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# An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent

Lee J. Strang\*

## I. INTRODUCTION

Originalists<sup>1</sup> over the past thirty years have constructed a coherent, elaborate, and powerful theory of constitutional interpretation.<sup>2</sup> In doing so, originalism has changed to overcome cogent criticisms lodged against it.<sup>3</sup> However, busied with building and defending originalism, originalists have thus far failed to fully explain the role of precedent in constitutional interpretation.<sup>4</sup> Recently, some originalists, including myself, have provided explanations of the role of *non*originalist constitutional precedent.<sup>5</sup>

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\* Professor of Law, University of Toledo College of Law. Thanks to Eric Claeys, Ken Kilbert, Lou Mulligan, Rob Natelson, Michael Rappaport, Doug Ray, Bill Richman, Lawrence Solum, Rebecca Zietlow, participants at the University of Toledo College of Law Workshop, participants at the 2009 Law and Society Annual Conference, participants at the 2010 Midwest Political Science Association Annual Conference, and participants at the Ohio Junior Scholars Workshop, for their comments and suggestions. I also wish to thank James Carty, Adi Pawar, and Katie Pawlak for their research assistance, the University of Toledo College of Law for its research support, and Elizabeth for her love and support.

1. By originalism, I mean the theory of constitutional interpretation which holds that the public meaning of the Constitution's text, when it was ratified, is its authoritative meaning. Professor Larry Solum has argued that originalism is defined by two propositions: (1) the fixation thesis and (2) the contribution thesis. See Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411–12 (2009) (describing these theses); see also Lawrence Rosenthal, *Originalism is Useless* 1–2 (Oct. 19, 2010) (adopting this definition) (unpublished manuscript) (on file with author). My definition accords with Solum's theses.

2. For a broad review of the history of originalism see DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 1–89 (2005); JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

3. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89–100, 113–16 (2004) (explaining originalism's evolution).

4. I will use the label “constitutional precedent” for precedents that purport to articulate the Constitution's meaning and to apply that meaning to the facts presented by a case.

5. *E.g.*, Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961 (2008); Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232 (2006); Randy E. Barnett, *Trumping Precedent*

In this Article, I take the important next step and describe the status and role of originalist precedent<sup>6</sup> in constitutional adjudication.

It is crucial for originalists to provide a theory of originalist precedent because, as prominent critics have argued,<sup>7</sup> originalism—at least at first blush—appears to run afoul of the judiciary’s deeply held commitment to *stare decisis*. This tension arises, the critics argue, because, in each new case, originalists are compelled to look beyond precedent and freshly interpret the Constitution based solely upon its original meaning. To make matters worse, originalists have failed to address this powerful criticism. In this Article, I offer an originalist response to this problem.

Originalism must provide an account of the roles originalist precedent plays in constitutional adjudication for three primary reasons. First, originalism, as currently articulated, has a gap—it is not a fully developed theory of constitutional interpretation—because it has not yet addressed the status and role of originalist precedent. To offer a rich, robust theory of constitutional interpretation, originalists must tackle the thorny problem of originalist precedent.

Second, precedent plays such a central role in our legal practice that all plausible interpretative methodologies must account for the role of precedent in their theories. Relatedly, if originalism does not have a role for originalist precedent, then it would dramatically diverge from our current legal practice and lack explanatory power. Along these lines, Professor Richard Fallon, a critic of originalism,

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*with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257 (2005); 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, 327 (2005); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Stephen J. Markman, *Resisting the Ratchet*, 31 HARV. J.L. & PUB. POL’Y 983 (2008); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U.L. REV. 803 (2009); Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); 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); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006).

6. An originalist precedent, as I will explain in Part III, is a precedent that meets the standard of Originalism in Good Faith. Originalism in Good Faith, in turn, provides that a precedent is an originalist precedent if it evinces an objectively good faith attempt to articulate and apply the Constitution’s original meaning.

7. RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 43 (2001).

has suggested that “[a]ccording to the originalist . . . approach[], every case should furnish an occasion for judicial inquiry into the truth about what the Constitution means. Yet the Supreme Court patently does not function this way.”<sup>8</sup>

Third, most scholars believe that stare decisis is normatively attractive,<sup>9</sup> and its prominence in our legal practice suggests that its participants do as well;<sup>10</sup> consequently, theories of constitutional interpretation will be more normatively attractive if they maintain a place for stare decisis. Originalism, as well, will be more normatively attractive if it provides a role for stare decisis.

