legal interpretation must honor. And if the decision as a practical matter can be honored without disturbing decisions on other issues that remain unsettled or have been settled differently,[94] then the meaning of the relevant provision is arguably best interpreted as encompassing an exception for the prior holding.

d. Changed Facts

The fourth stare decisis factor is changed facts, and Professor Paulsen aptly notes that "[t]he factor probably is included in the Court's discussion in order to justify departures from precedent in other circumstances."[95] In particular, Professor Paulsen recognizes that *Brown v. Board of Education*[96] has

92. The plurality explicitly acknowledged that *Roe* reflected an "intensely divisive controversy." *Id.* at 866.

93. *Id.* at 858 (emphasis added). I quote this line to emphasize the tense of the word "was." This is, of course, at best only suggestive evidence, but it is in marked contrast to Professor Paulsen's use of the present tense in discussing whether a precedent "is correct." Paulsen, *supra* note 8, at 1561.

94. My analysis so far does not exclude the possibility that Congress might be able to pass a statute affecting this part of the calculus. For example, Congress might pass a statute stating that the Court should avoid following a precedent that would lead to subsequent erroneous decisions. This does not resolve, however, how the Court should deal with such a statute if in fact it believes that the precedent has become correct.

95. Paulsen, *supra* note 8, at 1562.

96. 347 U.S. 483 (1954).

emerged as a paradigm case that many commentators seem to agree any theory must ultimately justify,[97] and that *Brown* relied "on changed factual circumstances and new sociological studies"[98] in reaching a different result from, but technically not overruling, *Plessy v. Ferguson*.[99] Because the *Casey* Court did not want to cast doubt on its reasoning in *Brown*, it "labors mightily to distinguish *Brown*'s overruling of precedent from *Casey*'s declining to do so."[100]

If changed facts are relevant to stare decisis, Professor Paulsen argues, this "further confirms the propriety of Congress's deciding to abrogate such a policy," because the relevant possible changes in factual circumstances "are not case-specific adjudicative facts but general findings quintessentially thought to be appropriate subjects for legislative fact-finding as a predicate for enacting general policies."[101] Interestingly, however, he fails to acknowl-

97. *See* Paulsen, *supra* note 8, at 1562 ("Any theory of stare decisis must of course justify *Brown* . . . ."). For other comments noting that constitutional theorists would view as incorrect any theory that would lead to the opposite result in *Brown*, see Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990), and Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 513 (2000). *See also* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1931 (1995) (arguing that the "perceived exigency of justifying *Brown* represents . . . one manifestation of the beleaguerment of constitutional theory by ahistoricism").

98. Paulsen, *supra* note 8, at 1562.

99. 163 U.S. 537 (1896). Nonetheless, *Brown* was more of a repudiation of *Plessy* than *Casey* was of *Roe*, as Professor Paulsen demonstrates in a mock draft Supreme Court opinion in *Brown* modeled on *Casey*. *See* Michael Stokes Paulsen & Daniel N. Rosen, Brown, Casey-*Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994).

100. Paulsen, *supra* note 8, at 1562 (citing Planned Parenthood v. Casey, 505 U.S. 833, 862–64 (1992)). The *Casey* Court explicitly acknowledges the need for theory to accommodate paradigm cases: "[T]he sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed." *Casey*, 505 U.S. at 861. In addition to explaining *Brown*'s retreat from *Plessy*, the Court explains the effective overruling of *Lochner v. New York*, 198 U.S. 45 (1905), in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

101. Paulsen, *supra* note 8, at 1562. Even if the distinction between adjudicative and legislative facts justifies the courts in deferring to congressional fact-finding in statutory cases, it does not necessarily do so in constitutional cases. As David Faigman argues, the Supreme Court has long made decisions relying on various kinds of "constitutional facts." David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 551–65 (1991). For example, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "[t]he pertinent constitutional-rule fact (the general understanding of 'necessary') together with the pertinent constitutional-review fact (that the national bank was an appropriate means to a legitimate end) formed the final result." Faigman, *supra*, at 554. Professor Paulsen presumably would not suggest that Congress could have overturned *McCulloch* by issuing legislative fact-finding challenging these constitutional facts. The proper analogue to Congress's power to establish legislative facts in legislation is the people's theoretical power to correct such constitutional fact-finding through constitutional amendment. Professor Paulsen offers no distinction among different kinds of constitutional facts to explain why the facts found in *Roe* are uniquely suitable to legislative change.

edge the implications of this theory: that Congress, or perhaps even the legislature of Kansas in the absence of congressional action, could have passed a statute finding that segregation imposed no "badge of inferiority"[102] on blacks. Indeed, perhaps a Congress tired of modern equal protection analysis could pass such a statute today.[103]

A possible reply is that unlike a statute declaring that segregation does not adversely affect blacks, Professor Paulsen's hypothetical statute would not change the merits. At most, such a statute would require the courts not to let the absence of factual circumstances prevent them from reaching the merits of a dispute.[104] But if Congress cannot affect constitutional doctrine through an anti-*Brown* statute, this is presumably because the observation that segregation does impose a badge of inferiority is part of the equal protection analysis itself, rather than just a mere fact to which the Supreme Court applied the law.[105] This admission recognizes, however, that in interpreting constitutional provisions, the courts may consider more than just the text of the Constitution and its enactment history. Acceptance of this makes plausible that precedent is part of what determines the meaning of a constitutional provision much less strange.

Moreover, the changed-facts factor fits comfortably into such a view of stare decisis. With this factor, a court looks to the merits of a dispute, but only to part of the merits.[106] That is, the court will look to determine

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102. *Plessy*, 163 U.S. at 551.

103. So far as I have been able to determine, no state opposed to *Brown* attempted to pass a statute purporting to correct a factual error by the Supreme Court. This is notable given the considerable resistance to *Brown*. *See* Cooper v. Aaron, 358 U.S. 1, 17 (1958) (rejecting "the premise of the actions of the Governor and Legislature [of Arkansas] that they are not bound by our holding in the Brown case"). Nor did anyone suggest that Congress had or would have had the power to force the Supreme Court to consider *Plessy* as binding precedent. *Cf.* Harrison, *supra* note 26, at 540 ("Imagine, for example, that in 1952 Congress had decided to maintain sectional tranquility by providing that the dictum in *Plessy* concerning school segregation was not to be questioned.").

104. As Paulsen indicates, "It is difficult to see how the factor of 'changed factual assumptions' *supports* (partial) adherence to prior case law in *Casey*." Paulsen, *supra* note 8, at 1562 (quoting *Casey*, 505 U.S. at 860).

105. If this were not so, then equal protection doctrine ought presumably to allow lawyers to defend a particular instance of segregation by showing that in that particular case, no badge of inferiority was imposed. *Brown*, however, reversed decisions of lower courts finding schools to be separate but equal. *See* Brown v. Board of Education, 347 U.S. 483, 488 (1954).

106. In *Casey* itself, the only changes in factual circumstances that the Court recognized were that improvements in medical technology had made abortions safe to the mother later in pregnancy and changed the time in a pregnancy at which the fetus becomes viable from twenty-eight to twenty-three or twenty-four weeks. *See Casey*, 505 U.S. at 860. The Court recognized, however, that

> these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest

whether the argument underlying a prior holding is no longer valid on account of a newly changed factual premise, but it will not consider whether the argument is simply wrong. One might imagine a stare decisis doctrine that required courts to conduct a preliminary consideration of the merits, with substantial problems in the reasoning of a prior opinion militating toward de novo review.[107] That the courts do not engage in such analysis must be because it is meaningful whether an argument is wrong because of a changed factual premise versus for some other reason, such as an error in logic. One explanation for why this should be is that if the facts relevant to a constitutional doctrine have changed, a prior holding is less likely to gain acceptance irrespective of its initial correctness, because the society to which the law applies is in flux. It would thus be odd in such a circumstance to conceive the prior holding as embodying the meaning of the provision over time. In contrast, recognition of an earlier legal error may not matter when the fact of the decision has made its holding part of constitutional meaning.

e. Judicial Integrity

Professor Paulsen identifies the "fifth and final factor in *Casey*'s stare decisis mix" as "judicial integrity."[108] The *Casey* plurality does indeed spend a great deal of time considering how overruling *Roe* could undermine the Court's legitimacy.[109] At first this concern seems irreconcilable with the notion that stare decisis is a recognition that a prior holding, by virtue of that holding, becomes a constitutional provision over time. After all, concern about integrity is solely instrumental. Perhaps it is plausible that the meaning of constitutional provisions depend on prudential factors,[110] for the Framers themselves may have intended that the goals underlying certain

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in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.

Id. The Court thus rechecked its logic, but only to determine whether a change in the factual premises would have any implications for the legal analysis.

107. This would be analogous to courts' practice of considering whether there is a likelihood of success on the merits in determining whether to grant a preliminary injunction. *See generally* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.3 (2000).

108. Paulsen, *supra* note 8, at 1564.

109. *See Casey*, 505 U.S. at 864–69. Among the language that Paulsen finds "overwrought," Paulsen, *supra* note 8, at 1564, is the following: "The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete." *Casey*, 505 U.S. at 868.

110. Prudential argument is one of the modalities of interpretation discussed by Philip Bobbitt. *See infra* Part II.C.1.a.

provisions be advanced as prudence would dictate. It would seem downright bizarre, though, for a court to claim that the meaning of a constitutional provision depends on a prudential consideration having nothing to do with the provision itself.[111] Indeed, the *Casey* plurality's analysis of judicial integrity seems to have nothing to do with whether substantive due process includes the right to abortion.[112]

A careful reading of *Casey*, however, reveals unambiguously that the plurality did not consider judicial integrity to be a factor in considering stare decisis at all. In beginning its discussion of stare decisis, the Court lists four factors, all of those discussed previously but not judicial integrity,[113] and then examines each of them in consecutive subsections.[114] The discussions of past overrulings of cases and of judicial integrity are in separate sections.[115] This is no accident of organization. The Court expressly begins its discussion of integrity by stating that "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[116] Concerns about judicial integrity are thus related to but independent of principles of stare decisis.

This does not mean that the discussions of past overruling and of judicial integrity are mere surplusage. Rather, the discussions justify following the principles of stare decisis as presented in *Casey* and not overruling *Roe*. Simply applying stare decisis as a factor in interpretation begs the question of why it should be one.[117] Concern about judicial integrity may be the

111. Professor Paulsen makes this point so emphatically that he italicizes it: "*The judiciary has no power to enhance public perceptions of its integrity by adopting rules of decision at variance with the Constitution, treaties, and laws of the United States.*" Paulsen, *supra* note 8, at 1565.

112. The *Casey* plurality explicitly indicates that concerns of legitimacy are potentially present regardless of the particular issue at stake: "The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case." *Casey*, 505 U.S. at 866. Though the joint opinion states that such principled action is most important in regard to "the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," *id.*, it nowhere suggests that concerns about legitimacy are generally greater in interpreting the Due Process Clause than in interpreting, say, the Second Amendment.

113. *See id.* at 854–55.

114. *See id.* at 855–61 (breaking Section III.A of the opinion down into subsections). Although there are five subsections, the fifth is simply a summary of the previous four and does not introduce anything new. *See id.* at 860–61.

115. *See id.* at 861–64 (discussing earlier overrulings in Section III.B); *id.* at 864–69 (discussing integrity in Section III.A).

116. *Id.* at 865.

117. Of course, the reasons explaining why stare decisis is important in interpretation may be different from any justification for the role of stare decisis in interpretation. For an argument that judges embrace stare decisis as a way of advancing their normative agendas, see Erin O'Hara,

Court's ultimate justification for why it believes that its present view of a constitutional provision should ordinarily be whatever the Court has said in the past. The *Casey* plurality recognizes the possibility of reasonable disagreement in constitutional law,[118] and it is because of this possibility that the Court places a high value on settling a divisive issue. This analysis might be naïve because the abortion issue remained divisive at the time of the *Casey* plurality decision,[119] but it shows *a fortiori* how concerns about judicial legitimacy may explain the appeal of the principle of constitutional circularity when the public genuinely has accepted a particular precedent.

Ensuring judicial legitimacy may be just one of many objectives in interpretation. Because stare decisis generally will prove relevant only if uncertainty surrounds which interpretation best promotes the other objectives, however, it may be logical to assign precedent an important role in determining what legal provisions mean the role is particularly justified. Stare decisis, one might argue, would have the same benefit of preserving judicial integrity whether it is a means of determining doctrine, as constitutional circularity would suggest, or just an extrainterpretive means of preserving it, as Professor Paulsen would have it. Yet stare decisis itself is of little value if there is no stare decisis of stare decisis. That is, constitutional stare decisis loses much of its value if it is subject to legislative abrogation. If legitimacy is a reason for the stare decisis rule in constitutional jurisprudence, then only a partial constitutionalization of stare decisis can protect

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Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis, 24 SETON HALL L. REV. 736, 738–48 (1993).

118. This is perhaps best seen in the following passage:

> Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.

Casey, 505 U.S. at 864. The very notion of a "present doctrinal disposition" seems inconsistent with the notion that competing interpretations of constitutional provisions can be ordered in a value-neutral way.

119. The problem with this approach is that citing stare decisis does not necessarily succeed in settling the issue:

> The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to *adhere* to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of the original decision.

Casey, 505 U.S. at 963 (Rehnquist, C.J., dissenting). Perhaps the plurality is being truly forward-looking, however, looking to the next divisive issue that will face the Court, or the one after that. If, over time, the principle were to become established that the Court will adhere to its decisions, then it is plausible, though certainly speculative, that opponents of the Court's rulings in the future would focus on redress through constitutional amendment rather than through selection of Justices.

that legitimacy.[120] The broad phrases that the Court uses in discussing judicial legitimacy suggest that for the Justices in the plurality,[121] stare decisis is no mere doctrine of convenience, but part of constitutional meaning.

f. Additional Clues

Perhaps the best clues to how the Supreme Court conceptualized the doctrine of stare decisis that it was applying in *Casey* lie not in the portions of the opinion directly addressing the issue but in the opinion's opening and closing phrases. The first sentence of *Casey* is arresting: "Liberty finds no refuge in a jurisprudence of doubt."[122] This sentence suggests that the very word in the Constitution at issue, the word "liberty" in the Fourteenth Amendment's Due Process Clause,[123] would be undermined by a failure to apply stare decisis.[124] The end of the last paragraph hearkens back to this

120. The constitutionalization is partial in the sense that stare decisis is constitutionalized only in certain situations, those in which the public has come to accept a holding as reflecting the Constitution's meaning. This explains why the principle of constitutional circularity is not at odds with the Court's oft-repeated claim that stare decisis is weaker in constitutional than in statutory cases. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997). It must sometimes be weaker, because constitutional circularity may require the Court to overturn a precedent when the public has come to accept a view of the Constitution that is inconsistent with precedent. *Cf. infra* Part I.B.2 (explaining that constitutional circularity may apply when the public's perception of the Constitution outpaces precedent). In the absence of constitutional circularity, the Supreme Court's blanket statement about stare decisis in constitutional cases must be puzzling, for surely there are some constitutional precedents—to take just two, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Brown v. Board of Education*, 347 U.S. 483 (1954)—that the Court would surely follow even if it became convinced that they were wrong as an original matter. Constitutional circularity explains both why these precedents are sacrosanct and why other precedents cannot be.

121. Consider the following statement: "Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law." *Casey*, 505 U.S. at 868. This statement may initially seem like rhetorical hyperbole, but read literally this statement suggests that constitutional meaning develops with time. "Their belief in themselves as such a people," the Court continues, "is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals." *Id.* In other words, the people's very conception of a constitution, according to the plurality, demands a Court that does not waiver. On this reasoning, use of precedent in interpreting the Constitution is a precondition to the democratic project itself.

122. *Id.* at 844.

123. The basis for substantive due process in the Fourteenth Amendment is, under long-standing doctrine, the Due Process Clause rather than the Privileges and Immunities Clause. *But see* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 172 (1998) (arguing for a broader reading of the Privileges and Immunities Clause and a narrower reading of the Due Process Clause); *cf.* Saenz v. Roe, 526 U.S. 489, 501–04 (1999) (applying the Privileges and Immunities Clause for the first time in almost sixty-five years).

124. The sentence has attracted considerable commentary. *See, e.g.*, Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1645 (1993) ("[I]f liberty finds no refuge in a jurisprudence of doubt, it similarly finds none in a jurisprudence that any court can

opening,[125] concluding, "We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty."[126] This sentence transforms the marriage of stare decisis and constitutional meaning suggested by the first sentence beyond the jurisprudence of the Due Process Clause to constitutional interpretation more generally.

In the end, all of this may just be ambiance. It would be too adventurous, I think, to claim that the *Casey* Court consciously characterized stare decisis as part of constitutional meaning rather than as a doctrine of policy, and the Court almost surely did not anticipate Professor Paulsen's and Professor Harrison's arguments that Congress might be able to abrogate stare decisis. Yet these snippets and others indicate that for the members of the plurality, precedent and constitutional meaning became fused. Perhaps the Court was just reaching for some means of upholding *Roe*, but what the Court did in so reaching is significant. The notions that the nation had absorbed the *Roe* precedent and that the precedent itself was relevant to the interpretive task seemed to have appeal for the plurality. And it is notable that the Court did not seek to defend its upholding of *Roe* by explicating stare decisis as a convenient time-saving device for the courts.

B. Prophylactic Constitutional Rules

Casey is both a valuable and a questionable source for constructing a theory of stare decisis in the Supreme Court. It is valuable because the Supreme Court considered the issue of stare decisis in such length.[127] It is questionable because only a plurality of Justices signed onto the opinion, and because abortion is so controversial an issue that any jurisprudence concerning it may be sui generis.[128] I therefore must look elsewhere for clues

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read to mean anything it pleases." (internal quotation marks and footnote omitted)); Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENT. 215, 224–25 (1994) (citing the sentence as being particularly quotable and thus revealing "that a real person occupies a seat on the Court").

125. The beginning of the last paragraph is relevant too: "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one." *Casey*, 505 U.S. at 901. In other words, the Constitution's meaning develops over time, and no generation can repudiate the interpretations developed by the generation before it.

126. *Id.*

127. *See id.* at 854–69.

128. This is, of course, what critics of the plurality have claimed. *See, e.g.*, Paul Benjamin Linton, Planned Parenthood v. Casey: *The Flight from Reason in the Supreme Court*, 13 ST. LOUIS

about how the Court conceptualizes stare decisis. Cases casually mentioning stare decisis or repeating stock phrases and citations,[129] however, are unlikely to be helpful, because the Court has not directly confronted the question of whether stare decisis may be connected with constitutional meaning. I will thus extend my descriptive analysis by focusing on one case in which such an understanding of stare decisis helps to bridge the gap between majority and dissent,[130] and I will then return to the closely related issue that Professor Saunders discusses. Both of these analyses involve prophylactic constitutional rules. This is a useful context, because it allows us to consider both stare decisis and the legitimacy of apparently prophylactic rules themselves.

1. *Miranda* and *Dickerson*

In *Dickerson*, the Supreme Court confronted a congressional statute that appeared to be an attempt to legislate around a landmark constitutional holding of the Supreme Court. In *Miranda v. Arizona*,[131] the Court held that if police officers fail to warn a suspect of certain rights, such as the right to remain silent, then any statement the suspect made during custodial

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U. PUB. L. REV. 15, 18–34, 77 (1993) ("'[T]he present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law.'" (quoting Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting))); Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 31 (1992) (arguing that adherence to stare decisis leads to the unanswerable question of whether to follow precedents that themselves ignored stare decisis).

129. The current set of boilerplate statements add up to the following:

> *Stare decisis* is not an inexorable command, but instead reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. Thus, we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law.

Agostini v. Felton, 521 U.S. 203, 235–36 (1997) (citations and internal quotation marks omitted).

130. Although my theory of stare decisis is based on just two cases, these are two important cases attracting a great deal of attention. *See* KeyCite of *Casey*, 505 U.S. 833, at http://www.westlaw.com (Sept. 28, 2001) (indicating that *Casey* has been cited 3848 times); KeyCite of Dickerson v. United States, 530 U.S. 428 (2000), at http://www.westlaw.com (Sept. 28, 2001) (indicating that *Dickerson* already had been cited 336 times). Further, I do not claim that my approach to stare decisis is the best explanation of all of the Supreme Court's stare decisis jurisprudence. A theory of stare decisis as part of constitutional meaning is not mutually exclusive with a more traditional approach to stare decisis as independent of constitutional meaning. My claim is that this understanding helps resolve some puzzles and may have implications for issues such as the one that Professor Paulsen addresses.

131. 384 U.S. 436 (1966).

interrogation cannot be admitted into evidence against him.[132] This rule complemented the existing requirement preventing the admission into evidence of any statement involuntarily made.[133] Congress, however, responded by passing 18 U.S.C. § 3501, which specified, despite the *Miranda* rule, that "a confession . . . shall be admissible in evidence if it is voluntarily given."[134] Oddly, the statute was effectively ignored until the late 1990s,[135] and the Supreme Court did not address the constitutionality of the statute until the Fourth Circuit upheld the statute in 1999.[136]

The litigants' briefs focused on whether *Miranda* was a constitutional rule.[137] Congress, of course, cannot overrule constitutional decisions,[138] so if admission of voluntary confessions not preceded by *Miranda* warnings violated the Fifth Amendment's Self-Incrimination Clause, the statute would have to give way to the Constitution. As both the majority and dissent in *Dickerson* conceded,[139] there was language in past opinions to support both

132. For hornbook treatment of the *Miranda* doctrine, see WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 332–73 (3d ed. 2000).

133. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Brown v. Mississippi, 297 U.S. 278 (1936).

134. 18 U.S.C. § 3501 (1994). The statute purported to apply only to federal prosecutions. *See id.* § 3501(a) (limiting application to "any criminal prosecution brought by the United States or by the District of Columbia").

135. Some have argued that this occurred not because the statute was forgotten, but because the U.S. Department of Justice decided not to enforce it. *See, e.g.*, Craig Turk, *Police May Be Freed from the* Miranda *Straitjacket*, WALL ST. J., Feb. 11, 1999, at A26 ("Why haven't we heard more about Section 3501? Because a soft-on-crime Justice Department refused to enforce it in 1968, and no subsequent administration has had the courage to upset that determination."). Professor Cassell revived interest in the statute by filing amicus briefs and writing a law review article. *See* Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 178 n.13 (1999) (noting his involvement in the litigation through representation of the Washington Legal Foundation). He contends that until the Clinton Administration, the Department of Justice essentially did forget the statute, despite having formally endorsed its application. *See id.* at 198–203.

136. *See* United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

137. *See* Brief of Petitioner at 13–29, *Dickerson* (No. 99-5525) (arguing that *Miranda* is a constitutional holding); Brief for the United States at 21–29, *Dickerson* (No. 99-5525) (agreeing that *Miranda* is constitutionally based); Brief of Court-Appointed Amicus Curiae Urging Affirmance of the Judgment Below at 5–9, *Dickerson* (No. 99-5525).

138. This principle has roots in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and was reaffirmed more recently in *City of Boerne v. Flores*, 521 U.S. 507, 517–21 (1997).

139. *See Dickerson*, 530 U.S. at 438 ("We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court."); *id.* at 447 (Scalia, J., dissenting) ("It was once possible to characterize the so-called *Miranda* rule as resting (however implausibly) upon the proposition that what the statute here before us permits—the admission at trial of un-*Mirandized* confessions—violates the Constitution. That is the fairest reading of the *Miranda* case itself.").

views.[140] The majority in *Dickerson* concluded "that *Miranda* is constitutionally based,"[141] while the dissent adopted the opposite position.[142] Both sides supported their arguments by maintaining that a contrary view would contradict a prominent feature of *Miranda* doctrine. A nonconstitutional interpretation of *Miranda*, the majority insisted, could not explain why *Miranda* applies in state as well as federal courts, because the Court has power to prescribe rules of evidence and procedure only in the federal courts.[143] The dissent countered that an acceptance of *Miranda* as constitutional would undermine holdings that the "fruits" of a *Miranda* violation are admissible and that otherwise inadmissible statements under *Miranda* could be used for impeachment purposes.[144]

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140. *Compare, e.g.*, Miranda v. Arizona, 384 U.S. 436, 445 (1966) ("The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody . . . ."), *and Dickerson*, 530 U.S. at 439 n.4 ("[T]he issues presented are of constitutional dimensions and must be determined by the courts."), *with* Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."), New York v. Quarles, 467 U.S. 649, 654 (1984) (stating that "[t]he prophylactic *Miranda* warnings . . . are not themselves rights protected by the Constitution" (citation omitted)), *and* Michigan v. Tucker, 417 U.S. 433, 446 (1974) (stating that the "police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege").

141. *Dickerson*, 530 U.S. at 440.

142. *See id.* at 445 (Scalia, J., dissenting).

143. *See* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959), *cited in Dickerson*, 530 U.S. at 437.

144. *See Dickerson*, 530 U.S. at 451–52 (Scalia, J., dissenting) (citing Oregon v. Hass, 420 U.S. 714 (1975); Michigan v. Tucker, 417 U.S. 433 (1974)). In my view, the first of these points is weak. Justice Scalia argues that if the nonconstitutional status of *Miranda* does not explain why the fruits of *Miranda* violations are admissible, "then the Court must come up with some *other* explanation for the difference." *Id.* at 455. He adds,

> That will take quite a bit of doing, by the way, since it is not clear on the face of the Fourth Amendment that evidence obtained in violation of that guarantee must be excluded from trial, whereas it *is* clear on the face of the Fifth Amendment that unconstitutionally compelled confessions cannot be used.

Id. That is, Justice Scalia emphasizes that the Fifth Amendment's stipulation that "[n]o person shall be compelled in any criminal case to be a witness against himself" reads naturally as an exclusionary rule, but that the Fourth Amendment's ban on "unreasonable searches and seizures" does not. *Id.* This may be right, but it does not follow that the Fifth Amendment's exclusionary rule should be broader. Justice Scalia's argument seems to be that the Fourth Amendment exclusionary rule is facially more suspect, which may be true, but the question is how broad the exclusionary rules should be, not whether they should exist at all. Assuming that an exclusionary rule is appropriate under the Fourth Amendment as a means of preventing unreasonable searches and seizures, there is no inherent reason to distinguish between items directly seized and the indirect product of a search or seizure. The specificity of the Fifth Amendment, meanwhile, invites a natural distinction between use of compelled testimony and its fruits. *See, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 47 (1997). Of course, Justice Scalia said only that making sense of the distinction between the Fourth and Fifth

This might seem straightforward enough; incoherence was inevitable, and the majority and dissent disagree as to which type of incoherence was the more tolerable. There is, however, a mystery in *Dickerson*, and it is a mystery on which much depends. In the second paragraph of his opinion, Justice Antonin Scalia states, "One will search today's opinion in vain . . . for a statement (surely simple enough to make) that what 18 U.S.C. § 3501 prescribes . . . violates the Constitution."[145] About this at least, Justice Scalia is surely right. The majority refers to the constitutional status of *Miranda* several times,[146] but never says directly that admission of un-Mirandized statements violates the Fifth Amendment, indeed a simple enough statement to make, especially given Justice Scalia's dare. The majority responds only obliquely and misleadingly,[147] refusing to say that admission of such statements would be a direct constitutional violation. The mystery is thus why the majority does not accept the dare.

Justice Scalia double-dares the majority by offering a cynical theory. There was a path, Justice Scalia notes, that the majority could have adopted that would have avoided incoherence.[148] The majority could have stated simply that the Court has power to create prophylactic rules that are more expansive than constitutional rights, as urged by the United States,[149] and

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Amendments in a new way would "take quite a bit of doing," not that it could not be done. *Dickerson*, 530 U.S. at 455 (Scalia, J., dissenting).

145. *Dickerson*, 530 U.S. at 445.

146. Justice Scalia compiles the various formulations: "The Court today insists that the *decision* in *Miranda* is a constitutional one, that it has constitutional underpinnings, a constitutional basis and a constitutional origin, that it was constitutionally based, and that it announced a constitutional rule." *Id.* at 454 (citations omitted).

147. The majority characterizes the dissent as arguing "that it is judicial overreaching for this Court to hold § 3501 unconstitutional unless we hold that the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements." *Id.* at 442. The majority objects that *Miranda* stated only "that something more than the totality [of the circumstances] test was necessary." *Id.* The majority is thus referring to the *Miranda* Court's allowance that Congress would be free to adopt alternative approaches "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." Miranda v. Arizona, 384 U.S. 436, 467 (1966). The *Dickerson* Court concluded that Congress had not in § 3501 adopted procedures that would be "at least as effective," even taking into account subsequent case law developments providing remedies for violations of constitutional rights by state actors. *Dickerson*, 530 U.S. at 440. What Justice Scalia was clearly challenging the majority to say was that admission of un-*Mirandized* statements violates the Constitution in the absence of an adequate legislative alternative. The majority thus sidestepped Justice Scalia's attack by focusing on an aspect of *Miranda* that was tangential to Justice Scalia's concerns.

148. *See Dickerson*, 530 U.S. at 457 (Scalia, J., dissenting) ("There was available to the Court a means of reconciling the established proposition that a violation of *Miranda* does not itself offend the Fifth Amendment with the Court's assertion of a right to ignore the present statute.").

149. *See* Brief for the United States at 16, 30, *Dickerson* (No. 99-5525) ("'[P]rophylactic' is not a synonym for 'non-constitutional.'").

that such rules are immune to displacement by Congress.[150] Then it would have been clear that *Miranda* created such a prophylactic rule. The majority, Justice Scalia hints, did not want to sanction such a practice, the legitimacy of which he believes remains in doubt.[151] At the same time, Justice Scalia suggests, the majority could not insist that the Constitution itself required *Miranda*, because "Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is not a violation of the Constitution."[152] Perhaps triple-daring the majority, Justice Scalia announces that "what today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States."[153]

The majority opinion need not be read as so unprincipled or so radical. The majority neither endorses nor rejects the original reasoning of *Miranda*, on either a direct violation or a prophylactic rule view, but it does not ignore the issue altogether. Rather, it explicitly indicates that it need not revisit the decision, because "[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now."[154] The mere invocation of stare decisis is significant, given the Supreme Court's conclusion that Congress clearly intended to overrule *Miranda*.[155] If stare decisis is independent of constitutional meaning, and Congress has the

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150. *See id.* at 28.

151. Justice Scalia surveys several cases in which the United States suggested the Court had enacted a prophylactic rule to suggest that the Court has never firmly endorsed such a practice. Justice Scalia finds that all but one of these cases should be understood as finding a direct violation of a relevant constitutional violation. He admits that *North Carolina v. Pearce*, 395 U.S. 711 (1969), seemed to create a prophylactic rule by requiring that judges explain the reasons for increasing a sentence on resentencing to protect against vindictive motivation. *See Dickerson*, 530 U.S. at 459 (Scalia, J., dissenting). His implication is that given the rarity and impropriety of prophylactic rules, it would be preferable to overrule *Pearce* than to accept the legitimacy of enacting prophylactic rules. *Cf. id.* at 460 (citing favorably Justice Hugo Black's dissent in *Pearce*).

152. *Dickerson*, 530 U.S. at 454 (citing previous opinions by or joined by Justices Rehnquist, Sandra Day O'Connor, and Anthony Kennedy).

153. *Id.* at 461. Justice Scalia's opinion is thus a classic example of a dissent that, by purporting to expose the majority, could lead the majority opinion to be understood as even more antithetical to the dissent's viewpoint than it otherwise might be read to be. *See* Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795, 821 n.102 (1993) ("One . . . should be wary of a dissent's hysterical characterization of a majority holding . . . . Frequently, such statements are rhetorical or tactical exaggerations.").

154. *Dickerson*, 530 U.S. at 443. For a pre-*Dickerson* article assessing whether stare decisis should save *Miranda*, see Leslie A. Lunney, *The Erosion of* Miranda: *Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 786–99 (1999).

155. *See Dickerson*, 530 U.S. at 437 (noting the "obvious conflict between our decision in *Miranda* and § 3501").

power to abrogate stare decisis, then a statute purporting to overrule a constitutional decision ought to be interpreted as abrogating stare decisis.[156] The Court's invocation of the doctrine notwithstanding the statute suggests that the Court assumes that stare decisis has constitutional status.

The question remains whether stare decisis is intertwined with constitutional meaning. Even if the statute does not block stare decisis, this could be because Congress lacks the power to do so or because the Constitution mandates stare decisis as a doctrine of judicial discretion. To better understand what stare decisis means for the Court, we must look beyond the fact of its invocation. While the Court's recitation of the doctrine of stare decisis is brief,[157] its discussion of *Miranda* sheds light on its implicit theory of stare decisis. "*Miranda* has become embedded in routine police practice," the Court explained, "to the point where the warnings have become part of our national culture."[158] The Court added that subsequent cases have "[i]f anything . . . reaffirm[ed] the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."[159] The references to "national culture" and a "core ruling" are reminiscent of the plurality opinion in *Casey*.

The nature of this stare decisis argument becomes clearest upon comparison with Justice Scalia's retort. To Justice Scalia, "the *stare decisis* argument is a wash."[160] If the Court found that *Miranda* is not a constitutional rule, then cases applying it to states must be reconsidered, but if it is a constitutional rule, then cases allowing admission of the fruits of a *Miranda* violation must be reconsidered. If stare decisis means that *Miranda* is a constitutional decision, then, Justice Scalia believes, *Miranda*'s progeny that are

156. One could interpret the statute as purporting to overrule the constitutional holding but not as overruling the stare decisis effect of that holding. The doctrine of constitutional doubt might support such an interpretation. *See generally* Almendarez-Torres v. United States, 523 U.S. 224, 237–39 (1998) (discussing the doctrine of "constitutional doubt"). Given the uncertainty of Congress's power to abrogate stare decisis, the Court might prefer to avoid that constitutional issue while still deciding the constitutional issue unquestionably prevented. The Court, of course, makes no suggestion that it is seeking to avoid a constitutional issue at all.

157. The Court states simply, "While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *Dickerson*, 530 U.S. at 443 (internal quotation marks and citations omitted).

158. *Id.* The Court directly justifies the relevance of this statement only by citing a dissenting opinion by Justice Scalia, which the Court characterizes as "stating that the fact that a rule has found 'wide acceptance in the legal culture' is 'adequate reason not to overrule' it" *id.* (quoting Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting)). This is an unmistakable accusation that Justice Scalia is being inconsistent, but there is an important unacknowledged difference. Justice Scalia referred to the "legal culture," not the "national culture," and he would presumably insist that *Miranda* had not achieved wide acceptance in the legal culture.

159. *Id.* at 443–44.

160. *Id.* at 456 (Scalia, J., dissenting).

inconsistent with that premise must be revised. For Justice Scalia, stare decisis does not exempt the courts from trying to achieve doctrinal coherence. This may help explain why he ultimately urged that the Court overrule *Miranda* rather than find that Congress overruled it.[161] If *Miranda* technically survived, that would imply that the Court may create constitutional common law displaceable by Congress, a more modest power than creation of binding prophylactic rules, but one that Justice Scalia still may be hesitant to endorse.[162] Besides, given the necessity of implicitly overruling something, Justice Scalia may see overruling *Miranda* as no greater an evil than overruling a subsequent case.

The majority's analysis suggests that it does not see stare decisis in the same way. Rather, stare decisis may mean that a certain holding survives as a part of constitutional law, but that the rest of constitutional law need not be reorganized to achieve deep coherence with it. The "core ruling" that the majority finds in *Miranda* is not a principle, but a holding, that certain statements are inadmissible. The Court rejects the notion that subsequent cases undermined *Miranda*'s "doctrinal underpinnings," noting that all those cases did was to "reduce[] the impact of the *Miranda* rule on legitimate law enforcement."[163] To the Court, undermining doctrinal underpinnings does not seem to be about subsequent cases revealing a deep principle ultimately irreconcilable with the original case. In this view, a case would undermine *Miranda*'s doctrinal underpinnings if it overruled a case from which *Miranda* directly followed, but a case that is directly purporting to construe *Miranda* would not. The doctrinal underpinnings analysis is thus tantamount to the *Casey* plurality's consideration of whether a holding is a "remnant of abandoned doctrine." A "core ruling" consistently followed cannot be a remnant.

This is a loose invocation of the word "underpinnings," but the majority's approach fits more comfortably with a view that stare decisis is sometimes part of constitutional meaning than a view that stare decisis is an independent doctrine that is part of the common law process. The common law process prefers a deep coherence to a set of unprincipled exceptions.[164] If stare decisis allows a holding to survive despite the principles of subsequent case law undermining the reasoning initially underlying the holding, it must be because the holding itself has achieved some independent significance. Because of

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161. *See id.* at 456–57.

162. On the notion of constitutional common law, see Monaghan, *supra* note 24, and Schrock & Welsh, *supra* note 24.

163. *Dickerson*, 530 U.S. at 443.

164. This is apparent in the maxim that law is a seamless web. *Cf.* Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 403 n.3 (1993) (discussing the origins of this expression).

Miranda, Americans may have come to believe that the Self-Incrimination Clause means that they must be informed of their rights when arrested, and this popular understanding of the Fifth Amendment may be as important as the views of the Framers in determining what the Constitution means today. Even though *Miranda* may seem less significant than some of its progeny in developing underlying constitutional issues, it had a much greater effect on popular understandings of the Constitution, and is thus entitled to greater stare decisis consideration than the later cases.

This understanding helps to explain the intensely pragmatic nature of the Court's analysis of *Miranda*. The Court discusses "routine police practice" and the "national culture,"[165] extralegal concerns absent from a conventional stare decisis analysis. Even more significantly, the majority does not even consider whether *Miranda* was correctly decided, a factor that ought at least to be relevant to a stare decisis inquiry if stare decisis were solely about issues like efficient allocation of judicial resources. The most pointed difference between the majority and the dissent is that the dissent examined whether the rule of *Miranda* makes sense on general constitutional principles, while the majority checked whether there is an affirmative reason to overturn it, independent of whether *Miranda* is correct.[166] The majority analyzed practical advantages and disadvantages of *Miranda*,[167] but it did not consider legal arguments for and against the decision. Such pragmatic analysis is relevant to determining whether Americans have come to accept the doctrine, but it is not central in conventional legal argumentation.

To make the point clearer, suppose we found out that the last half century of constitutional law was a hoax. Since 1950, a group of aliens (from outer space) have kidnapped all Supreme Court Justices, morphing into the kidnapped jurists' human forms and deciding cases according to their alien beliefs.[168] After revelation of the hoax and the appointment of a new Court composed of humans, we might have some reconfiguration of constitutional law to do.[169] Even if the Court decided not to treat all previous cases as

165. Compare this with Justice Scalia's earlier reference to the "legal culture." *See supra* note 158.

166. "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson*, 530 U.S. at 443; *see also infra* note 193 (discussing the relevance of presumptions).

167. *See Dickerson*, 530 U.S. at 444 (acknowledging that *Miranda* might lead to acquittal of some defendants who have voluntarily confessed, but suggesting that *Miranda* is easy for police officers to conform to).

168. This is part of a greater alien conspiracy exposed by a popular television show. *See The X-Files* (Fox television broadcast, 1993–current).

169. There is no case law indicating how to deal with a hoax opinion long thought to be true. Perhaps the closest analogy is the famous "lost opinion of Justice Taney" on an issue involv-

legitimate precedent, it might well decide to keep the rule of a case like *Miranda*, because that case has affected what people think the Constitution requires. Even accepting the *Miranda* rule, however, the Court would feel no need to embrace consistent principles, such as acceptance of prophylactic rights, and it would not need to accord full stare decisis treatment to subsequent cases with little impact on popular perceptions.

2. Prophylactic Rules Generally

How one should characterize stare decisis might seem to be of purely academic interest. The *Dickerson* Court clearly upheld *Miranda* on stare decisis grounds, and it might seem not to matter whether stare decisis is independent of constitutional meaning. Certainly, part of my purpose in discussing *Dickerson* is to suggest that *Casey* is not idiosyncratic, thus supporting the conclusion that a congressional statute purporting to abrogate stare decisis would not be fully effective. Nevertheless, the Supreme Court's conceptualization of stare decisis also may be relevant even if Congress never passes such a statute. At the least, if a theory underlies the case law, this may legitimize factors highlighted by the Court in *Dickerson*, such as the Court's observation that the national culture assumes *Miranda*'s validity. On the other hand, a full explanation of the theory might limit the use of such factors to particular contexts not relevant in all stare decisis inquiries. Most importantly, as I show in this part, the Court's conceptualization of stare decisis may have applications beyond stare decisis and may indeed be relevant to the legitimacy of prophylactic rules themselves.

To assess these issues, it is worth considering Professor Saunders's essay suggesting that the recent race-conscious districting cases announced a pro-

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ing the Court of Claims. *See generally* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985). Justice Roger Taney wrote the opinion before dying, but his colleagues could not find it, and they therefore drafted another opinion. Justice Taney's opinion was later discovered and turned out to contain different reasoning. The difference was meaningful, as Congress later passed a statute that was responsive to the new opinion but not to the lost one. Eventually, the lost opinion was found, and the Supreme Court belatedly published it. Interestingly, the Supreme Court has treated the lost Taney opinion inconsistently. *Compare* Williams v. United States, 289 U.S. 553, 563–64 (1933) (quoting Taney's lost opinion favorably), *with* Glidden Co. v. Zdanok, 370 U.S. 530, 569 (1962) ("Taney's opinion was not the opinion of the Court."). The analogy is imperfect, because it addresses a valid opinion that was not issued, rather than an invalid opinion that was issued. If an opinion thought valid were later found to be invalid (perhaps a Justice was mistakenly listed as signing onto the opinion despite having actually signed onto the dissent), then the Court might consider the importance of the wrongly issued opinion in deciding whether to honor it on stare decisis grounds.

phylactic constitutional rule,[170] because her essay elegantly explains the structure of prophylactic rules. *Shaw v. Reno*[171] presents a puzzle,[172] because it declared districting statutes unconstitutional under the Equal Protection Clause even "in the absence of any proof that they subject any identifiable class of persons to a special disadvantage."[173] Rather than conclude that the Supreme Court revolutionized equal protection doctrine,[174] Professor Saunders postulates that the Court made a prophylactic effort to prevent such injuries. "The precaution the Court recommends," analogous to reading *Miranda* rights, "is to adhere to certain traditional districting principles in designing the districts."[175]

Professor Saunders recognizes that the *Dickerson* case, not yet decided at the time of her publication, might be relevant to her argument.[176] The decision, though, points in different directions. Though it upheld *Miranda*, the Court's refusal to endorse prophylactic rules explicitly, along with its abdication of any responsibility to reconsider *Miranda*'s reasoning, makes implicit endorsement of them equivocal. Nonetheless, one could argue that regardless of why the Court upheld *Miranda*, the Court ought to apply the same reasoning to uphold *Shaw*, even if the Court concluded that its initial analysis was mistaken. Just as there is no special justification for overruling *Miranda*, there does not appear to be any special justification for overruling *Shaw*. And just as the police have assimilated the rule of *Miranda*, so too have state legislatures assimilated in their practices the rule of *Shaw*.[177]

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170. For an assessment of whether various doctrines should be considered prophylactic, see Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 106–23 (1985).

