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Articles

The Role of Precedent in Constitutional Adjudication: An Introspection

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I. Introduction

In recent years, there has been a surprising outpouring of academic literature on the proper role of precedent in constitutional cases. Although some of the commentary addresses the question of “vertical” stare decisis¹—the question whether and to what extent higher court precedents should bind lower courts—most observers have focused on the “horizontal” problem of the effect of a court’s own precedents on its future decisions. And even this focus has been narrowed by concentrating on the U.S. Supreme Court, leaving the lower federal courts, as well as the state courts, to work things out for themselves.

My purpose here is to add to the reams of commentary on the issue thus narrowed. But I hope to contribute something not only by summarizing—and perhaps clarifying—the debate for any novices who may read this, but more significantly, by explaining and then testing my own position in an attempt to apply it as if I were a Supreme Court Justice.

At first blush, this exercise might seem like little more than an effort to play out a fantasy—one of being nominated and confirmed for a position that (like most of my academic colleagues) I have long felt I deserved but for which I have never been seriously considered. But that is not my only reason for this effort, or even my principal reason. Rather, I believe such an effort may cast light on several questions. For example, is it useful or counterproductive for a judge to try to adopt a theory about how to handle what might be called a metaquestion in his role as constitutional arbiter? After such an

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1. See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

effort, will the theory adopted have an effect on the judge's votes or his rationale for those votes? Will a theory have to be abandoned, or at least revised, in the light of experience?

In working out this project, I propose, in Part II, to begin by summarizing the theoretical and empirical literature on this question, with a comment or question here and there. Then, in Part III, I will try to position myself in this debate as if I were a newly appointed Justice to the Supreme Court. Succeeding Parts IV and V will apply my theory to a particularly thorny problem (at least for me). And finally, in Part VI, I'll attempt to draw some conclusions from the exercise.

The reader of these paragraphs should be skeptical about the undertaking. How can I possibly formulate a theory in the abstract and then test its application in the very same Article? Isn't the formulation itself, or at least the version the reader sees, bound to be affected by the application that follows? And if so, isn't the whole experiment in anecdotal empiricism of little or no value? Perhaps, but it may at least alleviate the reader's skepticism if I explain that these paragraphs are being written, and indeed each of the Parts that follow, without my knowing how the effort to apply the theory will come out or what it will demonstrate. And after my effort to apply the theory, I don't intend to go back and revise it as originally stated. Rather, any rethinking will be part of the succeeding discussion. (I concede, of course, my inability to deny that subconsciously, I will be thinking about the application while attempting to work out an approach.)

Another reason for skepticism about this project is at least as hard to respond to: how can one person's exercise in a hypothetical process of applying a theory cast any useful light on the questions asked at the outset? My response is twofold. First, I thought it would be an interesting experiment, and if no one else gets much out of it, I still will have enjoyed the effort. Second, the reader will have to decide whether, as I believe at this point, the project can add something to both the debate about theory and the battle among the empiricists about what actually goes on.

II. The Range of Views

Commentators disagree about almost every important question in this field, and especially the following:

- (1) What does a case "stand for" as a matter of precedent?
- (2) What theory, if any, should a judge (for which, most of the commentators considered here would say "U.S. Supreme Court Justice") adopt with respect to the proper weight to be accorded to a precedent or a line of precedent?
- (3) What weight do the Justices in fact give to a precedent or line of precedent?

A. *What Does a Case Stand For?*

Surprisingly, many commentators who have written at length on these problems pay little or no attention to the definitional question that should be the starting point. But among those who have directly addressed the question of what it means to follow precedent, the views of what a case does, or should, “stand for” cover a fairly broad spectrum starting, at one end, with the cynic’s “not much, if anything”² to a “rule of law” on the other—a rule to be derived from either the direct statements of the deciding court or the fair implication of that court’s rationale.³ In between are those who emphasize in various ways that the rationale of a particular decision must be approached in the context of the facts before the court.⁴ But I discern a consensus, if not unanimity, on at least two points. First, a decision’s force as a precedent may change over time—either growing or decreasing—in the light of subsequent “interpretations” or more candid expansions or contractions. And second, each decision has at its core a value as precedent that can be avoided only by a refusal to recognize the doctrine of precedent altogether or by effectively overruling the decision.⁵ (Of course, even here, there would be disagreement on what that core consisted of.)

B. *What Theory, if Any, Should a Judge Adopt?*

On the question of theory, even if one confines the discussion to the horizontal effect of Supreme Court precedent in constitutional matters, many more trees have been felled and the range of views is stunning. My effort here is to group these theories—somewhat arbitrarily and, doubtless, not comprehensively—into three categories, with a few subcategories and variations along the way.

2. Many sources might be cited here. *See, e.g.*, JEROME FRANK, *LAW AND THE MODERN MIND* 159–71 (Anchor Books 1963) (1930). One of the most provocative is KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62–91 (1960). In a chapter entitled “The Leeways of Precedent,” Llewellyn argues that *stare decisis* has an impact on decisions only in times of relative stagnation. *Id.* at 62, 62–91. Within that chapter, he includes a section entitled in part “Available Impeccable Precedent Techniques,” in which he describes sixty-four techniques that, he suggests, are selected by the deciding judge(s) largely on the basis of the respect they choose to accord to that precedent. *Id.* at 77, 77–91 (typeface altered).

3. *See, e.g.*, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989). Alexander favors what he describes as a “rule” model, and suggests that courts below the precedent court “follow a strong version” of that model and that courts of equal rank “follow weaker versions” of the model. *Id.* at 53.

4. Thus Edward Levi argues that reasoning with respect to precedent is not the process of applying general rules to diverse facts because in the process of determining the relationship of the precedent case to the case before him, a judge must decide for himself what in the prior case is relevant to its holding. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2–3 (1949).

5. The word “overruled” need not be used, and indeed such alternatives as “no longer serves as precedent” or “has long since been rejected” have found their way into the reporters.

In the first major category are those who challenge the doctrine of precedent⁶ either across the board or over a very wide field. Perhaps the boldest broadside is that of Gary Lawson, who argued vigorously and eloquently that no matter what one's theory of interpretation of the federal Constitution (unless one believes that the meaning of the Constitution stems from the interpretations themselves), the written Constitution must prevail in the event of a conflict with any action by any branch of the government, including the Judiciary.⁷ To follow precedent in one direction when the Constitution itself leads to a different outcome, he contended, is to violate the very Constitution the Court is purporting to interpret.⁸ Similarly, James Rehnquist, arguing on both practical and theoretical grounds, finds little to be said for the doctrine in constitutional adjudication.⁹

Some scholars espouse variations of this approach. Randy Barnett argues that the Court's interpretations of the Constitution are sometimes permissible as precedent, though not required. There, he argues, the doctrine of precedent may play a role, but when the "original public meaning" of the Constitution can be ascertained and applied, it must trump any contrary precedent.¹⁰ And Michael Paulsen, clearly no fan of the doctrine of

6. I tend to refer to the doctrine of "precedent" and that of "stare decisis" more or less interchangeably. In brief, I believe they stand for the proposition that a precedent may, should, or, in some circumstances, must be followed by a judge who would not have agreed with it as an original matter, who does not agree with it now, or both.

7. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 26, 25–28 (1994) [hereinafter Lawson, *Case Against Precedent*] (asserting that a court cannot give effect to a legal source that "conflicts with some hierarchically superior legal source" and noting that the Constitution must prevail over a conflicting prior judicial decision). Lawson did conclude by acknowledging that the doctrine of stare decisis is deeply ingrained in our jurisprudence, but he insisted that this fact represents a choice of "political expediency over the Constitution." *Id.* at 33.

I use the past tense here because just recently, Lawson has modified his position slightly. Lawson now concedes that "[a] court may properly use precedent if, but only if, the precedent is the best available evidence of the right answer." Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 4 (2007). This is a requirement that, in Lawson's view, would rarely be met and that includes posing the "right" questions and attempting to solve them through the "right" methods. *Id.*

8. Lawson, *Case Against Precedent*, *supra* note 7, at 24.

9. See James C. Rehnquist, Note, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 375 (1986) ("In the context of Supreme Court constitutional adjudication[,] the doctrine serves no important legitimating function . . ."); see also Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2944 (2007) ("My argument that precedent can't constrain judicial decision making in any significant way is an acknowledgment of law's open texture."). Attacks on the doctrine of stare decisis are not new. As far back as 1904, one commentator argued that the doctrine stood in the way of the search for truth and "must disappear through the inevitable course of human progress." Edward B. Whitney, *The Doctrine of Stare Decisis*, 3 MICH. L. REV. 89, 94 (1904).

10. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005).

precedent when it comes to the issues addressed here,¹¹ argues that because the doctrine is not constitutionally required, and indeed is recognized by the Court itself as only a matter of judicial policy (and not a very good one), Congress may (should?) mandate its rejection, either in general or in a particular subject-matter area.¹²

Perhaps also belonging in this category are those who view the doctrine so skeptically that they apparently believe it virtually never sways a vote, even when it is relied on in an individual opinion or by the Court.¹³

In the second category, I would place those who see a more significant role for precedent in constitutional interpretation, but whom I would describe as permitting reliance on the doctrine to support a result that the judge believes to be incorrect *but only if*. Perhaps one might fit Barnett's theory, referred to above, into this category because he would support use of the doctrine (as favoring, but not requiring, a result the judge would not have reached as an original matter) if the precedent case adopted a "permissible" reading of the Constitution.¹⁴ Similarly, Caleb Nelson, in a thoughtful essay, sees at least a limited role for precedent—especially decisions that started a line of development in the early days of the Republic—in helping to narrow the range of acceptable interpretations of provisions that are broad or ambiguous and as "fix[ing]" the meaning of some such provisions.¹⁵ But neither theory fits this category comfortably because both scholars would support a vote to overrule a precedent that the judge believes to be an

11. See Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) ("Stare decisis is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!").

12. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1540 (2000) [hereinafter Paulsen, *Abrogating*] ("Congress may, by prospective legislation . . . direct the court to decide constitutional or statutory interpretation issues without regard to prior precedent (aside from the precedent's persuasive value to the Court on the merits)."); see also John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 542 (2000) ("[U]nder the Necessary and Proper Clause, Congress may consult the criteria the courts consult in formulating rules of precedent and may adopt any rule a court reasonably could adopt."). Somewhat surprisingly, Gary Lawson disagrees with the conclusion that Congress may legislate on this subject, arguing that Paulsen has everything on his side "except the Constitution." Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 200 (2001). See Michael Stokes Paulsen, *Lawson's Awesome (Also Wrong, Some)*, 18 CONST. COMMENT. 231 (2001) for Paulsen's amusing response, in which he expresses surprise at being attacked "from the right," *id.* at 231 (emphasis omitted), and suggests that Lawson has, in this instance, abandoned his formalism for a "fuzzy-wuzzy of functionalist-pragmatist-balanc[ing]," *id.* at 238.

13. The views of Llewellyn are representative of the realist approach to decision making: adherence to precedent is more a matter of form and technique than of substance. See LLEWELLYN, *supra* note 2, at 510 (labeling realism a technology rather than a philosophy, and describing it as a method that emphasizes the "fresh look" and the process of "see[ing] it clean" and that "includes nothing at all about whither to go"). Similarly, Rehnquist argues that the notion of "principled overruling[]" is essentially a "myth." Rehnquist, *supra* note 9, at 358 (emphasis omitted).

14. See *supra* note 10 and accompanying text.

15. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 588 (2003).

incorrect interpretation of the Constitution, or to use a phrase of Nelson's in another article, "demonstrably erroneous."¹⁶

Among the scholars who would generally (but not always) insist that the correct reading of the Constitution trumps precedent are Charles Cooper, who would allow the doctrine of precedent to protect an "erroneous" decision only when the country would clearly be damaged by overruling the precedent,¹⁷ and Steven Calabresi, who would support reliance on an erroneous interpretation where the precedent cases have been firmly established because of "the acquiescence of the people and the States."¹⁸

The third category, by far the largest if we count heads, takes a more sympathetic view of the doctrine of precedent, and I would define the residents of this category as supporting reliance on the doctrine as a general matter *unless*. Those who would generally allow the "correct" reading of the Constitution to trump precedent (including especially those who view themselves as "originalists") do not, as a rule, fit within this category. The scholars I have in mind have, in general, rejected originalism, at least in its pure form, and have a much firmer belief in the role of *stare decisis* in the development of substantive constitutional doctrine. Even so, this last category provides a large umbrella, bringing in from the rain at least a few who look to some concept of original meaning as a primary source.¹⁹

16. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001). This article and Nelson's *Originalism and Interpretive Conventions*, *supra* note 15, are, I believe, fully consistent. Nelson's view of the principal value of case law in this area is as an aid in "fix[ing]" the meaning of vague or ambiguous constitutional provisions or concepts. Early decisions and a line of precedent that has developed over time are especially useful for this purpose.

17. See Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 410 (1988) (supporting a rule that would allow "erroneous" precedent to stand if to do otherwise "would be on the order of killing the body to save a limb"). Cooper, like several others who share his view, cites as a leading example the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), a decision that (in upholding the validity of the acts authorizing the issuance of paper currency) overruled *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), decided only a year earlier. Cooper, *supra*, at 410 n.39. Some would place *Brown v. Board of Education*, 347 U.S. 483 (1954) in a comparable category. See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723 (1988). After positing that the Fourteenth Amendment was not written or ratified in the belief that it would prohibit racial discrimination in public schools, Monaghan states that nevertheless, "*Brown* will not be overruled," *id.* at 723, because "the original understanding must give way in the face of transformative or longstanding precedent," *id.* at 724.

18. Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 315 (2005) (citing Andrew Jackson, Veto Message of July 10, 1832, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576, 582 (James D. Richardson ed., 1897)). Calabresi also argues that the Court should consider any problem afresh, regardless of precedent, when the precedent is challenged by another branch; he reasons that in such a case, deference to the other branch on the applicability of the doctrine of *stare decisis* is appropriate. *Id.* at 344.

19. See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1442, 1441-42 (2007) (proposing that the presumption of validity normally accorded to precedent may be reversed "when an erroneous prior decision either maintains a structural error in the political process or completely immunizes an issue from majoritarian

But the clearest examples of this category are those who see precedent as playing a vital role in the evolution of constitutional doctrine—scholars who have come to be considered, and by and large consider themselves, not as originalists but as “common law” constitutionalists.²⁰ These scholars explain their positions in different ways and differ in the extent to which they recognize the role of original understanding, but their common ground is substantial. David Strauss describes himself as a common law constitutionalist and recognizes the importance of precedent as a constraint.²¹ Ernest Young and Thomas Merrill stress the influence of Edmund Burke on their thinking. They express support for his skepticism about human rationality, his belief in the limitations of every individual, and his sense that these limitations justify recognition that the collective experience embodied in our traditions (which for lawyers and judges includes our developing case law) does and should act as a constraint, but not an insuperable barrier, to incremental change.²² Other leading scholars have emphasized a variety of factors influencing their positions, including the need for “[s]tability and continuity of political institutions,”²³ the need for “those charged with implementing the law to accept reasonable, if not always ideal, premises as bases for coordinated decisionmaking,”²⁴ and such values as consistency, predictability, and efficiency.²⁵ A particularly illuminating metaphor, supplied by Barry

politics”); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 558 (2006) (arguing that her approach to constitutional interpretation allows for “the potential for reconciling assertions of historicity with the possibility of change”).

20. *But see* Meyler, *supra* note 19. Professor Meyler argues that “common law originalism,” as she views it, does not provide “determinate answers that fix the meaning of particular constitutional clauses” but rather supplies “the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively.” *Id.* at 558.

21. *See* David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300–01 (2005).

22. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 689 (1994) (describing a theory of constitutional interpretation that adopts Burke’s rejection of abstractions and emphasizing the importance he places on tradition and gradual change); *see also* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 509 & n.4 (1996) (acknowledging that the author’s theory of conventionalism is inspired in large part by the writings of Burke and referencing Young’s *Rediscovering Conservatism, supra*, for “an especially insightful treatment of the implications of Burke’s political philosophy”).

23. Monaghan, *supra* note 17, at 748. Monaghan’s insightful discussion concludes with a call for “giving precise content to a theory of constitutional adjudication that includes original understanding, precedent, political equilibrium, and the need for change.” *Id.* at 773.

24. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 109 (1997). For a fuller statement of Fallon’s views, see Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001).

25. For a forceful statement of the role of precedent in promoting these and related values in a study written over a half century ago, see RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JURISDICTION* 56–83 (1961). *See also, e.g.*, Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 83–87 (1991) (positing that stare decisis promotes stability in government by creating consistency and predictability); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L.

Friedman and Scott Smith, is that of a “sedimentary” Constitution, with mountains of historical developments that have built up on the text of such provisions as the Due Process Clauses and the Fourth Amendment, and with deep valleys of essentially uninterpreted text, like the Third Amendment and the minimum age and other qualifications for the Presidency.²⁶

Neither these scholars nor the judges who appear to embrace similar views have come up with an exhaustive, agreed-upon list of the kinds of considerations that meet the “unless” criterion for overruling precedent. But an interesting effort by Justice Kennedy, in his opinion for the Court in *Patterson v. McLean Credit Union*,²⁷ might meet with general approval. He includes on his list:

REV. 991, 994–96 (1987) (arguing that precedent is binding on the Executive precisely because the rule of law is based on consistency and predictability).

For other interesting insights supporting the doctrine of precedent, see Drew C. Ensign, Note, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1160–61 (2006), where Ensign argues that because of the Court’s important role in protecting minorities, a precedent or line of precedent is entitled to stronger weight when it protects a “liberty” interest, and Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 134, 133–34 (1972), where Shapiro describes the doctrine as an instance of “redundancy,” which has the value of decreasing “noise,” increasing the clarity of the message, and limiting doctrinal movement to “incremental” change. Ensign’s theory stands in stark contrast to the view, frequently expressed, that a precedent is entitled to more weight when significant property interests have developed in reliance on it. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828, 827–28 (1991) (noting—in overruling a precedent disallowing the use of “victim impact” statements in death-penalty hearings—that no contract or property interests were affected by rejection of the earlier decision).

26. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 36–39 (1998).

27. 491 U.S. 164 (1988). *Patterson* involved the effect to be accorded a precedent on a matter of statutory interpretation, and Justice Kennedy, speaking for a unanimous Court in refusing to overrule its prior decision (even though several Justices thought it had been wrongly decided), did emphasize this aspect of the case. *Id.* at 171–73.

But Justice Kennedy also coauthored (with Justices O’Connor and Souter) critical portions of the opinion of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a constitutional decision refusing to overrule *Roe v. Wade*, 410 U.S. 13 (1973) in significant part on the basis of the doctrine of stare decisis. In the course of their opinion in *Casey*, the three Justices said that relevant questions in considering whether to overrule an important precedent were whether overruling would involve:

serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law’s growth in the intervening years has left [the precedent’s] central rule a doctrinal anachronism discounted by society; and whether [the precedent’s] premises of fact have so far changed . . . as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

Casey, 505 U.S. at 855 (plurality opinion). The Court later added that a decision’s force as precedent is increased when (as in *Roe*) it seeks to resolve an “intensely divisive controversy,” *id.* at 866, by calling on the contending sides “to end their national division by accepting a common mandate rooted in the Constitution,” *id.* at 867.