In this Article, I show that originalism does retain a robust role for originalist precedent, thereby enabling it to fit our legal practice and appropriate the normative attractiveness of stare decisis. I use the label “Interpretative and Constructive Approaches” to identify how judges should treat originalist precedent. In brief, the Interpretative and Constructive Approaches toward originalist precedent take their names from the two functions of originalist precedent. First, some originalist precedent performs the epistemic role of providing evidence of how the Constitution’s original meaning governs a case. Second, other originalist precedent performs the metaphysical task of creating constitutional meaning. Judges will use the Interpretative or Constructive Approaches to originalist precedent depending on the precedent’s function, as described in Part V.

A presumption protects the evidentiary and creative “work” performed by originalist precedent. This presumption gives originalist precedent its privileged place in constitutional adjudication. By following the Interpretative and Constructive Approaches toward originalist precedent, judges can rely on originalist precedent and avoid the extraordinary expenditure of resources that would be necessary to freshly evaluate every possible constitutional issue in cases that come before them. For example, in an Equal Protection Clause challenge to affirmative action, instead of deciding anew whether the Clause prohibits discrimination on the

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8. *Id.* at 43; *see also* Barnett, *Response*, *supra* note 5, at 1232 (“In recent years, as the popularity of originalist interpretation has risen . . . its critics have increasingly harped on its supposed incompatibility with the doctrine of stare decisis.”).

9. *See* Solum, *supra* note 5, at 186–201 (defending a “Neoformalist” conception of stare decisis).

10. *See* Calabresi, *supra* note 5, at 327 (stating that “the caselaw construing the [Constitution’s] text is . . . of critical importance”).

basis of race, courts can rely on originalist precedent for that proposition and move on to the novel issue raised by the case. The Interpretative and Constructive Approaches embody this presumption.

As importantly, the Interpretative and Constructive Approaches resolve an ongoing quandary in originalism. On the one hand, originalism's core tenet is that the Constitution's original meaning is its authoritative meaning.<sup>11</sup> On the other hand, Article III requires that federal judges give significant respect to constitutional precedent.<sup>12</sup> How can a judge be faithful to the Constitution's original meaning, while at the same time give significant respect to precedent? The Interpretative and Constructive Approaches to originalist precedent cut that Gordian Knot. They explain how originalist precedent is a faithful articulation and application of the original meaning and, therefore, in following originalist precedent, judges are faithful to both the original meaning *and* Article III's command that they give precedent significant respect.

This Article proceeds as follows. First, in Part II, I briefly review the debate in originalism over the role of constitutional precedent. I explain that originalists have thus far failed to describe originalist precedent's place in a fully explicated originalism.

Second, in Part III, I describe how participants in our legal practice can distinguish between originalist and nonoriginalist precedent using a standard called Originalism in Good Faith ("OGF"). Under OGF, precedents that are objectively good faith attempts to articulate and apply the Constitution's original meaning, are originalist precedents.

Third, in Part IV, I revisit the original meaning of "judicial Power" in Article III, which requires federal judges to give significant respect to constitutional precedent. With this background in mind, I show that the Interpretative and Constructive Approaches meet Article III's mandate. In doing so, they remain faithful to the Constitution's original meaning, as I explain in Part V.

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11. See Lawrence B. Solum, *Semantic Originalism* (Ill. Public Law Research Paper No. 07-24, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) ("[T]he fixation thesis is the claim that semantic content of the Constitution . . . is fixed at the time of adoption."); see also *id.* at 6-8 (describing the "contribution thesis," which states that the Constitution's original meaning contributes to constitutional law).

12. Strang, *supra* note 5, at 447-62; see also McGinnis & Rappaport, *supra* note 5, at 823-25 (finding that federal judicial power incorporates stare decisis).

Fourth, in the heart of the Article, Part V, I explain the roles of originalist precedent in constitutional adjudication, described by the Interpretative and Constructive Approaches toward precedent. The Interpretative Approach is that originalist precedent serves the epistemic role of providing presumptive evidence of the original meaning and its proper application.<sup>13</sup> The Constructive Approach is that originalist precedent serves the creative role of determining the defeasible content of the Constitution's meaning.