171. 509 U.S. 630 (1993).

172. As Professor Saunders makes clear, the puzzle is presented even more starkly in *Miller v. Johnson*, 515 U.S. 900 (1995), which made unequivocal that plaintiffs do not need to provide evidence that racially based districting subjected them to a special disadvantage.

173. Saunders, *supra* note 9, at 1607.

174. Saunders argues that the absence of a disadvantage seems to make the law inconsistent with *Washington v. Davis*, 426 U.S. 229, 239–40 (1976), which further requires "a showing that the state has 'intentionally' or 'purposefully' subjected the plaintiff to this special disadvantage." Saunders, *supra* note 9, at 1609 n.31 (quoting *Davis*, 426 U.S. at 239–40).

175. Saunders, *supra* note 9, at 1618.

176. *See id.* at 1637 ("The Rehnquist Court, it seems, is conducting its revolution in race with tools borrowed from the Warren Court's revolution in constitutional criminal procedure. If so, then the pending challenge to *Miranda* may have ramifications far beyond the context of custodial interrogation.").

177. One might argue that although state officials recognize *Shaw* as a precedent, they remain confused about how much reliance they may put on race in drawing districts. *See Experts Warn About Tougher Redistricting This Time*, CONG. DAILY, Dec. 11, 2000, *available at* 2000 WL 27012923 ("[L]egislators also will have to balance the seemingly opposite legal requirements of the Voting Rights Act, which protects the voting strength of minority voters, and what is known as the doctrine against racial gerrymandering, which is based on the 1993 Supreme Court ruling in

An argument that the *Shaw* holding should be upheld because it has become part of constitutional meaning, even if the Court ultimately decides that it has no power to craft prophylactic rules and that the Equal Protection Clause generally demands a demonstration of actual injury, is both weaker and stronger than the analogous argument concerning *Miranda*. On one hand, the argument is relatively weak because race-conscious districting is not nearly as ingrained in culture as the reading of *Miranda* warnings. More television dramas feature police arresting suspects than legislators drawing electoral districts. *Shaw* is clearly not part of the national culture, though it may have affected the cultural milieu of those who participate in district drawing or of those who study constitutional law.

The relative strength of the argument is that it can be much more easily connected with the constitutional text. The *Dickerson* case may have resulted in a perception that the Constitution requires police to read suspects their rights, but this cannot be easily explained as an interpretation of some phrase in the Self-Incrimination Clause.[178] In contrast, *Shaw* might plausibly not only lead people to understand the Constitution as requiring race-neutral districting even in the absence of demonstrated injury, but also affect individuals' perceptions of what the word "equal" in the Equal Protection Clause means. It is at least facially plausible, placing historical and other scholarly arguments about Framers' intent aside,[179] to declare that a state has treated some group of individuals unequally by drawing district lines using

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Reno vs. Shaw."); Raja Mishra, *State Races See Big Money Parties Looking Ahead to 2001 Redistricting*, BOSTON GLOBE, Nov. 6, 2000, at A23 (noting that many legislatures feel caught between the strictures of the Voting Rights Act and those of *Shaw*).

178. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). The history of self-incrimination law itself may be an example of a prophylactic rule in the sense described below, a rule in which people's sense of what the Constitution required outpaced constitutional doctrine. The Self-Incrimination Clause was in the early nineteenth century redundant, because common law evidence rules routinely disqualified interested witnesses as a means of protecting the sanctity of the oath. *See* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 832–59 (1999). The common law witness privilege gradually disappeared, however, thus "stripp[ing] the constitutional self-incrimination clauses of their protective common-law shell." *Id.* at 830. Nonetheless, in the late nineteenth century, courts forced to define the contours of the Self-Incrimination Clause reached back to the earlier common law standards. *See id.* at 894–906. On Professor Witt's account, it was the familiarity of the common law privilege that made it natural for judges to associate that privilege with the Self-Incrimination Clause. Though Witt's argument is primarily positive rather than normative, an advocate of constitutional circularity might argue that the constitutionalization of the privilege is not simply an error to be undone, for the case law reflected the courts' understanding of what the Constitution required, even if the courts lacked an adequate theory to explain the privilege. *See id.* at 899 (noting the "difficult challenge [in the nineteenth century] in articulating a new set of principles to account for self-incrimination doctrine").

179. For an originalist approach to the Equal Protection Clause, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 58–67 (1990).

race as a predominant factor. The word "equal" is notoriously slippery and subject to interpretation,[180] making more plausible that a Supreme Court opinion could affect what people think the word means.

While there is no mathematical formula to weigh these competing factors, if the Supreme Court believes that its opinions affect constitutional meaning, the Court ought to consider public acceptance and textual support when discussing stare decisis. A consideration related to public acceptance is whether the opinion has been and remains controversial, which would make a claim that citizens have come to understand the Constitution in a way consistent with a judicial decision as a result of that decision less plausible. This factor alone cannot be dispositive for a positive account, of course, because it undermines the *Casey* plurality's conclusion that liberty has come to encompass the right to have an abortion.[181] On consideration of all relevant factors, if the Court determined that a judicial decision had not changed constitutional meaning, this would not necessarily preclude the application of stare decisis. But the version of stare decisis applied would be a more conventional type, and, if the rest of Professor Paulsen's theory is correct, Congress could abrogate that type of stare decisis.[182]

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180. A substantial literature has developed on the subject of whether equality is a coherent principle. *See* Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265, 1266 (1997) (arguing that the principle of equality "has force at least when two equals stand in some significant relationship to each other, and when the one who might receive worse treatment is aware that the other is an equal in relevant respects and has received better treatment"); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1215–22 (1997) (arguing that traditional statements of equality are meaningless, but that equality may be stated as a nontautological prescriptive principle); Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693, 696 (2000) (defending a "comparative" conception of equality); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 577–92 (1982) (arguing that the principle of equality can have meaning only if it incorporates some external value determining which persons and treatments are equal).

181. *Roe* became quickly controversial and has remained so. *See* GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1986, at 49, 51 (1987) (indicating that in 1974, shortly after *Roe* was decided, 47 percent favored and 44 percent opposed the decision); ROPER CTR. FOR PUB. OPINION RESEARCH, QUESTION ID: USLAT.061800 R13 (2000) (reporting survey results indicating that 31 percent of Americans strongly favored *Roe*, 12 percent somewhat favored *Roe*, 9 percent somewhat opposed *Roe*, and 33 percent strongly opposed *Roe*). My claim that a controversial holding may still affect constitutional meaning is a descriptive claim about the doctrine that the Supreme Court seems to have developed, not a normative one. Normatively, this seems to be the weakest link in *Casey*, but it is still not inconceivable to suggest that the ready availability of abortions after *Roe* affected even how foes of abortion and *Roe* conceptualized what "liberty" means in the United States.

182. That is, stare decisis may both be part of constitutional meaning and also applied as a pragmatic doctrine independent of it. The possibility that stare decisis might be either necessitated by the Constitution or a common law doctrine open to congressional revision was first recognized, without a complete analysis, by Henry Monaghan. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988). Neither Professor Monaghan nor Professors Paulsen and Harrison, however, consider the possibility that stare decisis might have both a constitutional component and an extra-constitutional component.

These types of considerations might be used to assess the vitality of any existing prophylactic rule, but they tell us little about the appropriateness of creating new prophylactic rules. Nonetheless, accepting the view that court opinions can influence constitutional meaning informs the legitimacy of such rules. If court opinions influence constitutional meaning, it is because social understandings and practices help define the Constitution. Implicit in this view is that constitutional text and original understanding are not exclusive sources of constitutional meaning. If constitutional meaning can develop, then a prophylactic rule, a rule of law beyond what the text of the Constitution explicitly requires, is not such a strange animal. With this understanding, prophylactic rules are not prophylactic at all, but instead are recognitions of expanded constitutional meaning in which popular perception extends beyond what conventional legal arguments would maintain.

This theory, if accepted, furnishes only a partial endorsement of what I will for convenience continue to call prophylactic rules, because it does not imply a judicial power to fashion whatever means are expedient to protect constitutional rights. Consider *Miranda* itself. One might argue that, in the wake of decisions clarifying that only voluntary confessions were admissible,[183] the understanding of the Fifth Amendment evolved so that confessions made voluntarily but in the absence of knowledge of the Fifth Amendment right seemed unconstitutional. More charitably stated, the conception of the word "compelled" had evolved so that knowledge of rights was thought to be a necessary precondition for a statement to be considered uncompelled. This seems to be an unstated premise of *Miranda*,[184] and it may be that earlier decisions themselves effected this change.

Even if this is plausible, it is hard to believe that before *Miranda* someone who unquestionably understood the Fifth Amendment, say a constitutional law professor, but was not informed of those rights after arrest would be thought of as having been compelled in any way.[185] Yet the *Miranda* Court

183. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964).

184. The *Miranda* Court quoted a prior case for the closely related proposition that "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960), *quoted in* Miranda v. Arizona, 384 U.S. 436, 448 (1966).

185. Perhaps the best argument for this is that in the absence of actually being informed of already known rights, a criminal defendant might believe that the police engaging in custodial interrogation will not actually respect those rights, and any resulting confession might in some sense be involuntary. The *Miranda* Court, indeed, noted that the "warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Miranda*, 384 U.S. at 469. Thus, even if everyone now knows the substantive content of the *Miranda* rights, *Miranda* may nonetheless serve a function in individual cases by identifying the point in time at which the defendant is

made unequivocally clear that its rule applied to such an individual.[186] At one point, the Court did state that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice,"[187] but the Court made no effort to justify this in the case of a suspect who already knows his rights. This aspect of *Miranda* cannot be defended on the ground that public perception of the constitutional right was broader than existing jurisprudence at the time.

Miranda has sometimes been justified as merely establishing a conclusive presumption of involuntariness given certain conditions.[188] Indeed, the opinion relies on the evidentiary claim that an inference of knowledge of constitutional rights "can never be more than speculation."[189] On this theory, *Miranda* is no more suspect than First Amendment doctrine categorically banning content-based speech restrictions even though the underlying purpose of the Constitution is the narrower one of preventing "the government from acting out of hostility to particular points of view."[190] As Justice Scalia notes, however, one can develop a plausible theory that the First Amendment itself prohibits the "chilling" of speech and that doctrine is thus not overinclusive.[191] Arguably, content-based speech restrictions inherently abridge the freedom of speech,[192] but an absence of warnings to someone who understands his rights does not compel any resulting confession.[193] The

clearly in an adversarial situation. A constitutional law professor, however, presumably would understand at least intellectually the adversary nature of interrogation.

186. The *Miranda* Court stated:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.

Id. at 468.

187. *Id.* at 458.

188. *See* Strauss, *supra* note 25, at 191–92. For a more recent argument along these lines, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 900–02 (1999).

189. *Miranda*, 384 U.S. at 469. The full sentence reads: "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact." *Id.* at 468–69.

190. Strauss, *supra* note 25, at 202.

191. Dickerson v. United States, 530 U.S. 428, 459 (2000) (Scalia, J., dissenting).

192. The theory that the Court has seen the First Amendment itself as banning the chilling of speech would be stronger if the Court took an "absolutist" approach to the First Amendment. *Compare* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 262–63, *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974) (holding that First Amendment freedoms are not absolute).

193. This refutes only one of Professor Strauss's examples, not his argument. The broader question is whether it is permissible for the Court to adopt conclusive evidentiary presumptions. *See, e.g.*, Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55

original *Miranda* opinion is thus defensible neither on the basis of the theory of societal constitutional expectations, nor on the ground that it was ordinary constitutional adjudication.

Other decisions creating what appears to be a prophylactic rule can be defended on the ground of societal expectation. Consider again race-conscious districting. As Professor Saunders notes, a state can avoid liability by adhering to traditional districting principles.[194] The existence of such traditional districting principles may explain why, in Justice Sandra Day O'Connor's words, "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters."[195] The baseline of the traditional set of factors may foster a sense of constitutional injury if those factors are ignored,[196] particularly if society perceives that the government cannot discriminate on the basis of race.[197] Although existing constitutional doctrine might not ban consideration of race in districting per se, the sense of injury in using race may unravel the fine distinctions of constitutional law. Richard Pildes and Richard Niemi have argued that the *Shaw* Court may have been concerned as much with the social impression conveyed by racial districting as with its concrete effects,[198] and

U. CHI. L. REV. 174 (1988) (arguing that conclusive presumptions are different in kind from rebuttable presumptions and thus constitutionally impermissible). The crux of Professor Strauss's argument is that "[u]nder any plausible approach to constitutional interpretation, the courts must be authorized—indeed, required—to consider their own, and the other branches', limitations and propensities when they construct doctrine to govern future cases." Strauss, *supra* note 25, at 208. This seems too sweeping; surely there are some plausible approaches to constitutional interpretation that would not consider pragmatic issues such as institutional weaknesses. Consideration of such issues may be an appropriate approach to constitutional interpretation, because excluding confessions obtained without *Miranda* warnings will have good effects. Nonetheless, the Court's understanding of stare decisis implies one possible but constrained justification for a prophylactic rule. Professor Strauss's independent justification is also constrained because he does not claim that the Supreme Court has unlimited power to enact provisions to minimize violations of constitutional law, but only to craft evidentiary presumptions in a way that accepts institutional realities.

194. *See* Saunders, *supra* note 9, at 1618.

195. Shaw v. Reno, 509 U.S. 630, 650 (1993).

196. For a discussion of the role of tradition in constitutional interpretation generally, see A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 415–45 (1999).

197. Professor Saunders argues, and I agree, that "[p]roperly understood, the stigmatic harm with which the Court is concerned is . . . the insult that may be suffered when one is placed in a district that everyone knows has been created for the special benefit of one racial group." Saunders, *supra* note 9, at 1621. I would add that the existence of a contrary traditional practice and of a perception that the Constitution prevents the government from engaging in racial stereotyping helps explain why this may be seen as insulting.

198. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993). Professor Pildes pursues the thesis further in Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997), and Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998).

this may in part be because of a popular sense that race-conscious action in this context is unconstitutional. This suggests that popular perceptions of the Constitution, at least among those aware of districting practices but not of constitutional jurisprudence, advance beyond doctrine and affect constitutional meaning.[199]

In sum, the account that I have developed of the Supreme Court's approach to stare decisis can explain prophylactic rules in two complementary ways. First, a court following the theory might allow an existing prophylactic rule to survive, because the opinions creating the rule themselves might influence the meaning of the Constitution. Factors that inform the use of stare decisis include whether the rule has been integrated into official practices and the national culture, whether it might affect how people understand a particular word or phrase of the Constitution, and whether the judicial decision is uncontroversial. Second, a court might create a prophylactic rule because public perception of a constitutional provision extends beyond the current doctrine. Thus, constitutional circularity can explain both the retention of a prophylactic rule regardless of its original correctness and the initial creation of such a rule.

Of course, these two explanations need not be independent. For example, the Court might issue a poorly reasoned opinion interpreting a constitutional provision expansively, inconsistent with other rules or assumptions that the Court is unwilling to disturb. Perhaps the Court would even undo the decision, if it could go back in time, but it cannot. In a subsequent opinion, the Court may characterize the first as establishing a prophylactic rule, thus excusing the Court from the task of achieving doctrinal coherence. This declaration, however, need not be an unprincipled one, because even if the first opinion did not change the underlying legal rules, it may have changed the public perception of the Constitution. Constitutional law survives despite a core ruling being labeled a prophylactic rule and other legal principles that, if considered in the absence of the legal principle that perception affects meaning, are inconsistent with it. This account of the development of prophylactic rules may explain Professor Saunders's observation that "the prophylactic justification for a rule often fails to emerge until well after the rule itself is promulgated."[200]

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199. My claim, of course, is not that the Court consciously adopted this theory in *Shaw*, but that the existence of a traditional practice and of a sense that the government cannot racially stereotype may have exerted a pull on the Court's jurisprudence and that this pull shapes constitutional meaning.

200. Saunders, *supra* note 9, at 1619. In support of this proposition, she cites both *Miranda* and *North Carolina v. Pearce*, 395 U.S. 711 (1969), the prophylactic character of which did not begin to emerge until *Colten v. Kentucky*, 407 U.S. 104 (1972). *See* Saunders, *supra* note 9, at 1619 n.85.

II. A NORMATIVE EVALUATION

So far, I have shown that the Supreme Court sometimes seems to consider public perceptions of constitutional meaning—or more accurately, the Justices' view of those perceptions—in deciding constitutional cases. I have not sought to establish that constitutional circularity is the approach taken by the Supreme Court. I have, however, tried to show that it provides a relatively predictive explanation of relevant data, including important decisions on stare decisis and prophylactic rules. This coherence makes the theory normatively appealing, because it avoids the strategy of reconciling our existing constitutional law by positing broad judicial powers to avoid revisiting constitutional issues and to protect the Constitution with ad hoc prophylactic rules.

We ought not embrace the theory, however, merely because it is a lesser interpretive evil. This part will offer a broader normative evaluation. Part II.A assesses how well constitutional circularity would work in practice, considering whether Justices applying the theory would reach the same answer. The ultimate balance of advantages and disadvantages is a difficult one, however. Perhaps the most salient feature of the constitutional circularity approach is its simplicity: If the people have a particular view about what the Constitution means, that view should be honored. I argue that this simplicity is both a strength and a weakness, for while constitutional circularity prevents subtle manipulations, it increases the danger of law through judicial fiat.

Regardless of how constitutional circularity would work if generally accepted, a normative assessment considers the legitimacy of a theory, which depends in part on its coherence with existing constitutional law and practice. Part I revealed traces of constitutional circularity in various cases, but this is not sufficient to establish its legitimacy, especially because the Supreme Court has not clearly articulated, let alone defended, the approach. Part II.A considers legitimacy and coherence relative to other considerations. Part II.B reconciles constitutional circularity with various areas of constitutional practice in which doctrine may seem to depend on circular reasoning, and Part II.C reconciles constitutional circularity with various constitutional theories, both radical and conventional. This part concludes by suggesting that constitutional circularity may improve constitutional theories and provide limits on their application.

A. Strengths and Weaknesses

This part assesses constitutional circularity along several dimensions and includes criteria that reveal potential weaknesses of constitutional circularity.

1. Legitimacy, Coherence, and Tradition

For many, legitimacy is paramount, and those who place stress on legitimacy will often insist that only an originalist account of the Constitution can be legitimate.[201] If a judge claims that the Constitution means something other than what its Framers meant it to mean,[202] the argument goes, then that judge must be making a claim about something other than law.[203] There are, though, two easy ripostes. First, the argument assumes its conclusion by defining "law" as what its creators intend.[204] Second, the Constitution does not provide for a particular approach to interpretation.[205] I need not revive

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201. *See* BORK, *supra* note 179, at 4–7.

202. Or at least on the basis of how the words in the Constitution would have been understood at the time of their enactment, to take Justice Scalia's preferred approach. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) ("It is the *law* that governs, not the intent of the lawgiver."); *see also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) ("[O]riginalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking the subjective intentions of the framers."). This approach recognizes that what the ratifiers of the Constitution thought was the content of the document they were agreeing to may be just as important. *See* Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 510–11 (1988) (arguing that the original intent of the drafters was irrelevant because the ratifiers could not know independent of the text what their intent was). The only distinction is whether the intentions of those who wrote the Constitution or the understandings of those who agreed to be bound by it control. Nonetheless, the concession that it is important what people would have understood the Constitution to mean considerably undermines the originalist case, indeed in favor of constitutional circularity. For if we care about the understandings of those who initially agreed to be bound by the Constitution, then should we not care about the understandings of those who were not alive at the time but continue to consider themselves bound to the Constitution?

203. For an early argument along these lines, see Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 215–16 (1900). *See also* Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 412 (1998) (noting that the terms of the debate over originalism have not changed much in the past 100 years). A related argument is that all interpretation must be based in part on the concept of intent. *See* Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQ. 723 (1982).