This aspect of the *Casey* decision has, of course, been part of the debate described in this Article; indeed, it generated a good deal of it. See, e.g., Paulsen, *Abrogating*, *supra* note 12, at 1537–40.

- (a) intervening changes in the law that have rendered the decision anachronistic, if not obsolete;²⁸
- (b) a showing that the decision impedes coherence and consistency in the law, either because of the inherent confusion it creates or because it poses a “direct obstacle” to the achievement of objectives embodied in other laws;²⁹ or
- (c) a showing that in the crucible of experience, the precedent has been found inconsistent with the contemporary sense of justice or social welfare.³⁰

These are vague phrases, to be sure, and not all are literally applicable in the context of constitutional precedent, but nevertheless it is a credible effort to emphasize that one who would have the Court reject a precedent has more of a burden than simply to persuade the Court that the precedent case was wrongly decided. (How much more, of course, is impossible to quantify.)

Not every scholar who has written on this topic fits comfortably into one of these categories, broad and flexible as they are. I have found none, however, who advocates a doctrine of total deference to precedent—a position once espoused (though never fully observed) and now abandoned by the House of Lords.³¹ But one unusual essay, which combines explicit features of the second and third categories, deserves mention. Lawrence Solum—in a defense of what he describes as neoformalism, an approach defined as a variant of formalism that abjures both mechanical jurisprudence and pure instrumentalism—advocates strong precedential effect (overrule only under extraordinary circumstances) to decisions that meet his neoformalist criteria.

For a comprehensive, scholarly history of stare decisis in the Supreme Court, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999). Lee concludes (a) that “inconsistencies and contradictions in the Rehnquist Court’s overruling rhetoric” result primarily from “an inherent tension in the countervailing policies at stake,” not from “deterioration of historically stringent standards of stare decisis,” *id.* at 734, and (b) that the notion that precedent is entitled to less weight in the constitutional than in the statutory sphere did not gain acceptance “until well into the twentieth century,” *id.* at 735.

28. *Patterson*, 491 U.S. at 173.

29. *Id.*

30. *Id.* at 174.

31. The story is told in detail in RUPERT CROSS & J.W. HARRIS, *PRECEDENT IN ENGLISH LAW* 102–08, 135–43 (4th ed. 1991). Rejecting its previous policy that it was bound by its own past decisions, the House of Lords, in a “Practice Statement” issued in 1966, stated that while it would, in general, continue to follow its precedents, it would in the future depart from past decisions when it thought it right to do so. *Id.* at 104. Cross and Harris state that from 1966 to the publication of their fourth edition in 1991, the House of Lords overruled an earlier decision on eight occasions. *Id.* at 135. I have discovered one article advocating that in the area of statutory interpretation (and federal common law), precedent should never be overruled. See Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989). But Marshall’s proposal, which is based principally on the idea that this is the best way of making Congress face up to its legislative responsibility, clearly does not apply to the constitutional arena.

Conversely, he argues for a considerably weaker precedential effect, amounting to a mild presumption of validity, to those decisions not meeting those criteria.³² While the chances that such an approach will ever be adopted, explicitly or even implicitly, strike me as hovering around zero, Solum's thesis shows how intricate and, yes, idiosyncratic theories of precedent can be.

I have two parting comments about theory. First, observation and research lead me to believe that, especially in constitutional matters, one's attitude toward precedent, and if one is inclined to theorize, one's theory about it, may depend at least in part on one's general view of the existing state of the law on a range of important issues. The more content one is with the status quo, the more likely one is to trumpet the virtues of respect for precedent. This is hardly surprising and not altogether unfortunate. Debates about the doctrine of precedent can serve to mediate more emotional debates about the underlying substantive issues and even make it easier for opposing views to arrive at some common ground.

Second, and more ineffably, some ways of looking at the world strike me as less likely to accord much value to precedent than others. For example, one inclined to accept some notion of natural law would, I'm sure, find less room in his theory for deference to precedent than one who favors a pragmatic approach to human affairs.³³

C. *What Weight Do the Justices Give to Precedent?*

The effect accorded to precedent, particularly by the Supreme Court to its own precedents, has been the subject of empirical studies as well, and here too, scholars differ. One study, by Jeffrey Segal and Harold Spaeth, concludes that “[o]verwhelmingly, Supreme Court justices are not influenced

32. See Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 159 (2006). Solum argues that a precedent meeting his neoformalist criteria should be honored, even though a majority of the present Court thinks it mistaken, because it maximizes rule-of-law values to defer to decisions that accord proper respect to the text and original meaning of the Constitution. *Id.* at 205–07. Even such a precedent should yield, however, if, for example, subsequent neoformalist precedents have rendered it an inconsistent exception to the prevailing rule. *See id.* at 205, 205–07 (noting that if the neoformalist conception of constitutional stare decisis is consistently applied, precedents “in tension” with the original meaning of the Constitution will gradually become more limited in scope and finally be overruled—the law will “work itself pure”); *see also* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 441 (2006) (stating, as a section heading, “Courts Should Follow Nonoriginalist Precedent Only When Overruling Nonoriginalist Precedent Would Gravely Harm the Common Good”).

33. *Cf.* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 69 (1985) (noting that in what he describes as the “originalist” and “fundamental moral values” camps, “judicial precedent—the most important tool of the constitutional lawyer—drops from sight”).

by landmark precedents with which they disagree.”³⁴ But other studies accord precedent a more substantial effect. For example, Saul Brenner and Marc Stier look at the subsequent votes of “four center justices” who had dissented from the precedent decision and conclude that those Justices joined the main opinion following the precedent (i.e., did not vote to distinguish or overrule the precedent) at levels of 73%, 69%, 50%, and 27%, for an overall average of 47%.³⁵ Moreover, if one excludes the subsequent votes of the four Justices during the same Term in which the precedent decision was rendered, the average rises to 64%.³⁶ Tracey George and Lee Epstein, focusing on votes in death-penalty cases over several periods, conclude that the “legal model” (i.e., legal doctrine as developed in decided cases) is roughly as good a predictor of outcomes in these contentious cases as a “nonlegal model” (i.e., one based on political, psychological, or sociological factors), though during the period in question, the legal model overpredicted “liberal” outcomes (against the death penalty) and the nonlegal model overpredicted “conservative” outcomes (for the death penalty).³⁷

Two sophisticated analyses look beyond the question of voting to conclude that precedents do make a difference. First, Herbert Kritzer and Mark Richards stress the effect of precedent both on case selection and on setting the terms under which a case accepted for review is analyzed and decided.³⁸ Second, Jack Knight and Lee Epstein note that *stare decisis* serves

34. Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 971 (1996). More specifically, the authors state that of some 350 votes evaluated, “90.8% of the votes conform to the justices’ revealed preferences. That is, only 9.2% of the time did a justice switch to the position established in the landmark precedent.” *Id.* at 983.

35. Saul Brenner & Marc Stier, *Retesting Segal and Spaeth’s Stare Decisis Model*, 40 AM. J. POL. SCI. 1036, 1043 (1996).

36. *Id.* One of the Justices included in the study, Tom Clark, reported that if he had dissented in a case, he would refuse to follow it in cases decided during the same Term of Court in which the decision itself was handed down but would treat it as binding precedent in future Terms unless he was able to persuade at least four of his colleagues to overturn it. *Id.* at 1037. Justice Harlan (another Justice included in the study) expressed a similar view—distinguishing the Term in which the decision was rendered from later Terms—when I was one of his law clerks. I’m not sure I understand the reason for the distinction.

37. Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 330–32 (1992). To correct for the “weaknesses” of both models, the authors propose an “integrated model . . . informed by both legal and extralegal factors.” *Id.* at 332.

A recent book by two political scientists challenges the legal/nonlegal model. See THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006). They contend—and attempt to test the proposition empirically—that “while precedent can operate as a constraint on the justices’ decisions, it also represents an opportunity . . . in the sense [that] the justices can utilize precedent to constrain other actors, thereby promoting the outcomes they prefer.” *Id.* at 13.

38. See Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 LAW & SOC’Y REV. 827, 828 (2003) (stating that the law is influenced by what the authors call jurisprudential regimes—“a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions” (internal quotation marks omitted)).

as an important norm constraining Justices from being “motivated by their own preferences”³⁹ because, *inter alia*, attorneys rely primarily on precedents, the Justices invoke them at conference and in their opinions, and cases overruled amount to only a minuscule percentage of those available for overruling.⁴⁰ At the very least, then, precedent shapes strategic behavior by advocates and judges—even those who may put little stock in the doctrine. Presumably they do so not because they are all engaged in a collective effort of self-deception but because some significant percentage of those who decide do in fact consider precedent an important factor in reaching a result.⁴¹

As the title indicates, the authors use the aftermath of the adoption of the three-part “*Lemon*” test (announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) as the principal focus of their analysis.

39. Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1032 (1996).

40. *Id.* at 1020, 1032–34.

41. Interestingly, in several sharply divided decisions involving constitutional issues, *stare decisis* fared rather well at the end of the 2006 Term, despite the change in the makeup of the Court and its unmistakable rightward shift. Thus in perhaps the most visible and divisive case, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), which struck down, 5–4, two school districts’ plans that relied on racial classifications in making school assignments, there was much heat in the opinions about the meaning of a number of Supreme Court precedents. But I for one could not conclude—especially in view of Justice Kennedy’s opinion, *id.* at 2788–97 (Kennedy, J., concurring in part and concurring in the judgment), which accompanied his decisive vote—that any Supreme Court precedent had been overruled.