Then, in Part VI, I explain how the Interpretative and Constructive Approaches operate in practice. I show that originalist precedent serves the roles of implementing the original meaning, embedding the original meaning in constitutional law, and affecting other areas of constitutional law through its gravitational force. In so arguing, I will elucidate how the role of originalist precedent varies depending on whether the context is one of constitutional interpretation or constitutional construction.<sup>14</sup>

Lastly, in Part VII, I argue that the Interpretative and Constructive Approaches increase originalism's normative attractiveness and are therefore preferable to other conceptions of originalist precedent that do not. Part VIII concludes.

The Interpretative and Constructive Approaches offered in this Article complete the circle of my originalist theory of precedent. In an earlier article, I showed why and how judges should give nonoriginalist precedent significant respect.<sup>15</sup> In this Article, I finish that project by showing how judges should give originalist precedent significant respect via the Interpretative and Constructive Approaches.

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13. A handful of originalists have stated in passing that precedent "can provide epistemic guidance in the face of uncertain original meaning." *E.g.*, Barnett, *Response*, *supra* note 5, at 1235. In this Article, I elaborate on that insight.

14. Stated briefly, constitutional interpretation occurs when the Constitution's meaning provides a determinate answer to a legal question, while constitutional construction occurs when there is more than one answer consistent with, but not determined by the Constitution's meaning. In these cases, a court must construct—create—constitutional meaning to decide the case. For example, the Commerce Clause determinatively answers, in the affirmative, the question of whether Congress can regulate freight trains traveling across state lines. This is constitutional interpretation. The question of whether Congress can regulate the Internet under its Commerce Clause authority is arguably constitutional construction.

15. Strang, *supra* note 5, at 472–84.

II. BACKGROUND DEBATE OVER THE ROLE OF CONSTITUTIONAL  
PRECEDENT IN ORIGINALISM: MOVING FROM NONORIGINALIST  
TO ORIGINALIST PRECEDENT

*A. Constitutional Precedent*

Despite—or, as I shall argue, out of faithfulness to—the central role of our written Constitution to our national legal and political life, constitutional adjudication has many of the characteristics of our broader common law legal practice and heritage.<sup>16</sup> Indeed, this affinity has prompted an appreciable number of scholars to argue that there exist no significant differences between constitutional and common law adjudication.<sup>17</sup> Less controversially, most constitutional scholars agree that constitutional precedent plays at least a significant role in American constitutional adjudication.<sup>18</sup> For purposes of this Article, I need only briefly describe the commonly accepted aspects of constitutional precedent's roles in constitutional adjudication because my claim is that the conception of originalist precedent I offer sufficiently incorporates those roles.

Most importantly, precedent is a source of legal norms that resolve or help resolve later cases.<sup>19</sup> Of similar importance is the role of precedent implementing the Constitution's norms.<sup>20</sup> Constitutional precedent also structures the Supreme Court's agenda, the cases it will and will not take.<sup>21</sup> It “frame[s], inform[s],

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16. See MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* (2008) (providing the most recent comprehensive overview of the role of precedent in constitutional adjudication).

17. For the most widely-cited example of this genre see David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); see also Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008) (arguing that common law constitutionalism is more normatively attractive than originalism); David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969 (2008) (same).

18. There is a recently-labeled school of thought, the New Doctrinalists, that focuses on the role of legal doctrine. See, e.g., FALLON, *supra* note 7; Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005); see also Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008) (using the ideas from the New Doctrinalists to explain the “Dormant” Commerce Clause).

19. GERHARDT, *supra* note 16, at 147–53.

20. *Id.* at 172–76.

21. *Id.* at 153–55.

and facilitate[s] a constitutional dialogue” in the nation.<sup>22</sup> Further, it forms constitutional structures, such as the legal system.<sup>23</sup> Other functions include: creating and chronicling history; educating Americans about the Constitution; symbolizing constitutional principles; and shaping national identity.<sup>24</sup>

### *B. Nonoriginalist Precedent*

Originalists have offered a stunning variety of normative foundations for originalism, which I will not detail here.<sup>25</sup> As originalism has matured, its proponents have begun to shift their focus from theoretical justifications for originalism to practical issues. Regarding the role of precedent, originalists initially focused their

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22. *Id.* at 155–57.