204. Oliver Wendell Holmes's prediction theory of law is sufficient to show that law can be defined in a way that focuses on the future rather than on the past. *See supra* note 30. One need not agree with this theory to recognize that it shows that the principle that "law" is inherently originalist need not be axiomatic. Moreover, acceptance of the proposition that the Constitution is the law does not necessarily endorse an originalist approach. Richard Fallon explains:

> However plausible it may appear on the surface, this argument begs the central questions in issue. . . . To acknowledge that the Constitution is the supreme law is not necessarily to accept that the best theory of constitutional interpretation will be based solely on the Constitution's text, heedless both of the way that courts have interpreted the Constitution over time and of the considerations that have given rise to a complex interpretive practice.

Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 546 (1999).

205. The only plausible *candidate* is the "Intents and Purposes" Clause of Article V. *See* U.S. CONST. art. V (providing that constitutional amendments "shall be valid to all Intents and

this debate here, but I can sketch out alternative possibilities. If originalism is the only legitimate approach to law, constitutional circularity is illegitimate. If not, then legitimacy must itself be a product of other variables for assessing interpretive approaches.

Two such variables are coherence and tradition. Perhaps coherence and tradition have inherent importance,[206] difficult to quantify, but they also may matter from a purely consequentialist perspective.[207] Coherence achieves the pragmatic goal of avoiding results at variance with existing doctrine or in tension with other operative constitutional theories. Constitutional circularity seems coherent, even if constitutional circularity does not cohere with constitutional practice and theory. Constitutional

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Purposes"); *see also* David R. Dow, *The Plain Meaning of Article V*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 117–18 (Sanford Levinson ed., 1995) ("[T]he use of the phrase 'Intents and Purposes' seems nearly to invite readers of constitutional amendments to dig beneath the words on the parchment."). Nonetheless, I have been able to find no one who advocates the view that this Clause, which would apply only to amendments in any event, mandates originalist interpretation. Even if it did, opponents of originalism would point out that the Constitution cannot conclusively provide for a particular interpretive approach, for the question would remain what interpretive device should be used to construe that provision. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 124 (1991); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999) ("The justification for adopting any particular interpretive method depends on external reasons of normative political theory. As a consequence, originalism cannot be justified by reference to the intent of the founders or by a purely historical argument."); *cf.* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 259–60 (1988) (pointing out that a theory of originalism could advocate adherence to the substantive but not to the interpretive intentions of the Framers). Nonetheless, such a provision might well be honored by a range of constitutional theories, as even nonoriginalists pay some attention to the Constitution's textual requirements.

206. I am skeptical that they do, for reasons articulated by Ken Kress. *See* Ken Kress, *Coherence and Formalism*, 16 HARV. J.L. & PUB. POL'Y 639, 666–67 (1993) (arguing that coherence is not "conceptually necessary for the existence of a legal system" or "ontologically required . . . [as] a necessary condition for legality").

207. I am not alone in adopting a consequentialist approach to assessing approaches to constitutional interpretation. As Cass Sunstein has written, "[A]ny approach to interpretation must be defended partly by reference to its consequences, broadly conceived . . . ." Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 564 (1997) (book review). More generally, Richard Posner's pragmatic approach to jurisprudence is unapologetically consequentialist. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 391 (1995) ("Legal rules should be viewed in instrumental terms."). Because Judge Posner's pragmatic approach considers all consequences, and not just the results in a particular case or the substantive merits of a particular statute, he would assess approaches to interpretation from a pragmatic lens as well. *See, e.g.*, Posner, *supra* note 97, at 1379. Posner writes:

> Call it pragmatism, not in its caricatural sense of deciding today's case with no heed for tomorrow, but in the sense of advocating the primacy of consequences in interpretation as in other departments of practical reason, the continuity of legal and moral discourse, and a critical rather than pietistic attitude toward history and tradition.

Id.

circularity is not so fine-tuned as to demand a particular result in the vast majority of cases, and so it does not make rearrangements of particular doctrinal areas necessary. Moreover, constitutional circularity would upset only doctrines at odds with what the people think the Constitution requires. If anything, constitutional circularity seems likely to increase stability and reliance by making constitutional law more consistent with what the people think it already is.

The value of tradition from a consequentialist perspective is more elusive. After all, if all that matters is consequences, then it might seem that switching to a doctrine that produces better consequences than its predecessor is necessarily desirable. The potential problem, however, is that switching to a new interpretive approach produces consequences not just because it changes the results of cases, but also because the mere existence of a switch may have effects. For example, the sudden adoption of a new approach to interpretation might remove some of the mystery from constitutional law, reducing judges to mere fallible humans with preferences.[208] This problem, however, also seems relatively unlikely with constitutional circularity, because the modesty of the doctrine makes the adoption of constitutional circularity unlikely to affect people's views of the judicial process.

Perhaps more ominously, the act of selecting a new interpretive approach may make future changes in interpretive approaches seem more likely, because that interpretive approach would have little claim on tradition. If interpretive approaches become merely a matter of individual judicial choice, or even worse individual choice in individual cases,[209] then interpretive

208. The significance of such a realization by the public, however, can easily be overstated. Any nonunanimous decision logically should reveal either that law is not entirely determinate or that some judges are willing to ignore what is objectively required. If the courts can survive even controversial decisions like *Bush v. Gore*, 531 U.S. 98 (2000), then it is hard to imagine a change in interpretive method having even nearly as large an effect, particularly if that change does not lead to results that the public would find surprising or inaccurate.

209. Even commentators who recognize that interpretive approaches are matters of judicial choice generally suggest that judges should stick with their initial choices. *See, e.g.*, Sunstein, *supra* note 207, at 564 ("Once an interpretive approach has been properly selected, it should not be abandoned simply because it produces a bad outcome."). *But cf.* Fallon, *supra* note 204, at 571 (arguing that interpretive methodology must be responsive to changes in "the constitutional community's relation to the written Constitution"). It is hard to see why a consequentialist judge would consistently follow a particular interpretive approach. Suppose, for example, that a judge believes that originalism will over the run of cases produce good results, but that in a particular case, it will lead to a bad result. If truly consequentialist, the judge should not apply originalism in that case, unless applying another constitutional approach will somehow make it less likely that originalism will be applied by other judges in other cases or will have some other bad effect, such as increasing litigation costs in other cases. Even if it would be socially beneficial for judges to precommit to a particular interpretive approach, there is no way to stop judges from cheating, and a consequentialist judge sometimes will cheat by ignoring or misapplying the selected interpretive approach. This is from the consequentialist judge's perspective the right thing to do, though from a

approaches become nothing other than rationalizations. If this is undesirable, then the relative newness of constitutional circularity must count as a strike against it. At the same time, however, constitutional circularity may be less of a threat than other interpretive approaches to the traditions of particular constitutional interpretations and governmental practices, for constitutional circularity produces only results that reflect popular understanding of constitutional traditions. It thus might be less offensive than some hypothetical new interpretative method that would make clear that suspects need not be read their rights for their confessions to be admissible. So whatever tradition cost constitutional circularity would impose merely by its existence might be offset by the benefit of honoring traditions with respect to particular constitutional issues.

2. Determinability and Manipulability

The greatest apparent weakness of constitutional circularity is that it seems indeterminate. Even if all judges agreed that the courts should follow the people's understandings of the Constitution when those understandings are clear, how can we ascertain whether the people have a firm view on a particular issue? There are two problems that will be obvious to anyone who has ever tried to ascertain group beliefs. First, there is the problem of determining who the relevant people are. Americans in general? Just enfranchised Americans? Voters? Americans who know at least a little bit about the Constitution? Lawyers? Constitutional scholars? If we take the least restrictive approach, we realistically will encounter many individuals who have virtually no sense of the Constitution at all, even some who, though aware that there is some document called "the Constitution," do not understand that this document serves as the basis for defining the structure and powers of government.[210] If we take the most restrictive approach, we may find great knowledge, but dubious right to the title of the people.

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social perspective, it may be desirable to try to stop such cheating by establishing a social norm against it and encouraging identification of instances in which judges have cheated by not applying their preferred interpretive methodologies.

210. For an argument that Americans suffer from "constitutional illiteracy," see Paul E. McGreal, *Constitutional Illiteracy*, 30 IND. L. REV. 693, 701–21 (1997). A recent illustration of constitutional illiteracy may be found in a Roper poll asking Americans what the Bill of Rights was. Only 21 percent of Americans were correctly able to identify the Bill of Rights as part of the Constitution. Thirty-five percent claimed to have heard about it but could not identify it in any way, and 27 percent admitted that they had never heard of it. Four percent misidentified it but revealed that they had some idea about its content, while another 5 percent misidentified it while indicating no knowledge about its content, and 8 percent gave answers otherwise classified or no answers. *See* ROPER CTR. FOR PUB. OPINION RESEARCH, QUESTION ID: USNORC.45239 (2000).

Moreover, we will still find some disagreement on virtually every interesting constitutional question.

Second, once the relevant group is identified, there is the problem of determining just how much agreement is required. Unanimity, of course, is impossible. The problem once again appears on both sides of the spectrum. Very casual observers of the government may simply be mistaken about what the Constitution requires, while very careful observers of the Constitution will disagree both about what interpretive approach is appropriate and about what the outcomes of different interpretive approaches would be. Perhaps only a majority should be required to have a particular understanding of the Constitution for it to be binding, though this seems arbitrary given that the Constitution itself required ratification by a supermajority and has a high standard for formal amendment.[211]

With respect to both of these problems, the answer is probably somewhere between the extremes. Neither the existence of ignorants nor experts should make false a claim about the people's understandings of the Constitution. While unanimity is impossible, a mere majority opinion about the Constitution surely cannot be enough if we are truly speaking about the understanding of the people rather than just of a popular majority. But where in between these pairs of extremes no one can say for sure. And the same is true of other questions as well. How sure does someone have to be about what the Constitution requires before that can be counted as an understanding? If someone believes that the Constitution *should* be interpreted in a particular way, is that sufficient, or must the person believe that the Constitution *is* interpreted in that way?

Given the ambiguity in how constitutional circularity should be applied, there may be many cases in which the approach that one takes to a constitutional circularity inquiry may determine the result. Even if it were possible to sort these questions out and obtain agreement before application there would be uncertainty about whether constitutional circularity should apply in a given case. Judges would presumably rely on intuition to resolve

211. Akhil Amar has argued that the American people retain the right to amend the Constitution by majority vote. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) [hereinafter Amar, *Philadelphia Revisited*] (emphasizing that Article V does not prohibit alternatives means of amendment); *see also* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994) (declaring the author "more confident about my Article V conjecture than I was in 1988"). Acceptance of this argument, however, would not necessarily mean that a particular understanding of the Constitution by a majority of the people should compel an interpretation in accordance with that understanding. The existence of popular sovereignty may give the people the power to change the Constitution if a majority intends to do so, but this does not mean that constitutional doctrine should change on account of a majority that does not mean to change anything.

constitutional choice questions, and different judges' intuitions will differ. One could imagine judges considering objective evidence in the form of polls.[212] Judges, however, would probably be reluctant to consider such evidence.[213] The results also would need to be subject to a methodological assessment before courts relied upon them.[214]

These difficulties leave a judge acting in good faith unsure of what to do, and also make constitutional circularity a tool that is easily manipulated. A judge's own doctrinal preferences may influence the decision, and constitutional circularity may give judges an opportunity to reach a desired result that simply would be indefensible given conventional approaches to constitutional interpretation. This manipulability may seem particularly problematic because it is hard to have a reasoned argument about whether constitutional circularity applies. If one judge says that the people have a certain understanding, and another judge says that they do not, there is not much that reasoned analysis can do to reveal who is right. The function of judicial dissents in serving as a credible threat that disingenuous arguments will be exposed is thus reduced.[215]

This all seems devastating, until constitutional circularity is compared to other constitutional theories. Only the most simplistic of constitutional theories—for example, one that would not include the function of judicial

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212. I have myself used polls at several points in this Article to bolster assertions about American beliefs. *See supra* notes 181, 210; *infra* notes 238, 283, 349.

213. The reluctance may stem from a belief that judges even less than politicians should pay attention to polls. Properly conducted polls from the perspective of constitutional circularity would ascertain not the public's policy preferences, but what, if anything, the public believes the Constitution provides for a particular issue. Nonetheless, judges have long been hesitant to consider polling data even when it might be relevant as factual evidence. *See* Note, *Public Opinion Surveys as Evidence: The Pollsters Go to Court*, 66 HARV. L. REV. 498 (1953) (describing then-existing evidentiary limitations on considering polling data in trademark and other suits, when the data does not indicate what the public believes the courts should decide). Of course, if constitutional circularity became a widespread practice, people polled might have an incentive to state their preferences rather than their beliefs, thus making polls unreliable.

214. Poll results are notoriously sensitive to the framing of questions. *See, e.g.*, James Lindgren, *Death by Default*, LAW & CONTEMP. PROBS., Summer 1993, at 185, 207 (providing an example). If different sensible framings of a question concerning a political issue produced vastly different results, however, that in itself would be relevant to a constitutional circularity inquiry, indicating that the public does not have strong beliefs about a particular issue.

215. *Cf.* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2173 (1998) (concluding that politically split judicial panels are much less likely than all-Democrat or all-Republican panels to reach partisan results because of the threat of exposure through a dissent). In addition, because such statements are conclusory, opinions and dissents might no longer serve the role of demonstrating the courts' commitment to deliberative democracy. *See* Kevin M. Stack, Note, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2236 (1996) (arguing that, in the Supreme Court, the "practice of dissent is necessary to manifest the deliberative character of the process through which the Court reaches its decisions").

review[216]—would lead to considerable agreement among judges as to how the theory should be applied. Originalism is notoriously plastic,[217] at least on interesting questions,[218] and other approaches may be even more so.[219] The views of different Framers and ratifiers can be placed against one another, historical materials can be interpreted in numerous ways, and precedents can be embraced or distinguished.[220] In constitutional decision making, judges often face actual decisions among competing arguments, not black-and-white answers, and they may manipulate their arguments to reach decisions that they prefer. If indeterminacy and susceptibility to manipulation doom a constitutional theory, then none can survive.

The magnitude and nature of uncertainty, however, may differ from one constitutional theory to another. Magnitude could be compared empirically, for example by conducting an experiment in which a number of judges were asked what results they would give assuming they followed a particular approach to constitutional interpretation. The higher the percentage of judges agreeing on the application of particular approaches, the greater the determinacy of a particular interpretive approach. In the absence of such an experiment,[221] one can only speculate. Nonetheless, it is likely that constitutional circularity is less indeterminate than other approaches.

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216. For an unconventional argument for a constitutional order without judicial review, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–76 (1999).

217. On the indeterminacy of originalism, see, for example, Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1240–43 (1984).

218. Commentators have pointed out that there are some constitutional provisions that are perfectly clear. *See, e.g.*, Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414, 420 (1985) (discussing the constitutional provision requiring that the president be at least thirty-five-years old). *But see* Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989) (challenging the easy cases argument by offering an argument that subsequent amendments might make such age discrimination unconstitutional). One might worry that adoption of constitutional circularity might make some of these easy cases hard. This seems unlikely, though, because it will be unusual for the public to have a firm view of the Constitution that is unambiguously contrary to the text. A claim that the public has an affirmative belief that a thirty-year old may run for president simply would not be credible, given that the vast majority of the public probably would either know the answer or admit to ignorance on the question.

219. *See* Chemerinsky, *supra* note 217, at 1243–48 (discussing the indeterminacy in approaches to interpretation other than originalism).

220. Moreover, one may argue even in theory about what originalism requires, and differences in approach may lead to differences in results, just as different ways of defining constitutional circularity may lead to different results. *See, e.g.*, Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 312 (1996) (distinguishing between "hard" and "soft" originalism).

221. Actually conducting the experiment would be difficult. First, one would have to find judges to participate, which might be particularly difficult given that an accurate simulation would require them to read briefs in all of the cases. Second, one would have to pick which cases to examine, recognizing that the selection of cases might determine the clearer interpretive approach.

Constitutional circularity would be used in conjunction with some other constitutional theory that would be applied when constitutional circularity produces no answer. Thus the only relevant cases are those in which some judges would apply constitutional circularity. Constitutional circularity therefore is unlikely to make easy cases hard or hard cases easy, because the public is unlikely to have a clear belief about the Constitution that is opposite the result dictated by the other interpretive approach or that exists despite great ambiguity using the other interpretive approach. Whether constitutional circularity is likely to improve or unravel consensus on cases in between is more difficult to discern.

Although constitutional circularity seems unlikely to have a large effect in either direction, differences in the nature of the uncertainty are also important. With an originalist approach, the uncertainty is what the relevant materials indicate the Framers intended or believed about the Constitution. With constitutional circularity, the question is what people today believe the Constitution requires. On one hand, originalists may have reached consensus on what materials are relevant for discerning intent, such as the *Federalist Papers* and statements in ratification debates.[222] It may be more difficult to identify the relevant materials today. On the other hand, contemporary views may be more accessible to Supreme Court justices, particularly given that there is no need to translate the world of the Founding Fathers to contemporary circumstances.[223] It may be more difficult to make a disingenuous claim about beliefs today than it would be to make a disingenuous claim about what people believed in the eighteenth or nineteenth century.

3. Outcomes

As Richard Fallon has argued, a constitutional theory should be judged in part by its "likely fruits."[224] Even those who advocate purely formal theories, such as originalism, "must rely at least in part on predictions about the results that judges would reach under their approaches."[225] A constitutional theory therefore may be judged by whether it produces acceptable results in specific cases. For example, because constitutional circularity seems to indicate that

222. Nonetheless, there is still considerable debate about the proper approach. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1227–40 (1987) (exploring methodological concerns in performing originalist historical research).

223. *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (discussing the process of translation in constitutional adjudication).

224. Fallon, *supra* note 204, at 539.

225. *Id.* at 562. This is necessarily an empirical inquiry, depending in part on the identity of the individuals who are likely to be judges applying the particular theory. *See id.* at 566–68.

the Constitution requires *Miranda* warnings,[226] the case for constitutional circularity depends in part on whether this is a good result. This is, of course, a largely subjective inquiry, so it is more important to bracket outcomes as potentially important than to explore them at length.[227]

In any event, the specific known results may be much less important than the unknown number of future problems to which the theory might be applied. Though one may make general assessments about whether a particular interpretive approach promotes values such as the rule of law and political democracy,[228] these are such contested concepts that an analysis is likely to be mostly rhetorical.[229] One might argue, for example, that constitutional circularity would embrace the rule of law and democracy by constraining judges from interpreting the Constitution in a way contrary to the beliefs of the people, or that constitutional circularity would repudiate the rule of law by creating a government of men, not laws. These are not trivial concerns, but they may be overblown. Because constitutional circularity applies only in unusual situations, and only if there is substantial agreement, it seems unlikely to have much effect on the nation's democratic politics. Perhaps the adoption of the doctrine would cause some advocates of particular constitutional positions to shift their tactics, trying to persuade the American people directly about what the Constitution requires, thus producing a robust constitutional conversation,[230] but one should not be overoptimistic.

Even if constitutional circularity is unlikely to produce many good outcomes that otherwise would probably not be achieved, it may be useful in preventing bad outcomes. The distinction is necessarily a loose one, because the prevention of a bad outcome may in itself be classified as a good one. Nonetheless, if deviation from the status quo is viewed as a change, then constitutional circularity may prevent some changes by ruling out doctrinal innovations based on other interpretive methods that would be at odds with public perceptions of the Constitution. That we should accept this tradeoff

226. *See supra* Part I.B.1.

227. Professor Fallon recognizes and rebuts the objection that "anyone ought to adopt whatever theory would be best for all of constitutional time, taking into account that the chosen theory should be applied across diverse historical circumstances by judges and Justices who differ in quality and normative outlook." Fallon, *supra* note 204, at 570.

228. *See* Fallon, *supra* note 204, at 562.

229. Professor Fallon would be the first to acknowledge this. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) (acknowledging that the meaning of the rule of law "has always been contested" and "may be less clear today than ever before").

230. Such conversation might be inherently valuable. *See* Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481, 500–20 (1997) (advancing a model that explains various features of American democracy as designed to produce meaningful conversation, rather than simply to transfer voter inputs into outputs).

is an implication of the psychological phenomenon known as "loss aversion,"[231] which suggests that people suffer more from losses than from gains, even taking into account income effects.[232] This produces a tentative endorsement for status quo bias, because the loss that someone who likes *Miranda* would suffer if that case were overturned would be less than the gain that someone who dislikes *Miranda* would receive from its overruling.[233] Such arguments can be taken too far, of course, because constitutional doctrines are not foremost among the contributors to human satisfaction.[234] Nonetheless, it seems only a modest concession to the status quo bias to entrench decisions that everyone already has come to accept, because it will be rare to have both such acceptance and a practical argument against the doctrine that a substantial

231. *See generally* RICHARD H. THALER, QUASI RATIONAL ECONOMICS 5–10 (1991) (introducing prospect theory, from which loss aversion follows); *id.* at 185–86 (using loss aversion to explain various market phenomena); Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 219–46 (considering four explanations for an apparent absence of loss aversion among criminal defendants); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193 (providing an overview of the experimental economics literature suggesting the existence of loss aversion); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1107–13 (2000) (discussing the "endowment effect" and its implications); Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299, 307–08 (applying loss aversion to environmental issues); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1179–81 (1997) (introducing loss aversion); Cass R. Sunstein, *How Law Constructs Preferences*, 86 GEO. L.J. 2637, 2646–48 (1998) (discussing loss aversion and applying it to the tort system).