And in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), which involved regulation of campaign expenses, an earlier case, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), was distinguished but not overruled, despite the urging of three Justices (Scalia, Kennedy, and Thomas) that it should be. In *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), which involved standing to challenge a claimed violation of the Establishment Clause, the plurality distinguished *Flast v. Cohen*, 392 U.S. 83 (1968) but did not overrule it, despite the urging of Justices Scalia and Thomas that it do so. In *Morse v. Frederick*, 127 S. Ct. 2618 (2007), which involved a student’s First Amendment claim, the Court distinguished *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) but did not overrule it, despite the statement by Justice Thomas, in a concurring opinion, that the “better approach” would be “to dispense with *Tinker* altogether,” *Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring). Finally, in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007), the Court refused to recognize a *Bivens* cause of action, *see generally* *Bivens v. Six Unnamed Fed. Narcotics Agents*, 403 U.S. 388 (1971), for an alleged constitutional violation but did not overrule the *Bivens* decision. Indeed, even Justice Thomas (in a concurring opinion joined by Justice Scalia), who referred to *Bivens* as a “relic of the heady days in which this Court assumed common-law powers to create causes of action,” was unwilling to overrule; he would instead have limited the case and its progeny to their “precise circumstances.” *Wilkie*, 127 S. Ct. at 2608 (Thomas, J., concurring) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

Some critics have suggested that in several of these cases, the precedents were overruled in all but name. *See, e.g.*, Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, N.Y. TIMES, June 28, 2007, at A1 (discussing Justice Scalia’s criticism of decisions effectively overturning precedent “without saying so”). I disagree. The conservative approach to precedent of Justices Alito, Roberts, and (usually) Kennedy is very different from the radical approach of Justices Scalia and (especially) Thomas. Thus in each of the cases discussed here, the precedent(s) in question, though perhaps narrowed more than they should have been and perhaps destined ultimately to fade away, live on for now as a factor in the future course of decisions.

III. Positioning Myself

Rather late in life—even later than the honor came to Holmes—I receive a long-overdue nomination to the Supreme Court, and after a perfunctory hearing before a friendly Judiciary Committee, the nomination is confirmed. Fortunately, confirmation comes at the end of a Term, and I have some time over the summer to think about my approach to the new job.

On or near the top of my list is the subject of this Article: how to deal with precedents, especially constitutional precedents that I may not particularly like. Deciding that I will not vote to expand the doctrines that constitutional precedents have helped to develop is an easy step. But how and when should I be willing to vote to cut them back or even to overrule them? I'm happy to think about this in the abstract, even though I'm aware that when push comes to shove in the context of a particular case, my carefully-thought-through approach may end up giving way.

On a practical level—that of determining how to be an effective member of the group—I know that I must give precedent some due, simply because that is the way the Court operates. To be sure, some Justices, like some commentators, have evinced little respect for precedent, at least constitutional precedent, when it conflicts with their own views, but even they are usually willing to play by more generally accepted rules and deal with precedent as if it mattered. Indeed, I recall one extraordinary incident when I was an academic listening to another academic propose a quite radical reading of a particular constitutional provision; when I asked him how he would go about implementing his idea if he were on the Court, he replied that he would look for a close case at the margin where the impact of case law was debatable and introduce his idea in either a concurrence or a dissent. Then, he would continue to press it more forcefully over the course of time until he could acquire an ally or two, and eventually, he hoped, he could command a majority. This response struck me as both cynical and strategically sound. As several political-science scholars have observed, precedent sets the framework for debate,⁴² and even one who does not put much stock in it has to recognize this fact if he is to achieve anything. If, as has been wisely said, “[h]ypocrisy is the homage vice pays to virtue,”⁴³ it is also the homage strategy pays to reality.⁴⁴

42. See *supra* note 20 and accompanying text.

43. FRANÇOIS DUC DE LA ROCHEFOUCAULD, REFLECTIONS; OR SENTENCES AND MORAL MAXIMS maxim 218, at 27 (J.W. Willis Bund & J. Hain Friswell trans., New York, Scribner, Welford & Co. 1871) (translated from the 1678 and 1827 eds.).

44. Interestingly, in his article arguing that Congress may abrogate the doctrine of stare decisis in the federal courts, generally or selectively, Paulsen states that once Congress has abrogated the doctrine, leaving existing precedents only with whatever persuasive force they may have, the Court may then “overrule” a precedent if persuaded that it is incorrect. Paulsen, *Abrogating*, *supra* note 12, at 1538. But since his premise is that stare decisis has been abrogated, it makes no more sense to “overrule” a case than it does to overrule a law-review article. Paulsen may just be having difficulty escaping the doctrine he rejects.

But is it hypocritical to give weight to a precedent or line of precedent to the point that one should not necessarily vote to overrule a case even if one thinks it constitutionally incorrect? Or to put essentially the same question somewhat differently, what would be my view of the doctrine of precedent if I sat alone on the Nation's highest court (an even more delusional fantasy)?

Conceding the elegance and power of the contrary argument,⁴⁵ I have concluded that *stare decisis* has an important place in constitutional jurisprudence. Indeed, I have come to believe that the suggested dichotomy between the Constitution and a decision or line of decisions interpreting it is in some respects significantly misleading. The sedimentary metaphor of Friedman and Smith is, for me, a powerful one.⁴⁶ Important provisions of the Constitution have been interpreted over time, and whether or not those decisions are readily reconciled with either the actual text or the original "public meaning," as many originalists use the term, they constitute part of our constitutional heritage at least as gloss and perhaps as a more malleable, but nevertheless cognizable, part of the Constitution itself. My response to Lawson, in other words, is in part that the meaning of the Constitution cannot be determined without giving heed to its interpretation over time.

I am influenced by the practical arguments of efficiency and predictability that support the doctrine, as well as the more normative arguments based on considerations of fairness, coherence, and legitimacy. Indeed, it is hard to overstate the value of coherence and predictability in the law as a basis for avoiding disputes and for facilitating settlements when disputes do arise. To be sure, this virtue may be more critical in everyday affairs (the rules for determining ownership of property, for example) than in the loftier realm governed by the Constitution. Yet constitutional rules do affect a wide range of relationships, especially those involving the interaction between the public and private spheres.

But perhaps my principal reason for finding the doctrine a congenial one lies in my own Burkean approach to the world in general and to law in particular.⁴⁷ The value that I place on tradition derives not so much from distrust of human reason or judgment as from a conviction that individuals, and here I include myself at the head of the list, are likely to overrate their own rationality, wisdom, or judgment (and to underrate the extent of their own biases). Thus, I agree with Young, who observes that a central aspect of respect for tradition in general, and precedent in particular, is importantly

45. See *supra* note 7 and accompanying text.

46. See *supra* note 26 and accompanying text.

47. See, e.g., David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 950, 949–50 (1992) (citing Burke's belief that continuity is "the principle of reform, not of opposition to it" in support of the author's approach to statutory interpretation).

related to humility⁴⁸—even though I recognize that any claim of humility is likely to be dismissed as arrogant.⁴⁹

So far, I suspect, I have done little more than locate myself in the mainstream of judicial and academic thought, and if I have, at least I have worked my own way through to that position. But I still have to give some heed to a question that is harder to answer in the abstract but probably more important: how much weight is precedent entitled to? Or to be more explicit, can I articulate workable criteria for deciding when to vote to cut back or overrule a precedent or line of precedent—criteria that do not give me more leeway (in view of my general stance on the virtues of *stare decisis*) than I want to have?

The starting point for considering a vote to overrule should certainly be a conviction that the decision was either “incorrect” to begin with or has been

48. See Young, *supra* note 22, at 697. Greene recognizes that “interpreters must operate with a healthy sense of self-doubt” but believes it is a sufficient restraint to “be open to the views of other interpreters.” Greene, *supra* note 9, at 2948–49. This is a restraint that presumably must yield when the interpreter remains convinced of his position after considering other views (and giving precedent no more weight than a law-review article?).

49. Adrian Vermeule has mounted a powerful critique on the Burkean approach to constitutional interpretation advocated by such scholars as Young and Merrill. See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007). In a section of his article entitled “Burke as Condorcet,” he directs his criticism at the notion that in light of our distrust of first-order rationalism, tradition (particularly in the form of judicial precedent) is a good second-order rule of thumb. *Id.* at 1485, 1485–89. Briefly summarized (and they deserve reading in full), his arguments raise both “internal” problems (only a small number of Supreme Court Justices have been involved in any line of precedent; today’s Justices are more informed about today’s problems; no problem ever arises twice in exactly the same form; if tradition is followed for its own sake, its “informational value” tends to cascade in the wrong direction; and the biases of judges are not random but tend to be skewed because of training and background) and “external” problems (even if the internal problems are resolved, it may still be more appropriate to look to the Framers than to the Court’s precedents, or in the case of statutes, to show greater deference to legislative judgments). *Id.* at 1492–509.