23. *Id.* at 157–62.

24. *Id.* at 162–72.

25. See BARNETT, *supra* note 3, at 54–68, 109–13 (arguing that originalism best protects natural rights); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 110–59 (1999) (grounding originalism in popular sovereignty); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 802–05 (2002) (arguing that originalism is justified because it protects the good consequences that arise from the Constitution’s supermajority requirements); Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL’Y 909, 983–97 (2005) (arguing that originalism best secures human flourishing). Lawrence Solum has also argued that one version of originalism, what he calls Semantic Originalism, is compatible with most normative justifications for originalism. Solum, *supra* note 11, at 128–34.

Originalists argue that judges are bound by and must enforce the constitutional text’s original meaning. The text’s original meaning is the publicly understood meaning of the Constitution’s text when it was ratified. Judges today may access this meaning through a primarily historical inquiry. Judges first look to the Constitution’s text and structure: what is the term or phrase at issue and how is it used elsewhere in the Constitution? (For an excellent discussion of this aspect of original meaning interpretation, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).) Judges also ascertain the meaning of the text in contemporary linguistic practice, drawing on the text’s usage in public discourse. For example, a judge would look at the use of the term “commerce” in the Framing and Ratification conventions. See BARNETT, *supra* note 3, at 313 (summarizing the Commerce Clause’s original meaning after utilizing this source of data, among others). Judges further review the social, cultural, philosophical, and religious background at the time.

Originalism, as a modern movement in the legal academy, began in response to the perceived excesses of the Warren Court. During the 1970s and 1980s, originalists struggled in a less-than-receptive legal academy to explain the basics of originalism. Originalists paid less attention to the practical aspects of constitutional adjudication, including the role of constitutional precedent. O’NEILL, *supra* note 2, at 94–132 (describing the rise of modern originalist arguments).



attention on the thorny problem of nonoriginalist precedent.<sup>26</sup> Originalists did so because of the common—and powerful—argument used against originalism: that it was fatally compromised by the existence of well-entrenched and broadly accepted nonoriginalist precedent.<sup>27</sup> As Henry Paul Monaghan stated, originalists “cannot reasonably argue that these [nonoriginalist] transformative changes should now be judicially overthrown.”<sup>28</sup>

I have recently argued that significant respect is due nonoriginalist constitutional precedent because of the constitutional and societal goal of effectively pursuing the common good.<sup>29</sup> I tied this normative claim to the Constitution’s command in Article III.<sup>30</sup> I then maintained that judges should overrule nonoriginalist constitutional precedent except when doing so would gravely harm the common good.<sup>31</sup> Other originalist scholars have similarly begun to offer explanations of the status of nonoriginalist precedent.<sup>32</sup> In this Article, I take the next step and describe the role of originalist precedent. The arguments in this Article therefore complement and build on my conclusions regarding nonoriginalist precedent.

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26. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (providing the first explicit discussion of nonoriginalist precedent).

27. See, e.g., FALLON, *supra* note 7, at 3 (“As I argue at length, the originalist model departs radically from actual Supreme Court practice. As originalists themselves acknowledge, doctrines that are of central importance in contemporary constitutional law could not be justified on originalist grounds.”); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 133–34 (1991) (“[F]aithful adherents to original understanding face an inescapable dilemma: they either can strive to overrule the better part of constitutional doctrine and thereby thrust the world of constitutional law into turmoil, or they must abandon original understanding in numerous substantive areas in order to stabilize constitutional law.” (internal quotation marks and citations omitted)).

28. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739 (1988).

29. Strang, *supra* note 5, at 419. I describe the standard of Originalism in Good Faith *infra* Part III.C, to distinguish between originalist and nonoriginalist precedents. This standard is different from the one I used in *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, and I intend Originalism in Good Faith to supersede my prior thoughts on this subject.

30. *Id.* at 420.

31. *Id.* at 419.

32. See sources cited, *supra* note 5. Professor Randy Barnett, with his characteristically incisive pen, has labeled those originalists who argue that originalism, properly understood, incorporates some form of stare decisis, “faint-hearted originalists.” Barnett, *Response*, *supra* note 5, at 1232. Others, including himself, whom he labels “fearless originalists,” largely reject stare decisis in constitutional interpretation. *Id.* at 1233.