232. The declining marginal utility of wealth means that a loss of $X will lead to a greater change in utility than a gain of $X. *See, e.g.*, Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 70–71 (1990) (discussing the declining marginal utility of money). The difference, however, is significant only if X is sufficiently large that a gain or loss would noticeably impact wealth. Loss aversion implies that people will suffer more from losses than they will benefit from gains even in the absence of a wealth effect, that is even if $X is a trivial percentage of a person's total wealth.

233. I recognize, but will put to the side, the objection that there is no way to aggregate different individuals' utilities. *See, e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 79 (1981) ("The 'interpersonal comparison of utilities' is anathema to the modern economist, and rightly so, because there is no metric for making such a comparison."); Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 61 n.26 (1992) (citing a variety of sources discussing the interpersonal comparison of utilities, including sources arguing that interpersonal comparison is not impossible).

234. For example, suppose it could be empirically shown that overruling *Miranda* would greatly reduce crime. *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1071–120 (1998) (arguing that *Miranda* caused crime clearance rates to fall precipitously and permanently); *see also* Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After* Miranda: *Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) (responding to a critique of the initial study). Someone who likes the *Miranda* rule might be disappointed by its overruling but nonetheless be better off because of a reduced likelihood of being a crime victim. This possibility invites the paternalistic justification that those who care about constitutional precedents may not know what is good for them.

majority of jurists would accept. Constitutional circularity prevents narrow majorities of judges from producing destabilizing constitutional change.

Ultimately, whether constitutional circularity produces good or bad outcomes depends in part on how it is used and whether it is abused.[235] If constitutional circularity degenerated into a tool that judges began to use to claim that the American public had settled on whatever they preferred, it might undo any claim to objectivity that constitutional analysis still possesses. If constitutional circularity is used sparingly, however, it might allow the Supreme Court to elevate a small number of propositions above the thicket of doctrine. By saving the Court from having to harmonize these conclusions with other interpretive approaches, the Court ironically may be able to follow those other approaches more rigorously and convincingly. Constitutional circularity thus may be important not so much for the outcomes it reaches, for the Court is likely to reconcile constitutional law to strong beliefs anyway, but because those outcomes will not distort other outcomes.[236]

At the same time, recognition of constitutional circularity may make loose invocations of rhetoric less palatable in cases in which the doctrine ought not apply. The notion that the people's beliefs and assumptions about constitutional law are relevant obviously has some intrinsic appeal, as indicated by decisions like *Casey* and *Dickerson*. Yet constitutional circularity may be far more dangerous as a rhetorical device than as an interpretive approach. If the Supreme Court already uses the ideas underlying constitutional circularity to support results, it might as well do so in a theoretically grounded way. It is possible that recognition of constitutional circularity might lead to its application less often, for once the predicates for application of the theory are understood, casually offered rhetorical statements about what the American people believe may suddenly seem unpersuasive. Of course, the same goal ironically could be achieved just as well by an emphatic rejection of the principles of constitutional circularity as by acceptance of it.

4. Public Acceptance

Finally, it may be useful to consider public acceptance, for that after all is the touchstone of the constitutional circularity approach. Ironically,

235. This is separate from the question of whether constitutional circularity is manipulable. *See supra* Part II.A.2. How a doctrine is used depends on historical circumstance, including the judges on the bench.

236. For example, by upholding *Miranda* on the ground that it has become accepted, the Supreme Court avoided having to make a choice between two lines of cases. *See supra* notes 160–163 and accompanying text.

constitutional circularity may be unconstitutional under itself.[237] Perhaps the people believe that originalism is the only mode of interpretation that the Constitution permits. The follower of constitutional circularity thus faces a paradox should originalism and constitutional circularity conflict. This problem, however, is not as serious as it might seem. It may be that people asked to interpret the Constitution would naturally assume an originalist approach, but this does not mean that, if specifically asked whether the Constitution requires originalism, they would say that it does.[238] Even if the paradox were real, a follower of constitutional circularity might decide to apply the approach to all questions other than the interpretive question, rather than to apply it to the interpretive question at the expense of all other questions. Interpretation is not mathematics, and there is no metaprinciple that one cannot follow an interpretive approach that leads to paradox. Originalism, after all, may be subject to the same problem.[239]

Even if there is no fatal paradox, however, considering public acceptance does not make a strong affirmative case for adopting constitutional circularity. I have suggested that the doctrine of constitutional circularity seems strange, and neither the public nor the legal community generally is likely to accept that which it finds odd. Indeed, it may be because constitutional circularity seems bizarre that Justices have been reluctant to rest explicitly on the approach, preferring to cram it into more conventional legal categories, such as stare decisis and prophylactic rules. Identification of constitutional circularity, however, at least may have the effect of making arguments that depend on it less strange. Perhaps the public and lawyers would more readily accept an explicit invocation of the public understanding of

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237. This is not the first doctrine to be identified as self-invalidating. *See* Rubenfeld, *supra* note 22, at 450 (arguing that "[s]trict scrutiny of race classifications may be the first instance in our jurisprudence of a constitutional doctrine *unconstitutional under itself*").

238. Indeed, issues of constitutional interpretation have received enough attention that many people might endorse the opposing view that the Constitution is a living document. For example, a 1987 poll indicated that 42 percent of Americans believe that the "Supreme Court should stick as closely as possible to the founding fathers' interpretation of the U.S. Constitution," while 55 percent "say the Supreme Court should make decisions based on a modern interpretation of what the Constitution means." ROPER CTR. FOR PUB. OPINION RESEARCH, QUESTION ID: USABCWP.267 R13 (1987). This question's wording is not ideal, because many originalists would argue for a modern interpretation of original intent, but it indicates substantial support for a flexible reading of the Constitution.

239. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers did not believe that original intent was to be the exclusive approach to interpretation). *But see* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988) (disagreeing with Powell's analysis). A living Constitution approach may also be subject to paradox, because one who maintains that the Constitution must be adapted to contemporary needs must concede the theoretical possibility that originalism might best meet those needs.

the Constitution than an argument that seems to invoke themes related to constitutional circularity in an inappropriate context. A form of argument that has a controversial basis may still receive more acceptance than rhetoric vaguely but unclearly invoking the constitutional circularity principle.

B. Reconciling Constitutional Doctrine

Perhaps one strike against the theory that perceptions of the Constitution help determine constitutional meaning matter is that it might seem odd. It is, after all, circular. But it is not so odd, and indeed several aspects of constitutional doctrine seem to reflect the principle. Understanding the theory may help make sense out of doctrines that commentators have criticized as incoherent.

1. Fourth Amendment

One of the more famous perversities of Fourth Amendment law[240] is the apparent absurdity of the Supreme Court's formulation of what constitutes a reasonable search. A search is reasonable, the Court has held, if it would not defeat anyone's reasonable expectation of privacy.[241] Scholars have scoffed at this formulation, because it suggests that the government could conduct any kind of search by announcing loudly that it will conduct certain kinds of searches, thus eliminating expectations of privacy.[242] Fourth Amendment

240. If we are to believe the commentators, the Fourth Amendment is unusually full of perversity. *See, e.g.*, AMAR, *supra* note 144, at 1 ("The Fourth Amendment today is an embarrassment."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The Fourth Amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' . . . ."); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 204 (1993) ("Critics of the Supreme Court's contemporary fourth amendment jurisprudence regularly complain that the Court's decisions are illogical, inconsistent, unprincipled, ad hoc, and theoretically incoherent." (citation omitted)); Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 542 (1988); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 788 (1999) ("Academics of all stripes agree that search and seizure law is a mess . . . .") (citation omitted); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 587 (1989).

241. The Court has established a two-part test to determine whether a search has occurred, asking whether an individual maintains a subjective expectation of privacy and whether such an expectation is reasonable. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

242. *See, e.g.*, Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1613 (1987). Coombs argues:

> To hold that citizens have no expectations of privacy because the police commonly use a particular technique would allow the government to pull itself up by its bootstraps, destroying otherwise existing expectations of privacy by imputing to citizens knowledge

doctrine, moreover, is circular, for someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area would be unreasonable.[243] Thus, just as in the stare decisis context described in Part I, the Court seems to be saying that what counts as reasonable depends on what the Court has previously held.

Acceptance of the Fourth Amendment doctrine makes constitutional circularity seem less absurd. When judicial decisions affect people's reasonable expectations of privacy and the reasonableness of a search depends on such expectations, the judicial decisions are indirectly affecting the Constitution's meaning.[244] If we accept that the Supreme Court is institutionally capable of identifying such reasonable expectations of privacy, then we ought to concede at least the possibility that the Court would be capable of identifying people's perceptions of other constitutional provisions. And if it is legitimate for the Court to consider such expectations in ascertaining constitutional meaning,

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> of the availability or use of techniques that are unlikely to be used by nongovernmental entities.

Id. (citation omitted); *see* James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 679 (1985) ("[The expectation] component has raised concerns about unwarranted and intolerable government control of the constitutional scope by designed manipulation of what the populace expects." (footnote omitted)); *cf.* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974) ("[T]he basis of the *Katz* decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection. Of course this begs the question.").

243. *See, e.g.*, Richard S. Julie, Note, *High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age*, 37 AM. CRIM. L. REV. 127, 132 (2000) ("[A] common criticism of *Katz*'s reasonable expectation of privacy test is that it is circular; as the argument goes, the Supreme Court protects only those expectations that are reasonable, while the only expectations that are reasonable are those which the Supreme Court is willing to protect." (footnote omitted)). The Supreme Court has also recognized this problem:

> [I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

244. One might argue that this does not change the Constitution's meaning, because the Constitution uses the word "unreasonable" to refer to contemporary social understandings of reasonableness. Constitutional circularity, however, need not be limited to situations in which the people have a particular syntactic understanding of a constitutional provision. It applies equally to understandings of the application of a constitutional provision. Constitutional circularity thus avoids the problem of determining the level of generality at which the Framers drafted a particular provision. *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1090–92 (1981) (discussing the level-of-generality problem); Michael J. Klarman, *supra* note 97, at 1926–28 (confronting the problem in Equal Protection Clause jurisprudence).

then it may also be legitimate for the Court to enshrine perceptions of constitutional meaning into constitutional law.

The theory, meanwhile, shows that Fourth Amendment doctrine is not circular in a logical sense, but merely that it may tend to be self-fulfilling in an empirical sense. It will not always be self-fulfilling, because a particular decision might be little known and thus not affect expectations of privacy.[245] In such a situation, the Court might reconsider the opinion if it later determines that it was originally wrongly decided, because that opinion will not have affected constitutional meaning. At the same time, application of the theory might alter Fourth Amendment doctrine slightly. Instead of focusing on people's expectations of what the government will do, the theory focuses on how people conceptualize the Constitution. Even if a particular decision is well known, it conceivably might not change the way people think about the Constitution, especially if people think the decision is incorrect.[246]

2. Takings Clause

Parallel reasoning may be applicable to the Takings Clause.[247] One factor in determining whether regulatory action counts as a taking is "the extent to which the regulation has interfered with distinct investment-backed expectations."[248] Unsurprisingly, critics have called this doctrine circu-

245. Bailey Kuklin has made this point in discussing the context of reasonable expectations generally, without specific attention to the Fourth Amendment. The "circularity is partially broken, and hence, loses its vicious bite," he observes, "when one recalls that the relevant background setting for the expectations is the broader legal culture, and not simply the law on the books." Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 25–26 (1997); *see also id.* at 35 ("Accepted morals, mores, custom and usages, and in sum, the general social milieu all mutually affect one another and animate the interplay between the reasonable expectations and the law, which in turn, influence the morals, mores, et cetera." (internal quotation marks omitted)); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 69 (1988) ("The notorious circularity of the 'reasonable expectation of privacy' test, for example, comes as no surprise to a positivist. What is reasonable for people to expect depends upon how our society actually functions, and a positivist is comfortable with the assertion that the Constitution is embodied in these expectations.").

246. This shift could have concrete practical implications. For example, it would defeat the suggestion of a pair of commentators that the Fourth Amendment should protect expectations rendered legitimate by the law of a particular state as well as by federal law. *See* Richard S. Walinski & Thomas J. Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1 (1981).

247. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

248. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The notion of investment-backed expectations originated in a famous article by Frank Michelman. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1213 (1967) (referring to "justified, investment-backed expectations").

lar too.[249] If case law indicates that the government can take a particular type of property (or opportunity for the use of property) without compensation, then the property owner ought not have expectations of profit. Indeed, the circularity problem may be more significant, because sophisticated investors presumably consider the relevant legal regime in making investment decisions, while individuals potentially subject to police searches may not consciously think about the Fourth Amendment at all.

Acceptance of constitutional circularity could also help clarify one of the puzzles of takings jurisprudence. Courts have held that existing regulatory regimes permitting certain uses of property generally do not create investment-backed expectations, because investors should recognize that the legal regime might change.[250] This explanation seems inconsistent with the economic concept of expectations in situations in which an adverse change in the relevant legal regime seems highly unlikely ex ante.[251] Expectations therefore must be relevant in other than a probabilistic sense. Perhaps the relevant expectations are simply perceptions of constitutional law, and these perceptions may include the notion that the government will not compensate investors whose speculations turn out to be misguided as a result of certain types of government action.[252]

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249. *See, e.g.*, Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 7 (1996) (referring to the "hopelessly circular inquiry into reasonable investment-backed expectations"); Maureen Straub Kordesh, *"I Will Build My House with Sticks": The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 442 (1996) ("The reliance interest, although a possible factor in takings analysis, is not an appropriate requirement for all takings cases, and is subject to circularity like other takings tests." (footnote omitted)).

250. For a discussion and citations, see Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1, 38 & n.260 (1989). More recent doctrine, however, has been more willing to find a taking even given notice of possible regulatory action. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

251. This does not imply that the doctrine is economically indefensible. One can argue from an economic perspective that the government should not compensate takings attributable to a change in a regulatory regime, for such a policy will encourage investors to consider the possibility of legal change. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986). My point is simply that if the law is to determine whether investment-backed expectations exist, a small theoretical possibility of government action should not be sufficient to find an absence of such expectations. After all, there is always some possibility of an adverse change in regulation. This logic would suggest that even explicit exercises of eminent domain, such as the confiscation of property to build a highway, ought not be compensated.

252. Professor Michelman suggests that a particular word in the Takings Clause, "property," embodies concepts of expectations. *See* Michelman, *supra* note 248, at 1212 (noting that, according to Jeremy Bentham, "property is the institutionally established understanding that extant rules governing the relationships among men with respect to resources will continue in existence"). This theory and one dependent on understandings about the Constitution are not necessarily mutually exclusive. Indeed, Justice Scalia has argued that "'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's

3. Territorial Jurisdiction

A similar phenomenon exists in constitutional civil procedure. Whether a state may assert jurisdiction over a defendant consistent with the Due Process Clause depends in part on whether the defendant could justifiably have expected to be haled into that state's courts.[253] Commentators have noted that this formulation also seems to be circular.[254] That this circularity seems to freeze the law of jurisdiction is particularly odd in light of the dramatic revolution in such law symbolized by *International Shoe Co. v. Washington*.[255] That case, though, illustrates well how circularity can be broken, as it followed a series of cases undermining the physical presence rule of *Pennoyer v. Neff*.[256] Perhaps the legal fictions established by those cases changed people's perceptions of where they might be sued, and perhaps even their perceptions of what the Constitution required.

Acceptance of this possibility could help bridge the gap between two apparently quite different visions of the Due Process Clause, as manifested

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power over, the 'bundle of rights' that they acquire when they obtain title to property." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

253. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Court explained:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id.

254. *See, e.g.*, Bruce N. Morton, *Contacts, Fairness and State Interests: Personal Jurisdiction After* Asahi Metal Industry Co. v. Superior Court of California, 9 PACE L. REV. 451, 465 (1989) ("[T]he Supreme Court's purported new test for personal jurisdiction is useless and circular without independent substantive criteria to guide one's reasonable anticipations."); David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 136 (1998). Professor Wille explains:

> The purposeful availment requirement stems from the notion that defendants should be able to plan their conduct knowing where that conduct will subject them to jurisdiction. But such a principle has been debunked as circular. Defendants only have reasonable expectations about where they will be haled into court because courts have created such expectations.

Id. (footnote omitted); *see also* Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1117 (1996); Luther L. McDougal III, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 10 (1982); *cf.* W. Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676, 680 (Minn. 1983) (refusing to follow pre-*World-Wide Volkswagen* cases inconsistent with that case merely on the theory that those cases provided the relevant reasonable foreseeability).

255. 326 U.S. 310, 316 (1945) (allowing jurisdiction even in the absence of physical presence because the defendant had "minimum contacts" with the forum). For a discussion of the revolutionary nature of *International Shoe*, see Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 805–17 (1995).

256. 95 U.S. 714 (1877). Among the cases undermining *Pennoyer* are *International Harvester Co. of America v. Kentucky*, 234 U.S. 579 (1914), and *Milliken v. Meyer*, 311 U.S. 457 (1940).

by Justice Scalia's and Justice William Brennan's competing opinions in *Burnham v. Superior Court.*[257] Both Justices agreed in that case that a California court properly could exert jurisdiction over a defendant passing through California because he was served with process in that state. Justice Scalia believed that this was because jurisdiction had traditionally been premised on the basis of such service,[258] while Justice Brennan found such jurisdiction to accord with contemporary notions of fairness.[259] Their one ground of agreement was that a defendant's reasonable expectation of suit matters, though they disagreed whether this is relevant because of tradition or contemporary notions of fairness.[260] Perhaps they are both justifications, though not independent ones. Tradition and notions of fairness may both affect perceptions of constitutional meaning, and this may be the ultimate source of constitutional definition.

4. Cruel and Unusual Punishment

Even doctrines that do not directly incorporate expectations may be explainable under the theory that perceptions of constitutional law affect constitutional meaning. The Supreme Court has held that the Eighth Amendment's Cruel and Unusual Punishment Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[261] Critics predictably have attacked this approach as self-fulfilling,[262] because judicial doctrine that allows or prohibits certain forms of punishment affects whether these forms of punishment meet society's evolving standards of decency. Yet at the same time, this approach leaves open the possibility that a punishment previously viewed as constitutional or unconstitutional in one case might switch status in the next because standards of decency have evolved.[263]

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257. 495 U.S. 604 (1990). Both opinions garnered four votes. Justice John Paul Stevens concluded that jurisdiction was proper for both the reasons discussed by Justice Scalia and those discussed by Justice William Brennan. *See id.* at 640 (Stevens, J., concurring).

258. *See id.* at 607 (Scalia, J., plurality opinion).

259. *See id.* at 628 (Brennan, J., concurring).

260. Justice Scalia suggests that in Justice Brennan's analysis, the reasonable expectation formulation "is just tradition masquerading as 'fairness.'" *Id.* at 624 (Scalia, J., plurality opinion).

261. Trop v. Dulles, 356 U.S. 86, 101 (1958).

262. *See, e.g.*, Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455 (1996).

263. Indeed, Justice Thurgood Marshall made this point in suggesting that past decisions upholding the death penalty have little stare decisis value. *See* Furman v. Georgia, 408 U.S. 238, 330 (1972) (Marshall, J., concurring) ("[T]he very nature of the Eighth Amendment would dictate that unless a very recent decision existed, *stare decisis* would bow to the changing values, and the

Acceptance of the theory that perception influences meaning does not invalidate these critiques, but makes them unremarkable. Doctrine might affect constitutional meaning and perceptions of decency might force changes in doctrine, but this does not mean that Justices have unbridled discretion to identify what decency requires.[264] Moreover, acceptance of the theory clarifies that what matters is not so much people's perceptions of decency per se, but people's perceptions of what the Constitution requires. Judges gain legitimacy by not interpreting the Constitution according to their own idiosyncratic preferences, for if they do, the people may conclude that the Constitution does not require anything in particular at all. Perhaps we do have a living Constitution,[265] but for it to stay alive, people must continue to perceive that it has some meaning.

C. Reconciling Constitutional Theory

Reconciliation with constitutional law can only be the beginning of a normative inquiry. Perhaps the previous part slighted constitutional circularity through guilt by association with disreputable doctrine. In this part, I argue that although constitutional doctrine reflects the Constitution, the Constitution also reflects constitutional doctrine. Although commentators have not explicitly recognized the possibility that constitutional meaning could be a function of perceptions, constitutional scholarship has long recognized that constitutional meaning can derive from a source other than original intent. My aim, though, is not to rehearse or resolve the debate about the propriety of a living Constitution.[266] Rather, it is to argue that just as the theory developed here and constitutional law both seem more attractive in light of each other, so too are the theory and modern constitutional theory mutually reinforcing. I divide my analysis into two parts, the first an assessment of the theories of constitutional entrepreneurs who have advanced bold reformulations of constitutional theory, and the second an assessment of

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question of the constitutionality of capital punishment at a given moment in history would remain open.").

264. The Court has sought to discipline its examination of evolving standards by looking to the legislative enactments and the actions of sentencing juries. *See* Thompson v. Oklahoma, 487 U.S. 815, 821–22 (1988); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("[An] assessment of contemporary values . . . does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.").