I find myself shaken but—for reasons too briefly stated here—ultimately unpersuaded. First, Vermeule himself acknowledges that his arguments do not address the reasons for a strong doctrine of precedent other than Burkeanism—reasons I also endorse. See *id.* at 1485; see also *supra* notes 23–26 and accompanying text. Second, with respect to the “internal” criticisms, they do not undermine my convictions about the special institutional role of the judiciary. Nor do they alleviate my concern about my own limitations or, indeed, about the danger that too little respect for precedent may make it far too easy to be blown by present-day political and social winds that will be proved tomorrow to be only a temporary aberration. (Moreover, I find Vermeule’s arguments more powerful when the question is one of the proper interpretation or application of existing doctrine than of its outright rejection in the form of overruling.) And third, with respect to the “external” problems, I have difficulty with both alternative sources. As for the Framers, I think that the argument sets up a questionable dichotomy between the original intent and the development of our present-day constitutional doctrine (not to mention that the Framers were even farther removed from the present day than virtually all of the Justices who have ever served). And as for legislative judgments, I share the view that judicial deference to those judgments is appropriate, but I do not find that view incompatible with my approach to *stare decisis* even in cases where deference is called for. If Congress reenacts a statute that the Court has previously declared invalid, I believe it meets the demands of appropriate deference to apply the criteria stated in the text below. Moreover, in many instances, the question of deference to the legislative branch—at least the federal Legislative Branch—is not even relevant to the case.

shown to be incorrect for purposes of present-day application by subsequent developments of law or fact.⁵⁰ But can one who puts stock in the doctrine of precedent stop there, or does this starting point give to a decision or line of decisions only the persuasive force that one would give to, say, a well-regarded treatise or scholarly article? And if so, would it help to add that one must be persuaded that the precedent(s) in question are *clearly* incorrect? Alternatively, might one draw a distinction between the view that a decision was wrong when decided and the view that a decision has been rendered incorrect by subsequent events? (Such a distinction would give much weaker force to the precedent(s) in the latter case.)

My response, during the summer of my introspection, would be “no” to each of the last two questions, though the second one falls closer to the line. Indeed, an affirmative answer to either question would seem inconsistent both with my view that the Constitution and the decisions interpreting it are not easily separated and with my Burkean approach of valuing tradition and of avoiding the likelihood of overrating my own rationality and wisdom. But I would certainly add to my criteria the requirement of an affirmative answer to one or the other of these questions (i.e., that the decision was clearly incorrect when decided or has been shown by subsequent developments to be clearly inappropriate for present-day application).

By now, the reader who is still there will surely recognize that I have situated myself firmly in the third of my original categories, i.e., one who would not vote to overrule a precedent *unless*. But I am only halfway to the point of completing that sentence, and the remaining part is perhaps the hardest. What should be needed beyond “clearly incorrect”? Justice Kennedy’s noteworthy effort in *Patterson*⁵¹ is, I believe, especially helpful. To paraphrase and modify: I would ask for a showing sufficient to persuade me that the precedent(s) constitute a significant obstacle to the pursuit of other important, recognized objectives or the vindication of basic rights.⁵² And, somewhat cautiously, I would include as an independent ground (in addition to “clearly incorrect”) a showing that the decision in question is so inconsistent with subsequent decisions that the demands of coherence and

50. This Article is not an effort to articulate the factors that should determine whether a precedent, or line of precedent, is “incorrect” (though I do summarize my reasoning about a particular line of decisions in Part IV). But just as I believe that one’s ideas about the nature of law are likely to affect one’s approach to precedent, *see supra* text accompanying note 33, I also believe that those same ideas are likely to affect one’s thinking about whether the present state of the law is acceptable.

51. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172–75 (1988). For a discussion of Kennedy’s opinion in *Patterson*, *see supra* notes 27–30 and accompanying text.

52. For examples of overruling decisions falling into the first category of this sentence, *see*, for example, *United States v. Darby*, 312 U.S. 100 (1941) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For examples of overruling decisions that I would place in the second category, *see*, for example, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Smith v. Allwright*, 321 U.S. 649 (1944); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

predictability require its rejection.⁵³ I say “cautiously” because the very nature of doctrinal development in the difficult realm of constitutional law renders almost every line of precedent subject to this critique to some extent.

Two examples of instances in which I would not vote to overrule precedent may be helpful here. First, I might be convinced either (a) that the Court was clearly wrong to interpret the constitutional provision against impairment of contracts,⁵⁴ not only as restraining states from giving relief to debtors but also as applying to such matters as governmental grants and other regulatory activities,⁵⁵ or (b) that in any event, the acceptance of expanded governmental regulatory power since the adoption of the Constitution has cast the most serious doubt on that application. Nevertheless, the error does not appear to have prevented the vindication of rights (indeed, it may have had the opposite effect of recognizing rights that should not have been recognized⁵⁶). And given the general willingness to sustain government regulation in the face of the Contracts Clause, it does not seem, in its present form, to have significantly impeded the advancement of important, recognized objectives.⁵⁷ On the other hand, I would be reluctant to expand the doctrine for fear that to do so might well have the latter effect. Indeed, in close cases, I would lean toward a narrow construction of existing precedent.

53. *Smith v. Allwright* is an overruling decision falling into this category (as well as the category for which it is cited *supra* note 52). Others include *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) and, in an area raising both statutory and (implicitly at least) constitutional issues, *Angel v. Bullington*, 330 U.S. 183 (1947).

54. U.S. CONST. art. I, § 10, cl. 1.

55. For a statement that “[t]he major purpose of the clause . . . was to restrain state laws affording debtor relief,” see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 408 (16th ed. 2007). The authors then go on to note that the earliest cases nevertheless interpreted and applied the Clause “in cases involving public grants rather than private contracts.” *Id.* at 409; see also *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 650–51 (1819) (using the Clause to strike down New Hampshire’s effort to “pack” the College Board of Trustees by increasing its size); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138–39 (1810) (applying the Clause to a dispute arising from a grant of land from the Georgia legislature).

56. Perhaps I am suggesting a double standard here, but I do not think so. The other aspect of my test, referred to in the following sentence, is whether the “error” has impeded the achievement of significant social objectives. If it has not, the possibility that it *may* have expanded individual rights is not, for me, sufficient cause for overruling. Of course, such cases will surely be rare because unwarranted expansion of rights (freedom of contract in the last century, for example) is likely to impede the achievement of important social objectives.

57. The Supreme Court has, on several occasions, refused even to reach an impairment question on the ground that the alleged contractual obligation did not exist. See, e.g., *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187–88 (1992) (affirming a Michigan Supreme Court decision on the ground that disputed workers’ benefits were not express or implied terms of their employment contracts). With respect to “impairment,” the story of the rise, fall, and partial revival of the Clause as a restraint on state action is told in JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 246–50 (2007). My conclusion from this narrative is that while the Contracts Clause has frustrated regulatory efforts in a few instances, its overall impact on the achievement of state regulatory goals, at least since *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934), has been negligible; at the same time, it has served, along with the Due Process Clause, as a safeguard against unwarranted retroactive legislation. See *infra* note 61 and accompanying text.

Second, I might be convinced (as Justice Thomas has suggested⁵⁸) that the Ex Post Facto prohibition⁵⁹ applies to retrospective legislation establishing civil liability as well as to retrospective laws imposing or affecting criminal punishments and that the Court's continuing error on this issue is plainly incorrect.⁶⁰ But has this error prevented the vindication of important rights? I don't believe so, given the Court's recognition that in the event of significant adverse effects unjustified by an overriding public interest, retroactive legislation imposing civil liability may run afoul of the Contracts or Due Process Clauses.⁶¹ And surely, the error has not stood in the way of achieving important recognized social objectives.

To summarize, my criteria at the outset of my new career on the highest Court would not support a vote to overrule a precedent or line of precedent unless (a) I am convinced that the precedent(s) were clearly wrong when rendered or had clearly become unsound in the light of experience, *and* (b) I am also convinced that the error is significantly obstructing the achievement of generally recognized and important objectives, is obstructing the vindication of basic rights, or (more cautiously) is so inconsistent with later precedent that its rejection is required in the interest of coherence and predictability in the law.⁶² Having accomplished this goal, I now have the remainder of the summer to pore over certiorari petitions, to think through other metaquestions about judging, and to try to lower my golf scores.

You may well believe at this juncture that I have given too much deference to precedent in this effort to set the frame for my service on the highest Court—especially in constitutional matters.⁶³ And you may well be

58. See *E. Enters. v. Apfel*, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring) (noting that, in an appropriate case, he would be willing to reconsider a line of cases holding the Ex Post Facto Clause to apply only in the criminal context).

59. U.S. CONST. art. I, § 10, cl. 1.

60. As Justice Thomas noted in *Eastern Enterprises*, the Court has assumed from the outset that the Clause applies only in the criminal (or perhaps more broadly, penal) sphere. *E. Enters.*, 524 U.S. at 538–39 (Thomas, J., concurring). See generally *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798).

61. See NOWAK & ROTUNDA, *supra* note 57, at 250–57.

62. Others have arrived at similar formulations. See, e.g., Monaghan, *supra* note 17, at 758 (“Even an ‘overriding conviction’ of prior error is not enough; the precedent must have some palpable adverse consequences beyond its existence.”).

The question of the effect of overruling on existing reliance interests has been mentioned only in passing. While I do not believe that the absence of significant reliance interests is a positive reason for overruling an existing precedent, the presence of such interests may surely weigh in the precedent's favor. But if the case for overruling is strong and the reliance interests are also strong, I might well opt for the approach of prospective overruling—an approach that has certainly lost favor with the Court but has never quite been rejected in all its forms in the civil context. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 75–77 (5th ed. 2003) [hereinafter HART & WECHSLER]. And in the criminal context, a “new rule,” whether or not the result of the rejection of an existing precedent, is generally not available as a basis for habeas corpus. *Id.* at 75.

63. The notion that constitutional decisions are entitled to less precedential force than decisions in the statutory or common law sphere (both of which can be legislatively rejected or modified)

right. But my respect for tradition, my apprehension of my own fallibility, and my conviction that the judiciary plays a vital role in serving as a protector of continuity in the context of incremental change⁶⁴ have all contributed to this conclusion. It remains to see how this conclusion fares in the context of a testing case.