*C. Originalist Precedent*

A priori, there are three plausible conceptions of the status and role of originalist precedent in constitutional adjudication<sup>33</sup>: (1) originalist precedent plays no role in later courts' analyses (the "get rid of it all" conception);<sup>34</sup> (2) originalist precedent plays a role in later courts' analyses—it influences the later courts' decisions (the Interpretative and Constructive Approaches); and (3) originalist precedent entirely or substantially determines the outcomes of later courts' analyses (the "common law constitutionalism" conception<sup>35</sup>).<sup>36</sup> According to the "get rid of it all" conception, in each case presenting a question of constitutional meaning, the court must de novo re-evaluate the Constitution's original meaning and de novo apply that meaning to the case. The "common law constitutionalism" conception requires a court to decide later cases on the basis of originalist precedent without regard for the Constitution's original meaning. In other words, originalist precedent's authority is not subject to rebuttal in light of evidence that the precedent incorrectly articulated or applied the Constitution's original meaning.

These first and third conceptions have their adherents.<sup>37</sup> However, for reasons I explain below, I believe that the second conception is the correct originalist stance. The second conception,

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33. From an originalist perspective.

34. See Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1208 (2008) (giving, as one of four possible meanings of stare decisis, that courts have "no obligation to adhere to decisions they disagree with").

35. I intend this label to invoke Professor David Strauss' theory of constitutional interpretation. Strauss, *supra* note 17; cf. Healy, *supra* note 34, at 1208–09 (noting the position that precedents have a "strong presumption" in their favor).

36. See Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 947 (2008) (distinguishing between doctrinalists, who follow precedent, and documentarians, who primarily follow the Constitution's text); Healy, *supra* note 34, at 1174 (dividing scholarly responses to stare decisis in constitutional adjudication into three categories: scholars who argue that stare decisis is constitutionally required; scholars who argue that stare decisis is unconstitutional; and scholars who argue that Congress has the authority to determine the extent of stare decisis).

37. Compare Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1210–11 (2008) (arguing that precedent can play a limited informational role, but that it does not have independent authority), with Lash, *supra* note 5, at 1441–42 (arguing that an originalism justified by popular sovereignty maintains a role for precedent), and Solum, *supra* note 5, at 186–201 (advocating a "neoformalist" conception of constitutional stare decisis that significantly binds the Supreme Court).

what I label the Interpretative and Constructive Approaches toward originalist precedent, requires federal judges to give significant respect to originalist precedent in the form of presumptive authority in later cases. I designate this position the Interpretative and Constructive Approaches because of the primary roles originalist precedent plays under this conception. One is epistemic: originalist precedent bridges the analytic gap between the Constitution's metaphysically determinate original meaning and the facts presented in a concrete case; and the other is metaphysical: originalist precedent determines the content of the Constitution's norms when the Constitution's original meaning is metaphysically indeterminate.<sup>38</sup>

As I noted earlier, originalists have not focused on the role of originalist precedent in constitutional adjudication. I have already offered one explanation why: originalists were focused on securing the foundations of originalism and have only recently begun to explore other implications of originalism. One prominent example of this phenomenon is the recent discussion on the possibility and implications of the distinction between constitutional interpretation and constitutional construction.<sup>39</sup> The distinction was first proposed in originalist literature by Robert N. Clinton in 1987.<sup>40</sup> From there, it was picked up and given prominence by Keith Whittington and Randy Barnett in 1999 and 2004, respectively.<sup>41</sup> Today, there is a robust debate among originalists over the existence and scope of construction.<sup>42</sup> Similarly, originalists are beginning to turn their

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38. Unless noted otherwise, I use the term indeterminate as a shorthand for both indeterminate and underdeterminate.

39. I will discuss these concepts in greater detail later. At this point, let me say that constitutional interpretation is the process of elaborating determinate constitutional meaning, while construction is the creative process of fashioning constitutional meaning when the Constitution's meaning is indeterminate.

40. Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1264 (1987). Professor Clinton relied on an earlier statement of the distinction in MICHAEL PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 20 n.\* (1982).

41. WHITTINGTON, *supra* note 25, at 5–14, 42; BARNETT, *supra* note 3, at 118–30. Professor Whittington also devoted a book to the subject of constitutional constructions. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

42. See Solum, *supra* note 11, at 19–22 (detailing this divergence). Compare *id.* at 67–87 (explaining constitutional construction and detailing the debate over it), with John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of*

attention to other prominent facets of our legal practice, such as precedent.