265. For a prominent critique of the idea of a living Constitution, see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

266. The debate has been a long one. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 9–33 (1998) (tracing the tension between "originalism" and "living constitutionalism").

constitutional traditionalists, whose work, though no less creative, hews closer to the lines of contemporary constitutional practice.[267]

1. Constitutional Entrepreneurs

a. Bobbitt's Modalities

The possibility of precedent's functioning as something more than a handmaiden to original intent becomes clear in the work of Philip Bobbitt. In his "typology of constitutional arguments," Bobbitt lists historical argument, textual argument, doctrinal argument, prudential argument, structural argument, and ethical argument.[268] The third of these categories (doctrinal argument) amounts to arguments about precedent.[269] Whether or not Bobbitt would agree semantically with the assertion that precedent is part of what the Constitution means,[270] he believes that making arguments from precedent is part of what constitutional decisionmakers do.[271] Moreover, Bobbitt stresses

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267. I do not mean the label "constitutional traditionalists" to refer to theorists who emphasize the importance of tradition in constitutional interpretation, but rather to refer to theorists who follow more traditional theories than those in the first group. On the importance of tradition in constitutional interpretation, see *supra* notes 208–209 and accompanying text.

268. PHILIP C. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–119 (1982). Professor Bobbitt provides a useful summary of these modalities in a later work:

> historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).

BOBBITT, *supra* note 205, at 12–13.

269. Bobbitt is not enamored of doctrinal argument:

> Doctrinal argument faces its true crisis when the old purposes for the development of the doctrine have been obscured or mooted, or have simply withered away, or when there is no consensus as to the discernible purpose. It is reasoning from purpose that gives doctrinalism its power; it can't provide purpose.
>
> The difficulty is that the debate over constitutional purposes is generally the issue in Constitutional law.

BOBBITT, *supra* note 268, at 55. Yet neither Bobbitt's project nor mine is to assess whether precedent should be a modality of interpretation. *See id.* at 57 ("I am not, of course, discrediting such an approach nor, even if it were possible, as I believe it is not, urging its rejection."). The point is simply that it can be.

270. He would be more likely to agree with it if "meaning" were defined in accordance with the definition of Stanley Fish, as "the property neither of fixed and stable texts nor or 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." STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 322 (1980).

271. As Dennis Patterson comments, "The central theme of *Constitutional Interpretation* is that there is nothing more nor less to constitutional law than the practice itself. This is a thoroughly

that each modality is of equal import.[272] Because in Bobbitt's framework a doctrinal argument need not yield to even a persuasive argument from original intent, he conceptualizes doctrinal argument as being independent of the other modalities. He presumably would thus reject Professor Paulsen's notion that application of stare decisis in a constitutional case is something other than constitutional decision making itself. For him, an argument from precedent is as faithful to the document as any other type of argument.

Bobbitt's work might be more internally consistent, however, if the category of doctrinal argument expanded to include arguments about what citizens believe constitutional doctrine to be. One aspect of Bobbitt's work that commentators have criticized is his insistence that it is a mistake to try to find an algorithm or metarule for resolving conflicts among or balancing the various modalities,[273] for example by using moral theory or economics.[274] This insistence seems peculiar because Bobbitt's project is not entirely descriptive. Bobbitt states that he is defending "American constitutional institutions" against an "assault . . . by the American right wing,"[275] but he does not adequately explain why one should defend these institutions against alternative social practices, and he does not explain why this ultimate defense cannot itself be the source of a metarule. Yet there is a sense in which Bobbitt does have a metarule, or at least an ultimate value that his system seems to advance: the freedom of constitutional decisionmakers to resolve moral choices through appeals to conscience.[276] Interestingly, Bobbitt

radical view, one that is shared by virtually no one else in constitutional law or theory on the current scene." Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 270 (1993) (reviewing BOBBITT, *supra* note 205).

272. Some commentators understood Bobbitt as having elevated ethical argument above the other five modalities, in part because he devoted the largest portion of his book to discussing ethical argument. In *Constitutional Interpretation* however, Bobbitt makes unmistakable that he thinks it a mistake to suggest that any modality is more important than any other. *See* BOBBITT, *supra* note 205, at xi, 155–70; *see also* J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1794 (1994) ("Bobbitt holds that not only are there six and only six modalities but that each is the equal in its importance to its companions. No reader of *Constitutional Interpretation* can miss Bobbitt's passion in arguing for the equality of their status.").

273. *See* BOBBITT, *supra* note 205, at 123, 155.

274. *See* Balkin & Levinson, *supra* note 272, at 1778–84 (noting that Bobbitt draws a sharp distinction between legitimacy, which is gained by virtue of the existence of a social practice, and justification, which he believes cannot be provided from within the practice of law); Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on* Constitutional Interpretation, 72 TEX. L. REV. 1707, 1717–18 (1994) (criticizing Bobbitt for refusing to provide a justification of the modalities). For a concise description and critique of Bobbitt's distinction between legitimacy and justice, see Book Note, *Legitimacy and Justice in* Constitutional Interpretation, 106 HARV. L. REV. 1218 (1993).

275. BOBBITT, *supra* note 205, at xii.

276. Bobbitt writes, "[T]he algorithm that some critics are searching for . . . would sacrifice the political stability and pluralistic allegiance afforded by the present system of interpretation. . . . Finally, the provision of a metarule would disable moral choice." *Id.* at 161–62. Bobbitt thus seems quite

includes in the category of constitutional decisionmakers not just judges, but citizens as well.[277]

Thus, Professor Bobbitt can be seen as making a normative case that the Constitution ultimately should be interpreted to mean whatever citizens and other decisionmakers believe the Constitution means, however these decisionmakers weigh the individual modalities in a particular case. There is, however, an important distinction between this approach and constitutional circularity. In constitutional circularity, one set of constitutional decisionmakers, judges, should decide constitutional issues according to what another set of decisionmakers, citizens, believes. In contrast, Bobbitt imagines that each constitutional decisionmaker appeals to individual conscience in making a decision, whether that decision is resolving a case,[278] confirming a judge,[279] or conducting a public investigation.[280] In fact, Bobbitt's theory may become more attractive when reformulated in light of constitutional circularity. Though it is difficult to justify the practice of interpreting the Constitution according to any individual judge's conscience, it may be more tenable to interpret the Constitution according to the shared conscience and perception of the American people. Thus, just as Professor Bobbitt's work makes such an approach to interpretation seem more familiar, so too does constitutional circularity hold the promise of justifying and refining Bobbitt's approach.

b. Rubenfeld's Commitmentarianism

Perhaps constitutional circularity seems strange because it does not fit into major interpretive camps. It is not originalist, for it pays no attention to what the Framers originally believed, and it certainly is not textualist. Yet, at the same time, the approach does not embody the view that the

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close to justifying his system by considerations like stability, allegiance, and especially moral choice. That he does not expect those who practice constitutional interpretation to choose to act within the existing modalities by virtue of these considerations does not explain why he, surely a participant in constitutional practice himself, is permitted to contemplate them.

277. *See id.* at 28 ("[T]he approaches I have depicted in constitutional law retrieve that law from the monopoly currently held by the judiciary. . . . [I]f citizens and journalists (and politicians) know the basic modes, the fundamental ways of thinking about the Constitution as law, they can work through current problems on their own."); *see also* Tushnet, *supra* note 274, at 1720–22 (interpreting other passages as indicating that Bobbitt includes citizens as constitutional decisionmakers).

278. *See* BOBBITT, *supra* note 205, at 48–63 (analyzing Missouri v. Holland, 252 U.S. 416 (1920)).

279. *See id.* at 83–108 (discussing the nomination of Judge Robert Bork to the Supreme Court).

280. *See id.* at 71–82 (discussing the hearings on the Iran-Contra Affair).

Constitution is a living document,[281] at least not in the sense that it is a document into which judges can read their beliefs and aspirations. Differently stated, constitutional circularity skirts the countermajoritarian difficulty.[282] The approach does not rely on the consent of the governed at the time the Constitution was enacted, nor does it insist that the Constitution yield to whatever the people today would like the Constitution to say. Rather, it relies on the present consent of the people to live by the Constitution, including both aspects that they may like as well as aspects that they may not like,[283] and it considers what the people believe is the content of the document to which they give their continued consent. In short, the approach relies not on consent at one time—the founding or today—but instead emphasizes the commitment of the people to the Constitution.

The notion that constitutional legitimacy is predicated on commitment rather than on consent is not my own. As Professor Jed Rubenfeld has eloquently reminded us, constitutional interpretation is a temporally extended project.[284] Self-government, Professor Rubenfeld argues, "begins . . . with the premise that living up to enduring, substantive constitutional commitments is integral to self-government itself."[285] If Professor Rubenfeld is right that "[c]ommitment, not consent, is the normative force through which the

281. *See supra* notes 265–266 and accompanying text.

282. The term was coined by Alexander Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986) ("The root difficulty is that judicial review is a counter-majoritarian force in our system."). For a partial list of sources addressing the countermajoritarian difficulty, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 n.1 (1998). Professor Friedman criticizes the view that there is a difficulty in Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

283. The 2000 Election provided a useful example of how the people may pay allegiance to a constitutional principle that they themselves find problematic. Polls after the election indicated that most Americans favored abolition of the Electoral College. *See, e.g.*, ROPER CTR. FOR PUB. OPINION RESEARCH, QUESTION ID: USLAT.121700 R24 (2000) (reporting that 61 percent of Americans favored amending the Constitution). Nonetheless, the fact that Al Gore had won the popular vote did not lead most Americans to believe that a victory by George W. Bush would be illegitimate on the ground that he lost the popular vote. *See* ROPER CTR. FOR PUB. OPINION RESEARCH, QUESTION ID: USPSRA.111400 RE2 (2000) (reporting that only 41 percent of Americans would find a Bush victory illegitimate on account of Gore's having won the popular vote). This, of course, is not an example of a situation in which the people's understanding of what the Constitution requires can be used to resolve a constitutional ambiguity, for there was no ambiguity that the Constitution did not rely on the popular vote. *But cf.* Peter Berkowitz, *Nutty Professors*, NEW REPUBLIC, Nov. 27, 2000, at 11 (describing a newspaper advertisement signed by numerous legal scholars speaking of the concept of a "clear constitutional majority of the popular vote"). But it does show popular commitment to adhering to the original constitutional design, at least until the provision is amended, in the face of a belief that the constitutional design was suboptimal.

284. *See* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995).

285. *Id.* at 1121.

Constitution exercises binding authority,"[286] then we must consider to what the people are committed. In part, the people's commitment may be to a vague generality, the binding force of a document about which they know little. But there may be exceptional circumstances in which the people may have a more specific conception of what the Constitution means, and that conception may in part be a function of a past decision by the Supreme Court. When that is true, disregarding the people's specific understanding of what the Constitution requires would ignore the substance of the people's commitment in favor of the flimsy notion that the Constitution may be binding.

Nowhere, however, does Professor Rubenfeld suggest that the Supreme Court should consider what the people believe they have committed themselves to when interpreting the Constitution. Indeed, Professor Rubenfeld's interpretive method seems to focus much more on what the people originally believed that they were committing themselves to than on what they currently believe themselves committed to. The method starts from "paradigm cases," the "particular evils or abuses felt to be intolerable at the time of enactment: for example, slavery in the case of the Thirteenth Amendment, and the infamous 'black codes' in the case of the Fourteenth."[287] From this, it follows that a constitutional provision containing a prohibition must be interpreted at least as barring this particular evil, though the commitment may extend to something broader.[288] At the same time, a constitutional grant of power must be interpreted at least as encompassing the grant, though the powers might be interpreted more expansively as the commitment expands.[289] As Professor Rubenfeld reports, his interpretive method provides for "the parallel expansion of rights and powers" that is our constitutional history.[290]

The approach described in this Article reflects Professor Rubenfeld's key theoretical insight without unequivocally embracing his interpretive method. In some respects, Professor Rubenfeld is able to squeeze little from the notion of commitment. In discussing the Commerce Clause, for example, he concludes that his commitmentarian approach "makes modern Commerce Clause doctrine not necessary, but possible—not inexorable, but

286. *Id.* at 1154. Perhaps Professor Rubenfeld's central insight is that we are not "obliged to understand the Constitution's claim to bindingness through the concept of consent, whether past, present, or future." *Id.* More recent scholars have made related arguments that constitutionalism depends on commitments made over the course of constitutional history. *See* Friedman & Smith, *supra* note 266, at 78–80.

287. Rubenfeld, *supra* note 284, at 1169–70.

288. *See id.* at 1171–73.

289. *See id.* at 1173–77.

290. *Id.* at 1173.

intelligible."[291] If commitment is the essence of constitutionalism, however, then it might make sense to ask what the people today believe themselves committed to. If, for example, people have come to believe that the Constitution allows Congress to enact laws based on tenuous connections to commerce,[292] then perhaps this belief about the commitment should be accepted. In other respects, Professor Rubenfeld may squeeze too much. He sees the commitmentarian approach as explaining and justifying the strong emphasis on precedent in our constitutional practice.[293] But precedent should be relevant under his own analysis only where the people have committed to that precedent.[294] Constitutional circularity recognizes that while the people may feel constitutionally committed to particular principles, neither paradigm cases nor precedent will always inspire such commitment.[295]

c. Ackerman's Dualism

Constitutional circularity also may make more palatable Bruce Ackerman's dualist democracy thesis,[296] which has been described as one of

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291. *Id.* at 1177.

292. I do not claim that this is true. People generally might think that Congress is being sneaky when it claims to be regulating commerce or defines a criminal offense as requiring a minimal effect on commerce.

293. *See* Rubenfeld, *supra* note 284, at 1177–79. It may be that precedent is defensible by another aspect of Professor Rubenfeld's theory on which I place less emphasis, the notion that the written nature of the Constitution is central to its interpretation. *See, e.g., id.* at 1143–63.

294. Professor Rubenfeld does acknowledge that some precedents might inspire more commitment than others:

> The longer a principle has been adhered to in practice—the more it has been tested by a variety of circumstances, the more it has worked its way into the life of the nation—the more deference it is due, because (as discussed earlier) longevity in constitutional principle is evidence of soundness, and because any inter-generational adherence to a principle, once won, should not be lightly sacrificed. But a decision from long ago that has been of no great significance in shaping constitutional doctrine—a decision whose principle has not inscribed itself into social practices in material respects—is merely dated, rather than temporally extended, and therefore carries far less weight.

Id. at 1178–79.

295. A plausible objection is that the only difference between Professor Rubenfeld's approach and the one described here is that Professor Rubenfeld is willing to indulge a presumption that the people's general commitment to the Constitution embraces paradigm cases and precedent, providing a useful proxy for the principles to which the people have in fact committed. Though I do not think that this is Professor Rubenfeld's argument, it is a powerful one to the extent that paradigm cases and precedent are good proxies and can be identified more easily than the specific principles to which the people believe they are committed. *See supra* Part I.A.2 (discussing the difficulties of applying constitutional circularity).

296. The thesis is expounded so far in 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); and 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). Professor Ackerman promises a third volume, *Interpretations*, to complete the trilogy. *See, e.g.*, 1 ACKERMAN, *supra*, at 99.

the most important developments in constitutional theory today,[297] yet has failed to attract many adherents even in the academy.[298] Professor Ackerman's thesis is that constitutional transformation occurs in periods of "higher lawmaking" when the public is mobilized,[299] in contrast to the decisions that the public reaches in times of "normal politics."[300] When the public has engaged in higher lawmaking, it has effectively amended the Constitution, regardless of whether it has complied with the strictures of Article V.[301] The most controversial part of Professor Ackerman's claim is that the New Deal was a "constitutional moment"[302] and that its principal innovations are thus as much a part of the Constitution as if a constitutional amendment effecting similar changes had been approved.[303] At the heart of his argument is that this change was no more extralegal than the initial adoption of the Constitution, because it was not adopted pursuant to the amendment procedures of the preexisting Articles of Confederation.[304] Reconstruction was similarly extraconstitutional, in particular the adoption of the Fourteenth Amendment, which "would never have been ratified if the Republicans had followed the rules laid down by Article Five of the original Constitution."[305]

If these claims are correct,[306] then any constitutional theory that accepts the legitimacy of both the Constitution and its Fourteenth Amendment—and this seems to embrace all reputable constitutional theory—must provide an account of what events besides the process of Article V are

297. *See* 1 ACKERMAN, *supra* note 296, at book jacket (statement of Prof. Sanford Levinson).

298. *See, e.g.*, William E. Leuchtenburg, *When the People Spoke, What Did they Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2077 (1999) ("Scholars have dealt harshly with Bruce Ackerman's audacious reconfiguring of American constitutional history."); Richard A. Posner, NEW REPUBLIC, Apr. 6, 1998, at 32 (reviewing 2 ACKERMAN, *supra* note 296). Reviews by readers unpersuaded by Ackerman's thesis include Raoul Berger, *Bruce Ackerman on Interpretation: A Critique*, 1992 BYU L. REV. 1035 (reviewing 1 ACKERMAN, *supra* note 296); William W. Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955 (1992) (reviewing 1 ACKERMAN, *supra* note 296); and Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992) (reviewing 1 ACKERMAN, *supra* note 296). For more favorable reviews, see Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731 (1999) (reviewing 2 ACKERMAN, *supra* note 296), and L.A. Powe, Jr., *Ackermania or Uncomfortable Truths?*, 15 CONST. COMMENT. 547 (1998) (reviewing 2 ACKERMAN, *supra* note 296).

299. 1 ACKERMAN, *supra* note 296, at 266–94.

300. *Id.* at 230–65.

301. *See id.* at 267–68 (contrasting the "classical" system of constitutional amendment through Article V with the "modern system," in which the "decisive constitutional signal is issued by a President claiming a mandate from the People").

302. *Id.*

303. *See id.* at 47–50.

304. *See id.* at 173–74.

305. *Id.* at 45.

306. Some have argued that they are not. For Professor Amar's critique of Professor Ackerman's approach to constitutional amendment, see Amar, *Philadelphia Revisited*, *supra* note 211, at 1090–96.

sufficient to effect constitutional change. Professor Ackerman offers a framework, which he summarizes thus: "Interbranch Impasse → Decisive Election → Reformist Challenge to Conservative Branches → Switch in Time."[307] The process of higher rulemaking begins when one branch proposes sweeping innovations that a conservative branch opposes, forcing both sides to mobilize popular support, giving "extraordinary constitutional meaning to the next regularly scheduled election."[308] A decisive victory for the reformist branch, if it causes the conservative branch to yield to the popular will through a "switch in time" or through transformative appointments to the Supreme Court,[309] changes higher law.

It is this complicated framework for identifying constitutional change that is the weakest link in the case for dualist democracy. For even if it is accurate as a description of constitutional changes that Professor Ackerman believes have taken place,[310] one might argue for a different formula identifying constitutional change. Such a formula might exclude the New Deal, and even if it doesn't explain the historical data as well, it may be normatively superior. Professor Ackerman relies on past change to the means of accomplishing constitutional change, so it would be odd to insist that higher lawmaking in the future fit the formula that he identifies. The task of choosing a formula is then a subjective one. Thus, unless Professor Ackerman can inspire agreement with his particular formula for identifying such higher lawmaking, his general theory is too plastic to be of much use in constitutional interpretation.

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307. 1 ACKERMAN, *supra* note 296, at 49. Separately, Professor Ackerman identifies the stages as "signaling," "proposal," "mobilized popular deliberation," and "legal codification." *Id.* at 266–67.

308. *Id.* at 48. In the case of Reconstruction, the innovating branch was Congress and the conservative branch was the presidency, while in the case of the New Deal, the innovating branch was the president and the conservative branch was the Supreme Court. *See id.* at 268–69.

309. Transformative appointments ultimately must transform doctrine before higher law can be made. Thus, Professor Ackerman concludes that the attempt to overturn *Roe* was a failed constitutional moment. *See* 2 ACKERMAN, *supra* note 296, at 397–400 (reading the joint opinion in *Casey* as announcing a refusal to create a constitutional moment).

310. For critical historical analyses of Professor Ackerman's account of the three principal periods that he addresses, see Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2004–09 (1999), which maintains that consideration of the antebellum and post-Reconstruction years undermines Ackerman's assessment of Reconstruction; Laura Kalman, *Law, Politics, and the New Deal*, 108 YALE L.J. 2165, 2190–206 (1999), which argues that Ackerman pays insufficient attention to the failure of President Franklin D. Roosevelt's court-packing plan; and Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 YALE L.J. 1931, 1937–46 (1999), which questions Ackerman's account of the Founding. At least one commentator has challenged Professor Ackerman for ignoring a constitutional moment. *See* Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 122–40 (1994) (arguing that the 1876 retreat from Reconstruction was a constitutional moment under Ackerman's criteria); *see also* 2 ACKERMAN, *supra* note 296, at 471 n.126 (attempting to refute Professor McConnell's argument).

For if every judge and Justice picks an idiosyncratic theory by which to identify higher lawmaking, then constitutional interpreters will be able to agree not even on which attempts at higher lawmaking have been successful, let alone on what the implications of such higher lawmaking are.