IV. A Testing Case

A. *The Problem*

My first Term on the Court, though filled with the usual fare of relatively mundane but sometimes intriguing statutory issues and highly divisive constitutional ones, fails to test my criteria for implementing the doctrine of precedent. But early in the second Term, a problem arises that strikes me as going to the heart of the matter.⁶⁵ In a personal bankruptcy proceeding, the trustee in bankruptcy has sued a state university in federal court to recover, on behalf of the bankrupt's estate, damages for patent infringement. The university moves to dismiss on the ground of sovereign immunity, and the district court's grant of the motion is reversed by the appellate court. My colleagues and I have unanimously agreed to grant the state university's petition for certiorari.

To give a full recapitulation of the doctrinal context in which this case arises would take an essay in itself.⁶⁶ But I will try to say enough, in a few paragraphs, to set the stage for the discussion in this Part. *Chisholm v. Georgia*,⁶⁷ one of the Supreme Court's earliest decisions, rejected a claim of sovereign immunity by a state that had been sued in the Supreme Court by a private person asserting a breach of contract claim.⁶⁸ This decision resulted in the adoption of the Eleventh Amendment, the first to follow the Bill of Rights, which stripped the federal courts of jurisdiction in suits "against one of the United States by Citizens of another State."⁶⁹ This provision was

probably first appeared in 1871 in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 554 (1871), see *supra* note 17, and was first articulated in the twentieth century by Justice Brandeis in his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting). But this distinction seems hard to square with the common law constitutionalism I endorse, and as noted by Lee, *supra* note 27, at 708–12, it was not recognized in the Founding Era.

64. See Shapiro, *supra* note 47, at 941–50 (arguing that a judicial tendency to favor continuity over change serves legislative purposes and furthers both process-oriented and substantive values).

65. I hereby attest that although I had thought of this problem when I sat down to write this Article, I tried scrupulously not to think about how my summer's effort to develop workable criteria would play out in resolving it.

66. For a much fuller exposition and analysis, see HART & WECHSLER, *supra* note 62, at 973–1066 and *id.* at 129–42 (Supp. 2007).

67. 2 U.S. (2 Dall.) 419 (1793).

68. See *id.*

69. The Eleventh Amendment provides in full: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

narrowly construed for most of the nineteenth century, but then, in the course of a series of cases arising out of the insolvency of many states and localities in the aftermath of the Civil War, the Supreme Court held in *Hans v. Louisiana*⁷⁰ that the function of the Eleventh Amendment was to restore the notion of state sovereign immunity to federal suit to its rightful place;⁷¹ thus, immunity could be claimed even in a federal court action brought against a state by one of its *own* citizens on the basis of a claimed violation of *federal* law.

The question whether Congress could abrogate that immunity by specifically so providing in the course of exercising one of its delegated powers under Article I was answered first in the affirmative in a rather strange 5–4 decision dealing with Congress’s authority under the Commerce Clause⁷² and then in the negative in another 5–4 decision, handed down a few years later, dealing with the power of Congress under the Indian Tribes provision⁷³ of the Commerce Clause.⁷⁴ This decision was followed soon after by a decision rejecting Congress’s effort to abrogate state sovereign immunity in patent-infringement actions.⁷⁵ “Congress,” the Court said, “may not abrogate state sovereign immunity pursuant to its Article I power.”⁷⁶

The Court remained committed to the view, however, that Congress could abrogate state immunity in the legitimate exercise of its authority under Section Five of the Fourteenth Amendment,⁷⁷ but its decisions applied an increasingly rigorous standard in determining whether a purported exercise

70. 134 U.S. 1 (1890).

71. *See id.*

72. *See* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (upholding the power of Congress to abrogate state sovereign immunity in the exercise of its authority under U.S. CONST. art. I, § 8, cl. 3). The case is “strange” in two respects. First, it is difficult to square with the reasoning of *Hans* (which was not overruled), unless *Hans* is (re)interpreted as creating a kind of “constitutional common law” akin to the “dormant” Commerce Clause doctrine, a doctrine whose application in particular contexts is subject to congressional modification. (On the reasoning of *Hans*, see the thorough discussion in Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 24–28. On the dormant Commerce Clause, see SULLIVAN & GUNTHER, *supra* note 55, at 174–222.) Second, Justice White, who cast the crucial fifth vote upholding congressional power in *Union Gas*, stated that he concurred in this respect with the plurality of four but did not agree “with much of [its] reasoning.” *Union Gas*, 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). His own reasoning was not set out.

73. U.S. CONST. art. I, § 8, cl. 3.

74. *See* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Rejecting any effort to distinguish among aspects of the Commerce power, the Court explicitly overruled the *Union Gas* decision. *Id.* at 66.

75. *See* *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999). As in *Seminole*, the Court agreed that Congress (in the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a) (2000)) had made explicit its intention to abrogate state sovereign immunity in such a case. *Fla. Prepaid*, 527 U.S. at 635.

76. *Fla. Prepaid*, 527 U.S. at 636.

77. The power of Congress, in the exercise of its authority under Section Five of the Fourteenth Amendment, to abrogate state sovereign immunity was first declared in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and has been reaffirmed ever since.

of that authority was valid.⁷⁸ And in perhaps its most ambitious extension of the doctrine, the Court held, 5–4, that the Constitution mandated recognition of a sovereign-immunity defense in a *state court action* brought by a private person for a claimed violation of federal law.⁷⁹ True, the doctrine did not preclude an action against a state officer for prospective relief from a continuing or threatened violation of federal law⁸⁰ or a personal action for damages against such an official if he had committed such a violation.⁸¹ But the Court has at the same time established that a claim of sovereign immunity will lie in an action against a state officer for retrospective relief (usually damages) if the funds targeted by the action are state funds⁸² and has also extended the doctrine to federal administrative proceedings brought against a state instrumentality by a private person.⁸³

Thus the general direction of the state-sovereign-immunity doctrine has been an expansive one, even though by a narrow majority each time and even though there have been some recent signs pointing the other way. Notably, the Court has held that a state's removal of a state court action against it to federal court is a "waiver" of any sovereign-immunity defense (at least if the state could have raised no such defense in state court).⁸⁴ And in the

78. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. at 640–43 the Court, after invalidating Congress's effort to abrogate state sovereign immunity in the exercise of its Article I power over patents, went on to reject an argument based on authority under Section Five of the Fourteenth Amendment. See also *supra* note 75 and accompanying text. Conceding that a patent was "property" under that Amendment, the Court held that Congress had exceeded its authority under Section Five because the abrogation extended to unintentional as well as intentional infringements by the states and there had been no showing of "widespread and persisting" constitutional violations sufficient to justify "prophylactic" legislation. *Fla. Prepaid*, 527 U.S. at 645.

In two more recent decisions, however, the Court did uphold the authority of Congress to abrogate state sovereign immunity under its Section Five power. See *Med. Bd. v. Hason*, 538 U.S. 958 (2003); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

79. See *Alden v. Maine*, 527 U.S. 706 (1999).

80. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908). Though the decision has not been free from criticism within the Court, it has remained essentially intact. See HART & WECHSLER, *supra* note 62, at 994–95.

81. The leading case is *Monroe v. Pape*, 365 U.S. 167 (1961). Also, local-government entities, which have been held not to share the state's constitutional immunity from suit, see *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), may be held liable in damages for a violation of federal rights (under 42 U.S.C. § 1983 (2000)). *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). The Court has held, however, that a local entity will be liable only if its responsibility for the constitutional violation can be established on the basis of an existing policy or custom and that an individual defendant sued for damages under § 1983 may escape liability on the basis of qualified immunity if his action was not in violation of "clearly established" rights, e.g., *Saucier v. Katz*, 533 U.S. 194, 201 (2001), and, in some cases, on the basis of absolute immunity, e.g., *Stump v. Sparkman*, 435 U.S. 349, 362–63 (1978).

82. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

83. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

84. *Lapides v. Bd. of Regents*, 535 U.S. 613, 616 (2002). Over a century earlier, the Court had held, in *Smith v. Reeves*, 178 U.S. 436, 440 (1900), that a state could limit a waiver of its immunity

bankruptcy realm, the Court has been willing—somewhat surprisingly—to allow a bankrupt to obtain discharge of a debt owed to a state on an “in rem” theory.⁸⁵ More recently, and more surprisingly, a sharply divided Court, relying in part on this in rem theory and in part on the particular text and context of the bankruptcy power, has allowed a bankruptcy trustee to bring an action to recover for the bankrupt’s estate’s allegedly preferential transfers made by the bankrupt to several state agencies.⁸⁶

That, in a jerry-built nutshell, is the doctrinal background in which the present case has arisen, and it is in reliance on the two bankruptcy decisions last discussed that the federal court of appeals has rejected the state’s sovereign-immunity defense. But the trouble is that these two bankruptcy decisions don’t come close to resolving this case.⁸⁷ First, no stretch of the imagination can bring this action within the in rem umbrella that helped the majority in both earlier cases. (Though the second decision was a stretch on this point, the rule voiding preferential transfers was at least an integral part of the federal-bankruptcy-law package that displaced any conflicting state law with regard to the bankrupt’s “estate.”)

Second, unlike the latter of the two bankruptcy decisions, the action brought by the trustee here is not in any sense a cause of action created by the bankruptcy laws. Rather, as “representative of the [bankrupt’s] estate,”⁸⁸ the trustee simply stands in the shoes of the bankrupt for the purposes of bringing suit on any claims the bankrupt may have under federal or state law. Indeed, the statutory basis of *exclusive* federal court jurisdiction in this action is not the provision for jurisdiction in bankruptcy cases⁸⁹ but rather the provision covering actions under the patent laws.⁹⁰

to its own courts. The Court has always recognized that a state may waive its constitutional immunity, but with respect to nonlitigation activity, it has rejected the notion of “constructive” waiver. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

85. See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447–48 (2004). The bankrupt’s estate was analogized to the property involved in an in rem admiralty proceeding. *Id.* at 447.

86. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006). Such transfers are rendered voidable under federal bankruptcy law. 11 U.S.C. §§ 547(b), 550(a) (2000).

The Court in *Katz* explicitly declined to rely on the congressional attempt in 11 U.S.C. § 106 to abrogate governmental sovereign immunity in certain bankruptcy proceedings. *Katz*, 546 U.S. at 363.

87. See Thomas E. Plank, *State Sovereignty in Bankruptcy After Katz*, 15 AM. BANKR. INST. L. REV. 59, 94 (2007) (concluding that it would be an unwarranted extension of *Katz* to reject a claim of sovereign immunity as a “defense to [a] debt collection action by a bankruptcy trustee against a State to collect a debt owed by the state that the debtor in bankruptcy could not collect outside of bankruptcy”).

88. 11 U.S.C. § 323(a). Subsection (b) of this section confers on the trustee the “capacity to sue and be sued.” *Id.* § 323(b).

89. See 28 U.S.C. § 1334(b) (2000) (providing for concurrent jurisdiction).

90. *Id.* § 1338(a). And congressional abrogation of sovereign immunity in this action is to be found in the Patent Remedy Act, 35 U.S.C. §§ 271(h), 296(a) (2000), not in the similar provision of the Bankruptcy Act, 11 U.S.C. § 106, which apparently does not apply in this context, see Plank,

Accordingly, I don't believe that distinguishing the Court's earlier patent decision on the basis that the present action is related to a proceeding in bankruptcy will pass a straight-face test,⁹¹ and I am on record as strongly in favor of judicial candor⁹²—a notion I still heartily endorse. My vote would therefore have to favor the state, unless I decide that a precedent or line of precedent should be overruled. And if I do, that line may go all the way back to *Hans*, or at least to the Court's more recent rejection of the power of Congress to abrogate state sovereign immunity as part of a valid exercise of its legislative power under Article I.⁹³ Finally, to make matters worse, or perhaps just more challenging, I discover that the Court I have recently joined is divided 4–4 on the immunity question in this case.⁹⁴ I have the deciding vote.

B. Applying My Criteria

1. *The First Prong.*⁹⁵—For reasons that others have already elaborated in overwhelming detail⁹⁶ and that I will only summarize here, I have little trouble with the first part of my two-part test for deciding when to vote to

supra note 87, at 91, 90–91 (stating that Congress did not intend § 106 to “abrogate a State’s sovereign immunity if the trustee seeks to collect a debt owed by a State to the debtor pre-petition”).

91. The term “straight-face test” is probably self-defining. It was, at least at one time, in fairly common use among appellate lawyers who worried about putting arguments in briefs that would be hard to defend at oral argument.

92. See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (“In a sense, candor is the sine qua non of all other restraints on abuse of judicial power . . .”).

93. The critical decision on this question is *Seminole Tribe of Florida v. Florida*, which is discussed *supra* notes 74–75 and accompanying text. *Hans v. Louisiana* might be replaced by, or perhaps “explained” as, a rule of constitutional common law that can be overridden by a clear statement of congressional abrogation in the context of a valid exercise of its legislative authority. As noted *supra* note 72, I find the explanation route difficult in the light of the Court’s rationale in *Hans* itself.

94. The trustee–plaintiff has not alleged that the claimed infringement was “intentional” and thus may possibly be actionable even after the *Florida Prepaid* decision. Thus, all four Justices who would reject state sovereign immunity would distinguish *Hans* and overrule *Seminole* and, in consequence, *Florida Prepaid*. (The explicit abrogation of state sovereign immunity in §§ 271(h) and 296(a) of the Patent Remedy Act has never been repealed by Congress, even though declared invalid in the *Florida Prepaid* decision. See *supra* note 75 and accompanying text. Thus, in my view, it can rise, phoenixlike from the ashes if *Seminole* and its progeny are overruled. See David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 767 (1979) (“[I]t appears that a court may effectively rehabilitate a statute once declared invalid by overruling its earlier decision.”).)

95. After years of making fun of this word in my classes, I find myself using it, for want of a better alternative.

96. In addition to a wealth of commentary, most of which is critical of the doctrine as it has developed (see, for example, the articles and books cited in HART & WECHSLER, *supra* note 62, at 1066 n.12 and *id.* at 140–42 (Supp. 2007)), there are several extensive and powerful dissenting opinions in the Supreme Court. See, e.g., *Alden v. Maine*, 527 U.S. 706, 760–814 (1999) (Souter, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76–100 (1996) (Stevens, J., dissenting); *id.* at 100–85 (Souter, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247–302 (1985) (Brennan, J., dissenting).

overrule. Judged by virtually any standard, *Seminole* was clearly wrong when it was decided, and though *Hans* can perhaps be distinguished, its rationale is equally unacceptable.⁹⁷ Sovereign immunity is nowhere mentioned in the Constitution, even in the Eleventh Amendment's exception to the jurisdiction previously granted in Article III over suits against a state by a citizen of another state or a citizen or subject of a foreign state.⁹⁸ And the historical materials bearing on the contemporary understanding, both pre- and post-Eleventh Amendment, come far closer to the views expressed by the critics of *Hans* than to those embraced by the majority of the Court in and since that decision.⁹⁹

Moreover, the exceptions carved out by the Court make little sense. Why should the power of Congress to abrogate exist only when legislating pursuant to the Fourteenth Amendment and not when legislating pursuant to Article I, *unless* it is doing so under its authority to make "uniform" rules of bankruptcy? (The bankruptcy exception, though in my view not applicable here, is especially grating because of its lack of any principled basis.¹⁰⁰) And most important, the only modern rationale for the sovereign-immunity doctrine that I can even appreciate cuts strongly *against* the doctrine as it has developed. That rationale—that the institution responsible for making law can itself decide whether or not that law should give rise to a cause of action against the state¹⁰¹—may support a common law presumption that a state

97. I have set down in writing my own dim view of the doctrine in David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 RUTGERS L.J. 753 (2000) and in David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984). In addition, I served as cocounsel for Alden in *Alden v. Maine* and in *Atascadero State Hospital v. Scanlon*, and I wrote an amicus curiae brief for the American Civil Liberties Union arguing, among other things, that *Hans* should be overruled.

98. For thoughtful discussions of the meaning and appropriate application of the text of the Eleventh Amendment, see Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 496 (1989); Thomas R. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1028 (2002); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1671 (2004); and Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

99. The historical debate has been conducted not only in commentary but also in the pages of the Supreme Court reports—especially in the majority and dissenting opinions in *Seminole* and *Alden*. Among the scholarly studies in the secondary materials, one of the first, and perhaps best, is John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983), which sets the passage of the Eleventh Amendment in the historical context of a foreign-affairs crisis at the time of drafting and examines the political pressures related to state-debt repudiation that culminated in *Hans*. For a recent study arguing that *Chisholm's* view of the nature of sovereignty (as residing in the people and not the government) should be a recognized part of the constitutional canon, see Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007).

100. See Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of Central Virginia Community College v. Katz*, 15 AM. BANKR. INST. L. REV. 13, 56 (2007) (“[T]here is no principled way to distinguish the Bankruptcy Clause from any other Article I Clause.”).

101. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (noting that sovereign immunity rests on “the logical and practical ground that there can be no legal right as against the authority that

may not be sued without its consent but surely does not support the view that even though Congress has authority under the Constitution to impose a duty upon the states, that same document deprives it of power to authorize a private civil action to vindicate violation of that duty.

2. *The Second Prong.*—The second prong is not as easily disposed of, nor should it be if the doctrine of precedent is to have any impact when the voting judge is persuaded that the precedent in question was wrongly decided or that modern developments have cast it into serious doubt. But after some thought and research, I am persuaded that the first two of the alternative standards in this part of my test have been satisfied. To begin, the doctrine as it now exists does stand in the way of achieving important federal objectives as envisioned by Congress. Since in the areas in which the doctrine holds sway, even the clearest of congressional statements cannot abrogate a state's immunity from suit in any court in which the defense is properly raised, Congress cannot, for example, provide a private remedy in damages against a state or state agency for the purpose of compensating those injured by violations of the patent laws, the copyright laws, the laws protecting workers, certain antidiscrimination laws, or even provisions of the Constitution itself other than a violation falling within the scope of the Fourteenth Amendment.

Moreover, the same reasoning leads to the conclusion that the error stands in the way of vindicating basic rights. I do not believe that a right needs to derive from the Constitution itself in order to meet this standard; surely, for example, the right of working people to what Congress regards as a living wage and to other protections against the natural bargaining advantages of the employer should be eligible for this status. And in any event, there are constitutional rights against the states that are not necessarily within the scope of the Fourteenth Amendment—the right not to be the target of a bill of attainder,¹⁰² for example—that plainly meet the test.

My last alternative under this prong—that the line of precedent has become so incoherent as to make its application essentially arbitrary and unpredictable—poses even more difficulty, and I decline to rely on it here. The sovereign-immunity doctrine is odd, to be sure, and remains fuzzy at the edges, and I find it difficult to reconcile some aspects of it with others. But in general, results are far from unpredictable, and if one accepts certain

makes the law on which the right depends"). Even this rationale is subject to criticism: that at least with respect to the Constitution itself, the law was "ordain[ed]" and "establish[ed]" by "the People" and thus neither explicitly nor by implication protects any governmental entity from suit for violation of the rights it confers. U.S. CONST. pmbl. Moreover, even with respect to statutory rights, the fundamental concept of government under law might well support at least a rebuttable presumption that the government is not immune from suit.