Constitutional circularity recognizes the possibility of constitutional change outside Article V, but without Professor Ackerman's elaborate and debatable framework for identifying such change. The difference is that constitutional circularity identifies constitutional meaning not by looking to the past and identifying instances in which the people have acted in such a way as to entitle their subsequent actions to be considered higher lawmaking, but by looking to the present to identify instances in which a constitutional transformation was so successful that the people's conception of what the Constitution requires in fact has changed. If, for example, the people have come to understand Congress's power to regulate interstate commerce as considerably broader than they would have understood that power before the New Deal, then Professor Ackerman's thesis that the New Deal has amended the Constitution would be verified by the theory of constitutional circularity, though that theory would not need to tie the people's current conceptions to a particular historical event. Constitutional circularity does not need to take the uncomfortable step of labeling a change an "amendment" to the Constitution. It requires only that courts examine how the people conceptualize the Constitution today, not whether that conceptualization is different than it once was.

An advantage of this framework over Professor Ackerman's is that it is more flexible in two ways. First, Professor Ackerman indicates that under the "modern system," a president must initially "convince Congress to support the enactment of transformative statutes that challenge the constitutional premises of the preexisting regime."[311] Constitutional circularity imposes no requirement of where a reform effort must begin. Perhaps Congress might convince a president to sign transformative legislation, or perhaps the Supreme Court might even spur Congress and the president to rethink constitutional arrangements and make appropriate responses.[312] Second, Professor Ackerman

311. 1 ACKERMAN, *supra* note 296, at 278.

312. For example, it is conceivable that the Supreme Court's recent restrictive Commerce Clause jurisprudence ultimately might lead Congress to refrain from passing statutes in which the commerce nexus is attenuated or even to repeal numerous statutes not specifically invalidated by the Supreme Court on Commerce Clause grounds. *But cf.* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-369 to 3009-371 (codified at 18 U.S.C. § 922(q) (West 2001)) (reauthorizing the Gun Free School Zones Act struck down by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), by restricting it to possession of "a firearm that has moved in or that otherwise affects interstate or foreign commerce"). If this were to occur as a result of mobilized public deliberation, then it is not clear that these events should be

insists that the initial signal of higher lawmaking be followed by a lengthy "period of mobilized deliberation,"[313] leading to a period of "conservative countermobilization."[314] While controversy seems likely for transformative legislation, why should it be required? If the people are so persuaded of the need for a transformation that they act with near unanimity and unprecedented speed, then there seems little reason for the path to higher lawmaking to be blocked.[315]

More fundamentally, constitutional circularity allows for change through evolution and gradual acceptance as well as through revolution.[316] A legal transformation might initially encounter great resistance and not be decisively accepted in a subsequent presidential election, but the people nevertheless might come to accept the transformation as proper. The aftermath of *Brown v. Board of Education*[317] easily can be understood in these terms. Indeed, Professor Ackerman himself suggests that despite initial "Southern resistance and Northern indifference . . . *Brown* became a symbol energizing a multiracial coalition of blacks and whites into an escalating political struggle against institutionalized racism."[318] Professor Ackerman's account of *Brown* is strange.[319] He first seems to argue that *Brown* became higher law only when validated by a subsequent minor constitutional moment,[320] and then argues that *Brown* was a reflection of the New Deal,

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denied the status of higher lawmaking. Perhaps such a series of events seems less likely, given the Court's inability to pass transformative legislation, but there seems no reason that the model should exclude the possibility.

313. 1 ACKERMAN, *supra* note 296, at 285.

314. *Id.* at 287.

315. Professor Ackerman offers two arguments in favor of a lengthy deliberation period, but neither counters the possibility of uncontroversial change. First, he maintains that by "forcing the movement to undergo a second round of institutional testing, the dualist Constitution seeks to reduce" the risk that a constitutional proposal is favored "against all plausible competitors." *Id.* at 286. An absence of controversy would suggest an absence of such a risk. Second, Professor Ackerman argues that a lengthy period is necessary "to insist that a larger fraction of the American people give the proposal deep support." *Id.* Yet for a truly transformative change to happen quickly and uncontroversially, public support probably would have to be deep.

316. Professor Ackerman would likely argue that this is a defect of the constitutional circularity approach. *See id.* at 200–29 (emphasizing revolution's function in changing citizens' conceptions of their political identity).

317. 347 U.S. 483 (1954).

318. 1 ACKERMAN, *supra* note 296, at 137.

319. For a similar observation, see Christy Scott, *Constitutional Moments and Crockpot Revolutions*, 25 CONN. L. REV. 967, 976–77 (1993) (reviewing 1 ACKERMAN, *supra* note 296).

320. Professor Ackerman argues:

> Until the struggling civil rights movement gained the decisive support of the Presidency, the ultimate status of *Brown* remained in doubt. For the next decade, *Brown* energized massive racist resistance no less than civil rights activism—and it was hardly obvious which side of the struggle would gain the support of the majority of the American people. . . .
>
> The Presidential election of 1960 began to mark a change.

1 ACKERMAN, *supra* note 296, at 109.

which in embracing activist government undercut the premises of Justice Henry Brown's majority opinion in *Plessy v. Ferguson*.[321] Perhaps he offers two arguments because neither alone is persuasive: *Brown* does not fit within his formula for a constitutional moment,[322] and *Brown* differed from *Plessy* most fundamentally in its perspective on race, not in its perspective on government.[323] By eschewing reliance on a fixed pattern, constitutional circularity treats the principle of *Brown* much more naturally. However long it took for *Brown* to be accepted, and regardless of whether changes in attitudes occurred suddenly or over a large number of years not reflected in any one presidential election, a strong case can be made that the people now find the notion of "separate but equal"[324] inconsistent with the Constitution. It would be illogical to exclude this transformation from the realm of higher lawmaking merely because the people changed their views over time instead of all at once.

Constitutional circularity may be a better system than Professor Ackerman's, even in his own terms. Professor Ackerman recognizes that any framework presents the danger of false positives and false negatives.[325]

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321. 163 U.S. 537 (1896); *see also* 1 ACKERMAN, *supra* note 296, at 133–40.

322. Even placing aside that the impetus for *Brown* initiated in the Supreme Court, it is difficult to read the Election of 1960 as a referendum endorsing *Brown*. But for fraud in Illinois, John F. Kennedy arguably would have had only 273 electoral votes, and southern Democratic electors might well have extracted concessions from Kennedy on civil rights issues. *See* Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 954–57 (1996). Professor Ackerman might reply that Kennedy did win, fairly or not, but it seems troubling that the assessment of a critical phase of higher lawmaking should turn on so little. Moreover, Ackerman probably would not offer this response, given his recommendation that the Senate not confirm Bush judicial nominees. *See* Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48. Presumably, if Kennedy had lost the election, then Professor Ackerman would not be able to classify the Election of 1960 as part of a constitutional moment, even if civil rights struggles unfolded in essentially the same way.

323. Michael Klarman makes this point persuasively:

> Ackerman's argument is implausible not because Justice Brown's premises survived the New Deal transformation in attitudes about government, but because Justice Brown doubtlessly would have reached the same result even if deprived of those premises. To view *Plessy* as primarily dependent upon a certain conception of activist government, rather than a certain attitude towards race, is to fundamentally misunderstand the decision. The outcome in *Plessy* is mainly attributable to the virulent racism of the Gilded Age, not to the era's skepticism of activist government.

Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 787 (1992) (reviewing 1 ACKERMAN, *supra* note 296). Professor Ackerman's argument succeeds in showing how a different view of government undercuts *Plessy* as a technical legal matter, but it does not succeed and cannot succeed in demonstrating that a change in the conception of government was sufficient to overturn a decision that fundamentally was about race.

324. *Brown*, 347 U.S. at 488.

325. *See* 1 ACKERMAN, *supra* note 296, at 278–80. Professor Ackerman makes this point in discussing the signaling stage in particular but recognizes that the concern applies to the project as

Yet his framework seems likely to produce some of both, particularly false negatives, because the events constituting higher lawmaking are unlikely to always follow the same pattern. Constitutional circularity makes false negatives far less likely, for if higher lawmaking occurs in Professor Ackerman's sense, reflecting among other things a public commitment that is deep, broad, and decisive,[326] it is unlikely that it would not leave an impression upon the national psyche. By contrast, if events do not leave an impression, it is hard to believe that higher lawmaking has occurred. At the same time, constitutional circularity seems to pose little danger of false positives. It seems unlikely that the people would come to understand the Constitution differently, as opposed to merely recognizing the existence of a particular precedent, unless they meaningfully had come to accept the relevant transformation. By focusing on discrete points in time, Professor Ackerman risks admitting as higher lawmaking actions that reflected popular fervor over a relatively short period of time.[327] The test for whether the New Deal effected a constitutional change should be not simply whether the Great Depression caused the people to support legal transformations at the time of the Depression, but whether the transformations effected at that time had a lasting effect on how the people thought about government. If in 1950, the people felt that New Deal programs were a temporarily necessary evil, illegitimate under the Constitution, then the higher lawmaking movement ought not be judged to have succeeded, unless the people later saw the programs as permanent.

A final advantage of constitutional circularity over Professor Ackerman's approach to higher lawmaking is that it leaves some incentive for even those who have passed Professor Ackerman's obstacle course to memorialize their achievements in the words of the Constitution by passing an amendment pursuant to Article V. Though Professor Ackerman acknowledges the "ability

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a whole. *See id.* at 280 (suggesting that false negatives are worse than false positives in the signaling stage, because any proposal still must pass through additional stages). Professor Ackerman worries about false positives or false negatives in the sense that there might be an actual incongruence between higher lawmaking and the events necessary in his framework. *See id.* He does not worry about the possibility that a decisionmaker might make an epistemic error or a deliberate distortion in applying the frameworks. *See id.*

326. *See id.* at 272–77 (providing the necessary criteria for the first stage).

327. Professor Ackerman's own arguments here may be used against him. Professor Ackerman himself argues that plebiscites are poor higher lawmaking mechanisms because of their discreteness in time. *See id.* at 285–86. Yet one could argue that a few years is not necessarily much better than a few months. In either circumstance, the citizenry may be responding to passing trends. The test should not depend so much on how long the stimuli leading the populace into action last, but whether the period is sufficiently long and the deliberation sufficiently deep that the people understand the Constitution differently even once any temporary phenomena have passed.

of broad-based citizen movements to use the federalistic, assembly-based forms of Article V to express constitutional changes that were deeply important to their fellow Americans,"[328] he shows no preference for this mode of amendment over his approach to higher lawmaking.[329] Yet Article V amendment has the advantage of producing a written text, thus facilitating the process of interpretation.[330] An especially difficult task will be determining whether the people intended only to legitimate a particular statute or whether they intended to embed in the Constitution a new approach to government, one consequence of which would be legitimation of the particular statute.[331] Constitutional circularity effectively places higher lawmaking outside Article V on a lower track than an Article V amendment. In the absence of a written constitutional amendment, the supporters of the principles embodied by an act of higher lawmaking must ensure that the changes in perceptions of government are long-lasting, for the higher

328. *Id.* at 85–86 (footnote omitted). Professor Ackerman specifically cites the Sixteenth, Seventeenth, Eighteenth, and Nineteenth Amendments as examples of modern amendments reflecting higher lawmaking. *Id.*

329. For example, he writes in describing various 1960s movements that:

> [T]hese New Left movements did not devote much time or energy advocating constitutional amendments of the kind contemplated by Article Five of the Federalist Constitution. They showed themselves to be children of the modern republic by focusing their energies on Presidential politics, seeking to make the Democratic Party into the expressive vehicle for their transformative agenda.

Id. at 111. Ackerman suggests that this type of preference was principled, suggesting, "We will hear President Roosevelt and leading spokesmen of his Administration explaining why it was wrong to codify the New Deal transformation through forms sanctioned by Article Five; why we should rely instead on the appointment of new judges to give new meaning to the Constitution." *Id.* at 52. This, however, does not acknowledge the possibility that Roosevelt realized that he would be unable to accomplish change through Article V. This does not necessarily mean that the changes he accomplished should not be considered to be higher law, but it suggests that the higher track of lawmaking in Professor Ackerman's dualist democracy should be acknowledged to itself branch into at least two tracks.

330. Professor Ackerman might counter that constitutional amendments can be cryptic. *Cf. id.* at 289 ("In the classical system, [courts] confront a laconic text of high abstraction inscribed in a formal constitutional amendment."). Ackerman might maintain that interpretation is facilitated by the stage that he terms "codification," in which the courts approve of the transformation as they "confront concrete statutes they would have invalidated under the traditional principles of the preceding regime." *Id.* But even if later courts could look back to judicial decisions at the time of the constitutional moment to advance the process of interpretation, those initial judicial decisions may make errors in construing the higher lawmaking undertaken by the people.

331. The Fourteenth Amendment itself presents this problem. *See* BERGER, *supra* note 24, at 407–18 (arguing that the Fourteenth Amendment should not be construed any more broadly than necessary to constitutionalize the Civil Rights Act of 1866). But the problem is much more tractable because of the existence of a constitutional text. As Professor Ackerman himself persuasively argues, the Fourteenth Amendment cannot be understood only as constitutionalizing the Civil Rights Act of 1866, because "the text of the amendment does not even mention this act." 1 ACKERMAN, *supra* note 296, at 91.

lawmaking survives only as long as the new conception of government that it creates.

2. Constitutional Traditionalists

That constitutional circularity can improve bold theories that have yet to receive wide adoption in the courts is, of course, not enough. Constitutional circularity also must cohere with and improve conventional approaches to interpretation. In this part, I consider the work of three scholars who have taken strong, though not extreme, positions on constitutional interpretation. My goals are to show that constitutional circularity might peacefully coexist with more traditional interpretive practices and that acceptance of constitutional circularity might assist other approaches a means of avoiding uncomfortable results of unmitigated devotion to those positions. By showing that constitutional circularity is consistent with and could improve vastly different interpretive practices, I hope to show also that the approach may help explain the limits that courts self-impose in following any given constitutional approach.

a. Amar's Intratextual Documentarianism

Akhil Amar's work is a useful beginning, not only because of its well-deserved prominence, but also because Professor Amar has succeeded in reinvigorating the case for a textualist approach to constitutional interpretation. He has done so by broadening the approach from one that focuses on individual clauses of the Constitution in isolation to one that "always focuses on at least two clauses and highlights the link between them,"[332] a technique that he calls "intratextualism."[333] This allows Professor Amar to avoid the implausibility of a "plain meaning approach,"[334] while at the same time allowing him to borrow useful inferences from structural and

332. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999).

333. *Id.* Professor Amar explains:

> Clause-bound textualism reads the words of the Constitution in order, tracking the sequence of clauses as they appear in the document itself. By contrast, intratextualism often reads the words of the Constitution in a dramatically different order, placing textually nonadjoining clauses side by side for careful analysis. In effect, intratextualists read a two-dimensional parchment in a three-dimensional way, carefully folding the parchment to bring scattered clauses alongside each other.

Id.

334. For an evaluation of "plain meaning" approaches to constitutional interpretation, see Anita L. Allen, *The Federalist's Plain Meaning: Reply to Tushnet*, 61 S. CAL. L. REV. 1701, 1709–15 (1988).

other forms of argument.[335] It is the intratextualist method that ultimately makes plausible Professor Amar's insistence that the document can be compared to the doctrine—and win.[336] Individual clauses may leave great ambiguity, but intratextualism "enabl[es] us to squeeze more meaning from the document that inscribes our highest and most popular law."[337]

The concept of constitutional circularity initially helps answer Professor Amar's critics. Adrian Vermeule and Ernest Young, in particular, argue that "*Intratextualism* contains a pervasive, if only partially articulated, assumption that the Constitution is a fully coherent document."[338] The Constitution, they complain, "displays as much heterogeneity and particularity as it does coherence and integration,"[339] frustrating attempts to learn about one part of the document from another. For example, they challenge a comparison that Professor Amar makes between the First Amendment and the Necessary and Proper Clause[340] by noting that their respective advocates, the Antifederalists and the Federalists, had different preferences.[341] But it is precisely for this reason that intratextualism is useful. Other forms of originalist inquiry are

335. Professor Amar notes that intratextualism and structural argument are different, in that the most typical forms of structural argument focus not on the *words* of the Constitution, but rather on the *institutional* arrangements implied or summoned into existence by the document—the relationship between the Presidency and the Congress, or the balance between the House and the Senate, or the interplay among sister states, or the direct bond between citizens and the federal government.

Amar, *supra* note 332, at 790. At the same time he notes that "[l]ike Blackian structuralism, intratextualism seeks to identify and draw meaning from larger constitutional patterns at work," *id.*, and suggests that intratextualism can be used as a complement to structural and other forms of analysis. *See id.* at 799–800. While textualism often may be at odds with a doctrinal approach, intratextual and structuralist approaches to interpretation should rarely if ever produce opposite answers, for if they do, there is probably something wrong with either the intratextual or structural argument. Professor Amar notes that when abused, "intratextualism may lead to readings that are too clever by half—cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep reflection not truly sound but merely cute." *Id.* at 799.

336. *See* Amar, *supra* note 1.

337. Amar, *supra* note 332, at 826–27.

338. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 732 (2000). The argument is elaborated in *id.* at 739–59.

339. *Id.* at 748.

340. Professor Amar compares the opening words of the First Amendent, "Congress shall make no law," with the strikingly parallel "Congress shall have Power . . . To make all Laws . . . ." Amar, *supra* note 332, at 814. He explains that the First Amendment helped reassure the Antifederalists that "Congress lacked enumerated power to suppress free speech in the states." *Id.* "Thus the textual interlock between the First Amendment and the Necessary and Proper Clause was no coincidence but part of a deep design." *Id.*

341. "The Bill of Rights having arisen out of the Antifederalists' distrust of the doctrine of enumerated powers, it is passing strange to see Amar read that doctrine back into the First Amendment." Vermeule & Young, *supra* note 338, at 751.

limited by the problem of determining whose claims should be credited.[342] Because the First Amendment was drafted against the backdrop of the Necessary and Proper Clause, the similarity between the provisions helps reveal what everyone thought the Constitution meant.[343] Intratextualism is not about finding hidden clues intentionally left by the Framers of different provisions as a guide to future interpreters, but about ascertaining what the drafters seemed to assume.[344] Thus, just as constitutional circularity recognizes that contemporary beliefs about the Constitution may help determine its meaning, intratextualism's foundation is that drafters' assumptions about constitutional structures and the meanings of particular words are relevant to its meaning. By emphasizing that the people's assumptions about meaning may be as important as the particular rules they meant to impart, constitutional circularity makes intratextualism more attractive.

At the same time, constitutional circularity may provide a way of determining when intratextualist analysis should give way. Amar states that documentarians must pay some attention to precedent,[345] and he concedes that "even after close study the document itself will often be indeterminate over a wide range of possible applications."[346] "[P]ure textualism," Amar writes, "can

342. Though this leads many constitutional lawyers to rely on certain prominent framers as representative of the rest, this too may be problematic. *See* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 637–71 (1999) (arguing that James Madison's key ideas had essentially no influence on the other Framers and Founders, who largely did not understand them). A similar problem exists in statutory interpretation, in which some have argued that the purpose of a statute cannot be used to determine the statute's meaning, because a statute always involves compromises among legislators with varying levels of support for the statute. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

343. Interestingly, Professor Amar notes, "If everyone thought that Congress simply lacked all enumerated power to restrict 'speech' in the states, the 'speech' they all had in mind must obviously have been political discourse as opposed to mere commercial advertising." Amar, *supra* note 332, at 815. Professors Vermeule and Young criticize this statement, rhetorically asking, "But who are 'everyone,' 'they,' and 'no one'?" Vermeule & Young, *supra* note 338, at 751. Amar, though, does not mean that everyone literally had a conscious view on that issue. Rather, his analysis shows what was likely a taken-for-granted assumption about constitutional meaning at the time the Constitution was enacted.

344. This does not mean that one cannot dispute intratextualist analysis. But Professor Amar concedes that intratextualism "will not so much dictate results as suggest possible readings." Amar, *supra* note 332, at 799. At the least, by establishing likely assumptions, intratextualism shifts the burden of proof to those whose views are contrary to those assumptions. In the absence of specific evidence that the Framers did not entertain the assumptions intratextualism ascribes to them, it is natural to assume that they did make the assumptions suggested by the text.

345. "Those who privilege the document do not ignore precedent altogether. (How could they, given that the text itself suggests a role for judicial exposition?)" Amar, *supra* note 1, at 27 (citing Article III's vesting of the federal judiciary with "judicial Power").

346. *Id.* at 28.

risk serious instability if not chastened by attention to the legal status quo."[347] Constitutional circularity provides a way of separating instances in which textual analysis should give way to precedent from those in which it should not. Some precedents have become so ingrained that they are now taken for granted among lawyers and even the public. Constitutional circularity provides a principled reason that these precedents should be respected, while others, even of equal age and even if consistently followed by the courts, should not. In the absence of such a theory, the choice between theory and precedent is ad hoc, presenting the danger that the selection has more to do with individual judicial preferences than with matters of social stability. Adoption of constitutional circularity for this purpose may allow a jurist generally sympathetic to Professor Amar's approach to avoid some of his more radical recommendations. For example, Amar has vigorously argued against the use of the exclusionary rule in response to Fourth Amendment violations.[348] Yet there is at least a strong argument that people generally believe the Constitution requires exclusion of illegally obtained evidence.[349] Constitutional circularity would thus seem to counsel that until advocates like Professor Amar succeed in convincing the public that the Constitution has been badly misunderstood,[350] the exclusionary rule should remain part of Fourth Amendment jurisprudence.

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347. *Id.*

348. *See* AMAR, *supra* note 144, at 1–45.

349. Answers to a poll question provide indirect evidence of this. Pollsters asked Americans the following question in 1995:

> The U.S. (United States) House of Representatives recently passed a bill that would allow the police to make searches without having [a] warrant. Some people say this bill is a good idea because it will make it easier to convict criminals. Other people say this bill is a bad idea because it is a violation of the 4th amendment of the Constitution which protects people from illegal searches. Do you think this bill to allow the police to make searches without a warrant is a good idea, a bad idea, or don't you know enough to say?

CENTER FOR PUBLIC OPINION RESEARCH, QUESTION ID: USCBSNYT.022795 R30 (1995). Respondents thought that it was a bad idea, by a margin of 69 percent to 20 percent. Of course, some respondents may have been influenced by the question's characterization of the opposition to the bill, and some may have thought the bill a bad idea for nonconstitutional reasons. Nonetheless, the wide margin suggests that respondents generally believed that the Fourth Amendment requires a warrant as a precondition to search. *But see* AMAR, *supra* note 144, at 2 (concluding that the Fourth Amendment neither requires a warrant nor exclusion of illegally obtained evidence). Given that the exclusionary rule probably has at least as much cultural salience as the warrant requirement, it might be reasonable to conclude that most Americans believe the Constitution requires the exclusion of illegally obtained evidence.

350. Interestingly, Professor Amar appeals to the people's sense of the Fourth Amendment in discussing *Flippo v. West Virginia*, 528 U.S. 11 (1999). "The People's Fourth Amendment condemns unreasonable searches and seizures. Were the cops here unreasonable? Most citizens, I suspect would say no; but the Court says yes (and without a recorded dissent)." Amar, *supra* note 1, at 91. Whether the people's views on what is reasonable should be relevant to determining particular Fourth Amendment problems is a different question from whether to honor the people's

b. Fallon's Doctrinalism

Constitutional circularity also can provide a useful adjunct to constitutional theories placing heavy emphasis on precedent. Consider, for example, Richard Fallon's *Harvard Law Review* foreword.[351] Professor Fallon defends the Supreme Court's development of a myriad of tests for interpreting provisions of the Constitution,[352] maintaining that precedent and stare decisis allow courts containing multiple judicial decisionmakers to reach majority decisions that they would not be able to achieve if each worked individually from first principles.[353] Doctrinal tests allow "Justices of the Supreme Court, who might themselves disagree about the best reading of the Constitution, . . . nonetheless [to] come to reasonably stable agreement about doctrinal formulations."[354] This is important, Fallon believes, because a Justice has a duty not only to identify the meaning of the Constitution, but "to implement the Constitution successfully," a task that "is much complicated by the phenomenon of reasonable disagreement in constitutional law."[355]

From this argument, it is but a small step to a conclusion that the task of implementing the Constitution, and of deciding on issues such as the weight of stare decisis, is for the courts and not for Congress. Indeed, in a recent essay criticizing Professor Paulsen's article, Fallon takes this step.[356] Professor Fallon argues that the "foundations of law lie in acceptance,"[357] and the "Constitution is law because relevant officials and the overwhelming preponderance of the American people accept it as such."[358] The American people, Fallon adds, also seem to support or at least accept the doctrine of stare decisis.[359] "The entrenched status of stare decisis," Fallon concludes,

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views on what the Constitution requires when the Fourth Amendment is violated, but Professor Amar's appeal to a populist approach in one area may suggest sympathy in another as well.

351. Fallon, *supra* note 5. Another work defending the use of precedent and doctrinal tests in Supreme Court opinions is David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

352. Professor Fallon counts eight different types of constitutional tests, including "forbidden-content tests," "suspect-content tests," "balancing tests," "nonsuspect-content tests," "effects tests," "appropriate-deliberation tests," "purpose tests," and "aim tests." Fallon, *supra* note 5, at 67–73. Fallon argues that suspect- and nonsuspect-content tests are particularly dominant. *See id.* at 88–90.

353. *See id.* at 110.

354. *Id.* at 58–59.

355. *Id.* at 57.

356. *See* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

357. *Id.* at 585.

358. *Id.* at 586.

359. Fallon writes:

> [W]hen lawful status is predicated on these bases, it becomes an open question whether other, unwritten norms also might attain legal or even "constitutional" legitimacy on the

"thus furnishes an argument—only partly circular—that the doctrine should not be regarded as vulnerable to immediate delegitimization based, for example, on the possibility that new evidence might be discovered that would show it to be contrary to the original understanding of Article III."[360]

As Fallon's use of the word "circular" suggests, his view is not far from the theory of constitutional circularity. Fallon, however, does not take the step that logically follows: recognizing that if public acceptance of stare decisis may give it "'constitutional' legitimacy,"[361] then so too might public understandings of particular doctrinal provisions give those substantive doctrines legitimacy.[362] That is, Fallon is willing to justify his thesis that Justices must implement the Constitution by reference to public acceptance, but he does not indicate that public acceptance of particular doctrines is an equally powerful source of legitimacy. The difference is significant, because while Fallon supports precedent in general, Fallon might not object to a Justice's implementing the Constitution in such a way that ignores public acceptance of particular doctrines.[363]

In some respects, though, Fallon's own theory might be advanced by a full embrace of constitutional circularity. In his foreword, Fallon seems to concede that "the Court's multipart tests are inappropriate because they do not plausibly reflect the Constitution's true meaning."[364] Yet it is possible that he need not make even this concession. As we have already seen, constitutional circularity may help explain what appears to be a gap between the Constitution and the interpretation of it. This insight may apply not

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same grounds. In this Essay, I have meant to advance an affirmative answer to this question: The legitimate authority of the Supreme Court to apply a principle of stare decisis in constitutional cases can be supported at least partly on grounds of acceptance and reasonable justice and prudence.

Id. at 587.

360. *Id.* at 588.

361. *Id.* at 587.

362. Fallon does come close:

> Doubts about the validity of stare decisis seldom have been expressed from the bench, by the bar, or by the attentive public. On the contrary, the public appears to have embraced a variety of judicial interpretations—including some of initially doubtful provenance—as reflective of the Constitution that they accept and even venerate. Notable examples include decisions embodying the principle of one-person, one-vote, applying equal protection norms to the federal government (as well as the states), and enforcing the Establishment Clause's guarantee of the separation of church and state against the states.

Id. As the first sentence of this quotation emphasizes, however, Fallon believes that acceptance of doctrines is important not because that directly gives those doctrines constitutional status, but because it evidences support for stare decisis itself.

363. Indeed, Fallon writes that "it goes nearly without saying that constitutional stare decisis is potentially subject to criticism and reconsideration." *Id.* at 590.

364. *Id.*

simply to the holding of a case on a particular issue, but also to the doctrinal tests used to interpret constitutional provisions. It is plausible, for example, that the application of strict scrutiny to race-based classifications[365] has become so entrenched that it has in effect become part of constitutional meaning. Though it is unlikely that the average person on the street will know the words "strict scrutiny," it seems at least plausible that most people would agree with the proposition that the Constitution ordinarily prevents the government from making race-based classifications. Though citizens generally would be unable to recite doctrinal details,[366] the people may be as accurate on the meaning of strict scrutiny as on the identification of the "central holding" of *Roe*,[367] and courts inevitably must work out details of broad principles. In situations in which original constitutional meaning is inescapably vague, such as with the Equal Protection Clause,[368] popular understandings of constitutional meanings might even be more concrete and consistent than outcomes based on other interpretive methodologies.[369]

365. This may help explain in part why it is appropriate for the Supreme Court to apply strict scrutiny to race classifications by the federal government. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–18 (1995) (describing the development of this rule). If Americans have come to believe that race classifications (or at least those harming minorities) are subject to strict scrutiny, the Supreme Court can no more repudiate *Bolling v. Sharpe*, 347 U.S. 497 (1954), than it can *Brown v. Board of Education*, 347 U.S. 483 (1954), even though the analytical foundations of *Bolling* were weak. *See* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) (arguing that the Constitution, both before and after Reconstruction, permitted the federal government to enact laws containing race classifications).

366. For example, they might not recognize that strict scrutiny does not result in laws containing racial classifications being struck down when there is a "compelling" government interest to which the law is "narrowly tailored." *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (providing the basis for this doctrine).

367. *See supra* text accompanying notes 91–93.

368. *See supra* note 180 and accompanying text (noting the difficulty of the concept of equality).

369. The strict scrutiny test is not the only test relevant in this area, of course. The rational basis test might also be defended on the ground that people generally believe Congress is empowered to enact types of laws that have negative effects on classes of people like butchers or bakers. The intermediate scrutiny test might be more problematic, though it might be the case that people believe that the government can make some, but not all, distinctions based on sex. *See generally* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 315–21 (1998) (describing intermediate scrutiny doctrine). At the least, most people would arrive at that conclusion once given the examples of a law providing separate bathrooms for men and women and of a law barring women from practicing law. *See, e.g.*, Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 49 (2000) (considering the bathroom hypothetical). The intermediate scrutiny test may do a fair job of corresponding to people's beliefs about what the Constitution requires with respect to sex classifications, even if few citizens affirmatively would be able to recite the intermediate scrutiny principle or its equivalent. In this sense, doctrinal tests may serve as a representation of the outcome of a reflective equilibrium, except that the equilibrium is a popular one rather than the result of philosophers' inquiries.

If a doctrine embodied in precedent at least roughly encapsulates the popular understanding of what the Constitution requires, then the case for constitutional circularity does not weaken merely because popular understandings are vague. Constitutional circularity thus may be able to explain doctrinal formulations that seem to include requirements related to but not deriving directly from the constitutional text.

Constitutional circularity, however, does not produce an unequivocal endorsement for all doctrinal formulations and all use of precedent. For some doctrinal tests, it would be implausible to argue that the people have conceptualized the Constitution according to the Constitution. Balancing tests, for example, seem unlikely to correspond with popular conceptions of constitutional provisions. Few citizens, even among those who know the doctrinal rule, would believe that the Constitution means that the level of procedural due process that a citizen is entitled to depends on a balance of considerations.[370] This by itself does not necessarily mean that balancing tests are inherently suspect, because people probably do not believe that the Constitution mandates a rule for determining what process is due.[371] Doctrinal tests may be defensible for reasons wholly apart from constitutional circularity. But constitutional circularity may impose a useful limit on doctrinal tests. If a doctrinal test were to express a principle that would contradict the people's conceptions of the Constitution, constitutional circularity would invalidate that test. Thus, constitutional circularity provides a means of imposing a useful limit on arguments for doctrinal tests, allowing doctrinalists to explain why precedent can stray a bit beyond constitutional meaning but not indefinitely far.

c. Sunstein's Minimalism

Constitutional circularity should be compatible not only with theories about the content of constitutional law, but also theories about how the Supreme Court should approach the task of deciding constitutional cases.

370. *Cf.* Mathews v. Eldridge, 424 U.S. 319 (1976) (applying a balancing test for procedural due process), *discussed in* Fallon, *supra* note 5, at 78.

371. As Professor Fallon points out, it is generally accepted that the Constitution does not inherently require a rule or a standard for implementing particular provisions of the Constitution. *See* Fallon, *supra* note 5, at 77–78 (discussing a Fourth Amendment case in which the Court chose to adopt a per se rule rather than create a balancing test, without objection from any Justice that it was inappropriate for the Court to consider which would be institutionally superior). Unless the public were to develop the view that the Constitution requires rules rather than standards, a position that I suspect many would reject even if they were prompted in such a way that they understood the somewhat abstract inquiry, constitutional circularity presents no obstacle to either the use of rules or standards in constitutional law. *See generally* Sullivan, *supra* note 42 (discussing the use of rules and standards in Supreme Court cases).

One particularly important such theory is minimalism, a modernization of Alexander Bickel's argument for the "passive virtues."[372] Most notably championed by Cass Sunstein in his *Harvard Law Review* foreword[373] and in his book *One Case at a Time*,[374] the theory of minimalism insists that the Supreme Court should decide cases in a way that leaves considerable maneuvering room for future courts. Professor Sunstein distinguishes two ways in which an opinion can be minimalist. First, a decision can be "narrow rather than wide," meaning that the court decides only the case before it, resolving other possible disputes only to the extent necessary to reach a result.[375] Second, a decision can be "shallow rather than deep," meaning that the decision does not seek to resolve an issue of basic principle, such as by choosing a methodology for interpretation or embracing a controversial philosophical position.[376] Both kinds of minimalism are, in Sunstein's view, "democracy-promoting,"[377] encouraging the resolution of society's most intractable problems through the legislatures rather than through courts.[378]

Constitutional circularity is, in a sense, the most minimal of constitutional theories. Indeed, it does not dictate a result except in those rare cases in which society has already come to accept a result, leaving that for other theories to be paired with constitutional circularity. Constitutional circularity thus may be seen as a complement to minimalism. Although constitutional circularity by itself does not demand that courts wait to resolve fundamental value issues, it is a natural corollary, because minimalism helps avoid situations in which constitutional circularity would demand a result opposite to that of precedent. In addition, minimalism makes it less likely that people will lose faith in constitutional law altogether, losing its legitimacy as the people

372. *See* BICKEL, *supra* note 282, at 111–98. The modern approach to minimalism differs from the old in that the modern approach encourages minimalist decision making without abandoning judicial candor. *But cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 40 (1999) (acknowledging without explicit endorsement or condemnation that "realistically speaking, justiciability doctrines are used prudentially and strategically"). Instead of insisting that the Justices disingenuously avoid disputes altogether through justiciability doctrines, modern minimalists support minimalist resolutions on the merits of cases, perhaps even accompanied by explicit acknowledgment of the virtues of the minimalist approach.

373. *See* Sunstein, *supra* note 6.

374. *See* SUNSTEIN, *supra* note 372.

375. *Id.* at 10–11. Sunstein offers *United States v. Virginia*, 518 U.S. 515 (1996), and *Romer v. Evans*, 517 U.S. 620 (1996), as examples of cases in which the Supreme Court resolved the issue immediately before it yet left considerable uncertainty about whether the same result would obtain in slightly different factual circumstances.

376. SUNSTEIN, *supra* note 372, at 11–12.

377. *Id.* at 24–45.

378. Sunstein believes that the Court has some role in the ensuing democratic discussion. *See id.* at 121 (emphasizing that the Court may serve as "a catalyst for public discussion" by issuing fact-specific rulings). For a more aggressive view of the courts' role in giving "advice" to other democratic actors, see Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998).

begin to conclude that it is a hopelessly vague document into which judges and Justices place their policy preferences. Thus, though the main point of constitutional circularity is that the Supreme Court should reach resolutions of questions when the public has a clear conception about particular constitutional issues, acceptance of it also seems to encourage not reaching resolutions of questions when the public is deeply divided.

Rather than relying solely on the democratic branches, though, constitutional circularity imagines a debate in the hearts and minds of Americans. The debate, however, would not simply be about what would be the best statutory resolution of a particular issue,[379] but about what the Constitution provides.[380] I am not so naïve as to imagine a popular renewal of interest in the forms and details of constitutional argument, but I am also not so cynical as to believe that the people have no conception of the Constitution whatsoever. Though there will always be some individuals who question any given constitutional interpretation, the public may sometimes have near-unanimous beliefs about particular issues, even when those issues were once fiercely contested. This possibility shows how constitutional circularity can provide a useful limit on minimalism; constitutional circularity shows when the courts should switch from minimalism to maximalism.

For example, while Sunstein defends the Court's decision in *Brown v. Board of Education*[381] as being more minimalist than one might imagine, this attempt to reconcile minimalism with *Brown* does not ring true.[382] Perhaps

379. Even in dealing with constitutional issues, Sunstein understandably does not assume that legislatures would seek to reach resolutions based on their view of the Constitution. For example, in discussing the right to die, he imagines that after democratic debate, "eventually some states and nations will indeed come to recognize a right to physician-assisted suicide under appropriate conditions," SUNSTEIN, *supra* note 372, at 79, without suggesting that states would do so on account of their views of constitutional law.

380. An analogy to administrative law may be helpful. Gary Lawson has argued that in following Step 2 of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), courts should engage in hard-look review, which generally requires courts to ensure that administrative agencies have considered all relevant questions, but that the review should be focused on questions of interpretation, rather than simply on questions of policy. *See* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 327–28 (1996). Here too, decisions based on constitutional circularity derive from popular debate and reflection, but the relevant decisions are not decisions about the appropriate policy, but about constitutional law.

381. 347 U.S. 483 (1954).

382. Sunstein argues first that "[t]he *Brown* outcome had been presaged by a long series of cases testing the proposition that 'separate' was 'equal,' and testing that proposition in such a way as to lead nearly inevitably to the suggestion that 'separate' could not be 'equal.'" SUNSTEIN, *supra* note 372, at 38. Yet this history reveals that the Court certainly could have continued to issue minimalist decisions, for example by finding inequality on the particular facts of *Brown* without yet overturning precedent. Sunstein also notes that the remedy in *Brown v. Board of Education*, 349 U.S. 294 (1955), "had a minimalist dimension insofar as it allowed a large room for

the Court would have been better off continuing to issue narrow rulings until the public came to accept the principle that *Brown* eventually announced as constitutionally correct, at which time the principle of constitutional circularity would recommend a broad rule. Had it done so, it might have achieved the same result with less criticism.[383] If this analysis is correct, and it is necessarily speculative, then it is only because the Court rushed that *Brown* cannot serve as the prime example of the application of constitutional circularity.

CONCLUSION

Constitutional circularity is a type of constitutional argument, but it is both weaker and stronger than other constitutional arguments. To see why, consider *Mitchell v. United States*,[384] a recent Supreme Court case holding that a defendant's guilty plea does not waive the defendant's right to remain silent at a sentencing hearing. Writing for the majority, Justice Anthony Kennedy argued, "Principles once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition."[385] This is a paradigmatic application of constitutional circularity; previous court decisions indirectly led to an understanding of the right to remain silent that in turn influenced doctrine. On one hand, Justice Kennedy's observation comes only at the end of an opinion considering doctrinal arguments in considerable detail.[386] The line, however, does not read like a throwaway. It may well be that concern about the possible negative public perception of the Supreme Court's narrowing a right, even if the issue technically had never been resolved, may be a better explanation of why Justice Kennedy joined the four liberal

discussion and dialogue via the 'all deliberate speed' formula." SUNSTEIN, *supra* note 372, at 38. But this may have been more a concession to segregation proponents than an invitation for debate.

383. A counterargument is that without *Brown*, the public never would have come to accept racial equality. Another counterargument is that *Brown* did not cost the Court any of its legitimacy. Yet, at least in the years immediately following *Brown*, criticism of *Brown* was intense, as exemplified by Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959). Moreover, if counterfactually the country would not for a long time have accepted the principles *Brown* announced, then the holding even today might contribute to a perception that the Court is not a neutral arbiter of constitutional law, and the Court might not even have been successful in advancing the cause of integrating schools. *Cf.* GARY ORFIELD ET AL., DISMANTLING SEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 30 (1996) (indicating that even with increasing acceptance of the ideal of racial equality, the schools in many cases have become de facto more segregated than they were when *Brown* was decided).

384. 526 U.S. 314 (1999).

385. *Id.* at 330.

386. *See id.* at 321–30.

justices instead of the four conservatives on this issue, than is his understanding of case law.[387] Indeed, this may be what separates Justice Kennedy from Justice Scalia, who argued in dissent that even if the right to remain silent had found "general and wide acceptance in the legal culture," that furnished no argument for resolving an issue of first impression.[388]

The question is whether assessments of public perceptions are as important as, or even more important than, the rigors of traditional case law analysis. This is a question that academics have not previously considered, but it is on this question that the fate of constitutional circularity should hang. Whatever the resolution of this question, it would be better for Justices to confront directly whether public perceptions should be a factor in constitutional meaning than to offer or rebut constitutional circularity arguments casually without considering both whether these arguments deserve a place in constitutional jurisprudence and, if so, when and how it is appropriate for these arguments to be deployed.

387. Joining Justice Kennedy were Justices Stevens, Souter, Ruth Bader Ginsburg, and Stephen Breyer. The dissenters were Chief Justice Rehnquist and Justices O'Connor, Scalia, and Clarence Thomas. *See id.* at 316.

388. Justice Scalia writes:

> The majority muses that the no-adverse-inference rule has found "wide acceptance in the legal culture" and has even become "an essential feature of our legal tradition." Although the latter assertion strikes me as hyperbolic, the former may be true—which is adequate reason not to overrule these cases, a course I in no way propose. It is not adequate reason, however, to extend these cases into areas where they do not yet apply, since neither logic nor history can be marshaled in defense of them.

Id. at 331–32 (Scalia, J., dissenting).

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