102. U.S. CONST. art. I, § 10, cl. 1. For leading cases in which the Supreme Court held state action invalid (in a context other than a suit against a state entity for retrospective relief) on the basis of this prohibition, see *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) and *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866).

premises (the special need to protect state treasuries from some kinds of incursion, for example), the doctrine is not entirely irrational.

*Or*¹⁰³

2. *The Second Prong.*—The second prong is not as easily disposed of, nor should it be if the doctrine of precedent is to have any impact when the voting judge is persuaded that the precedent in question was wrongly decided or that modern developments have cast it into serious doubt. But after some thought and research, I am persuaded that neither of the first two alternative standards in this part of my test has been satisfied.¹⁰⁴

To begin, I find myself unable to conclude that the doctrine, strange and frustrating as it may be, stands in the way of achieving significant federal objectives. The doctrine virtually never precludes (a) obtaining injunctive relief against the responsible state officers for continuing or threatened violation of federal rights or (b) deterring violations of federal obligations by permitting compensation for past harm if the harm was caused by sufficiently culpable conduct of public officials or a pattern, practice, or policy of a local-government entity.¹⁰⁵ And even an action against a state or state agency for retrospective relief may be brought by the United States itself (or by another state) if it has the necessary standing and authority to sue.¹⁰⁶ Moreover, in those instances where Congress may wish to assure compliance through enforcement of federal obligations in private-damages actions, it is often able to achieve that goal indirectly by conditioning some state benefit on waiver of immunity from suit.¹⁰⁷

103. Cf. JOHN FOWLES, *THE FRENCH LIEUTENANT'S WOMAN* (1969) (providing the reader with alternative endings). My own penchant for approaching a problem through dialogue is evident in DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995). But the idea in this instance came to me late—as I struggled to apply my own standard.

104. I have already rejected the third. See *supra* text following note 102.

105. See *supra* notes 80–81 and accompanying text. True, qualified and even absolute immunity are obstacles in personal-damages actions, and the “policy or custom” hurdle can make damages actions against local-government entities difficult to win. But if these obstacles are believed to be too great, Congress can modify them and perhaps reject them entirely. Thus, it can surely impose a respondeat superior standard of liability on local-government entities. And I believe it can also eliminate the defense of qualified immunity and at least some aspects of absolute immunity. (There may be problems on the latter score with respect to certain state officers—judges and legislators, for example. But frequently the victim of the alleged violation will have other alternatives, e.g., a suit for declaratory or injunctive relief, or both, in the case of an allegedly invalid statute or in an instance of alleged judicial wrongdoing, appeal or (in criminal cases) collateral relief.)

106. See HART & WECHSLER, *supra* note 62, at 983.

107. Thus Congress could, in many instances, condition a grant of funds in a particular area on the state's explicit waiver of sovereign immunity in private suits claiming violations of any federal obligations imposed on the state that relate to the grant. See, e.g., Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141 (2002); cf. *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding an analogous condition). And in the area of patents (or copyrights), Congress may also be able to condition the benefit to the state of

Similarly, the doctrine does not significantly impede the ability to vindicate basic federal rights and not only because of the factors just listed. In addition, a defense of sovereign immunity is evidently unavailing with respect to some constitutional rights.¹⁰⁸ And there are in truth few constitutional rights against the states and their subdivisions that do not fall within the broad umbrella of the Fourteenth Amendment, a provision that has been held to authorize legislative abrogation as a means of effective enforcement.¹⁰⁹

V. My Vote

In the process of putting my standards to the test, I believe I have learned something useful. First, the standards do make a difference in establishing a framework for analysis. Had I started with the idea that a vote to overrule is justified solely on the basis of a conviction that the precedent or line of precedent is clearly wrong, this case would be an easy one for me. As it is, I am struggling with a close and difficult question. Second, and somewhat inconsistently, my carefully wrought standard (at least I thought it was) is, like many standards, sufficiently pliable that reasonably strong arguments can be made either way (or sometimes, more than two ways).

But I still have to cast the deciding vote and, in doing so, to push my adherence to judicial candor a little harder. In a sense, neither of the

federal patent (or copyright) protection on the state's willingness to subject itself to the same liability for violation of the patent (or copyright) laws as are other patent (or copyright) holders. *See generally* Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331 (2001). For a proposal of a statutory abrogation of state sovereign immunity from liability for "non-negligent [patent] infringement," see Tanya Mazur, Note, *Free for the "Taking": Why States Should Not Be Able to Invoke Sovereign Immunity in Patent Infringement Disputes*, 75 GEO. WASH. L. REV. 398, 420, 419–22 (2007).

For challenges to several of these suggestions, see Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003) and Jeffrey W. Childers, *State Sovereign Immunity and the Protection of Intellectual Property: Do Recent Congressional Attempts to "Level the Playing Field" Run Afoul of Current Eleventh Amendment Jurisprudence and Other Constitutional Doctrines?*, 82 N.C. L. REV. 1067 (2004). Needless to say, I regard these arguments as unpersuasive and would vote to reject them. If I found myself in dissent, I would have to rethink my conclusion here.

108. In some instances, a state may be constitutionally required to make a retrospective remedy available. *See, e.g.*, *Reich v. Collins*, 513 U.S. 106, 114 (1994) (requiring "meaningful backward-looking relief" for taxes exacted in violation of the Constitution (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 101 (1993))); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (noting the Court's previous decisions regarding the remedies available to cure an unconstitutional regulatory taking). For further discussion of these cases and the impact of subsequent court decisions, see HART & WECHSLER, *supra* note 62, at 946–47.

109. *See supra* note 77 and accompanying text. Under this rubric, Congress could surely expand 42 U.S.C. § 1983 to include remedies against states when the violation alleged falls within the Fourteenth Amendment. And similarly, even under *Florida Prepaid*, Congress could subject states to damages actions for "non-negligent" (intentional) patent or copyright infringements. *See Mazur, supra* note 107, at 420, 419–22.

arguments I have made on the second prong is complete without the other. And putting them together, I come, somewhat reluctantly, to the conclusion that, much as I dislike the state-sovereign-immunity doctrine that has developed, the mischief it is causing is too marginal to warrant a vote to overrule. To put it another way, the doctrine as it has evolved has so many loopholes and limitations that it seldom if ever stands in the way of implementing federal policy or vindicating federal rights.¹¹⁰

I must admit to some surprise at this outcome, given my background as an academic critic of these decisions. Have I perhaps given too little weight to the fact that four of my colleagues are ready to overrule these very decisions? Have I, as a matter of strategy, ceded too much power (as a relative matter) to those of my colleagues who take precedent much less seriously than I do? In short, should I revise my standard downward and change my vote?

For several reasons, I'm not ready to do that. First, I don't think my standard should be different in a case where I find myself with the deciding vote. True, my concern about my own limitations is less troublesome if half of my colleagues are ready to overrule a precedent I don't agree with, but if numbers matter, I need to consider the approach of a majority at least since *Hans*. And my respect for precedent derives from other factors as well, including its significance in delineating the institutional role of the courts.¹¹¹

Second, on the question of strategy—of yielding power to those who place a lower value on precedent—I'm far from certain that my strategy is a poor one or if it is, that it should change my standard. After all, if five of my colleagues vote to overrule a decision I strongly disagree with but wouldn't discard, I'm unlikely to go into mourning even if I find myself in dissent. And if they vote to overrule a precedent I admire, my dissent would be a stronger one because I would disagree on both prongs of my test, not just the second. In either instance, I would try my best to persuade the community of those interested in these issues that my approach is the better one for the health of the institution and of the Constitution we are interpreting. Other dissenters have ultimately prevailed; perhaps I will too. And in the meantime, I have the satisfaction of refusing to rise above principle.

110. Two important articles supporting this view are Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006) and John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998).

For example, I really had to stretch to come up with the Bill of Attainder point, *see supra* note 102 and accompanying text, and even there, I'm not certain that the availability of injunctive relief, direct Supreme Court review of a state court decision, and, in some instances, habeas corpus wouldn't adequately serve the purpose of vindicating the right at issue, even if Congress is unable to supply a private-damages remedy in the exercise of its authority to implement the Fourteenth Amendment. And I confess that coming up with my testing case wasn't that easy.

111. *See supra* notes 21–25 and accompanying text.

VI. Conclusion

My answers to the three questions posed at the outset of this Article¹¹² may be implicit in what has already been said, but I am happy to make them explicit: (1) yes, (2) yes, and (3) probably, in at least some instances.

First, I do believe it is useful to attempt to think through some metaquestions about judging before being confronted by specific cases. To do so, in my view, increases the likelihood that a case will be approached not simply in terms of the particular result desired but with an eye to the broader implications of that result and of the rationale one uses to reach it.

Second, I also believe that this effort, if it gets beyond the stage of platitudes that have little force and are too easily manipulated, will affect the judge's vote and the articulation of his rationale. One can rarely establish a proposition by an example and I have certainly not done so here, but I was interested to discover that my best effort to apply the approach I had adopted led me to a different outcome than I probably would have arrived at had I not attempted to think about the matter ahead of time.

Finally, though I didn't abandon or modify my approach in this instance, I was acutely aware of the strains it imposed on me, as well as the questions raised about the approach by the test case itself. This leads me to the view that any advance effort to work through the problems of judging, when tested in the world of actual cases, will and should be subject to reconsideration and revision as the learning process continues. But it's good to have a starting point.

For further discussion of this Article, visit www.texaslrev.com/seealso.

112. *See supra* Part I.