There are other reasons why originalists have not focused on originalist precedent. First, and perhaps most importantly, while there is substantial criticism of originalism on the basis of nonoriginalist precedent, there has been relatively little criticism based on originalist precedent.<sup>43</sup> Originalists, therefore, could afford to focus on more pressing criticisms. Second, there is substantial disagreement among originalists on the role of *nonoriginalist* precedent, which has thus become a focus of scholarly efforts. Third, for those originalists whose understanding of originalism includes a role for originalist precedent, there was less incentive to explore the subject because it was not a significant point of controversy.

### III. DISTINGUISHING ORIGINALIST FROM NONORIGINALIST PRECEDENT: ORIGINALISM IN GOOD FAITH

#### *A. Introduction*

My explanation of the functions played by originalist precedent in constitutional adjudication depends on a distinction existing between originalist and nonoriginalist precedent *and* that participants in our legal practice have the capability to ascertain that distinction with reasonable accuracy. Below, I explain how litigants, judges, and scholars can access the distinction in a manner that makes the Interpretative and Constructive Approaches toward originalist precedent possible. After describing the two primary facets of an originalist precedent, I describe the standard I suggest courts should utilize: Originalism in Good Faith (“OGF”).<sup>44</sup> Crucially, I end by showing that precedents established using OGF enjoy a presumption of validity in subsequent analogous cases.

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*Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 783–86 (2009) (arguing for original methods originalism which may eliminate construction).

43. Professor Richard Fallon, though not focusing on originalist precedent, has strongly criticized originalism for failing to fit our legal practice’s commitment to *stare decisis*. FALLON, *supra* note 7, at 76–110.

44. I intend this label to invoke Steven J. Burton’s book and its thesis, that good faith judgments by judges are what our legal practice can and should expect of them. STEVEN J. BURTON, *JUDGING IN GOOD FAITH* xii (1992).

*B. Distinguishing Originalist from Nonoriginalist Precedent: A First Approximation*

The distinction between originalist and nonoriginalist precedent is, at first blush, simple to describe. The distinction is between those cases where the Supreme Court properly interpreted—articulated—*and* properly applied the Constitution’s original meaning,<sup>45</sup> and those precedents where it did not. Originalist precedent is, therefore, correct, while nonoriginalist precedent is mistaken.<sup>46</sup>

For a precedent to merit the label originalist, it must first correctly express the Constitution’s original meaning. There are a variety of ways in which the precedent could do this, ranging from an explicit statement of the original meaning, to an inarticulate expression of that meaning. Examples of the first sort are relatively easy to spot. In *Crawford v. Washington*, the Supreme Court clearly stated, following its review of the history of the Confrontation Clause, the Clause’s original meaning: the Clause prohibited “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>47</sup>

Examples of precedents that state the Constitution’s original meaning opaquely are, by definition, more difficult to identify. In these cases, the Court does not explicitly articulate the Constitution’s meaning, leaving one to gather the meaning from other aspects of the opinion. For example, though the Court’s opinion in *Printz v. United States* is an originalist precedent, the precedent’s articulation of the original meaning is not perspicacious.<sup>48</sup> Instead, Justice Scalia’s opinion draws on the rather ill defined “historical understanding and practice, . . . [and] the structure of the Constitution.”<sup>49</sup>

Additionally, there are examples where the Court articulates the Constitution’s meaning without identifying it as original meaning,

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45. See GERHARDT, *supra* note 16, at 8 (“I understand ‘constitutional law’ to be the byproduct of the efforts undertaken by public authorities to determine constitutional meaning *and* to implement the Constitution.”).

46. This was my prior approach to the distinction between originalist and nonoriginalist precedent. See Strang, *supra* note 5, at 430–31 (describing nonoriginalist precedent as mistaken).

47. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

48. *Printz v. United States*, 521 U.S. 898, 905 (1997).

49. *Id.*

requiring one to determine whether the meaning articulated is the Constitution's original meaning. Much of the Court's case law in the antebellum period fits this description. The Court's articulation of the Constitution's meaning in the early Republic accorded with the acknowledged—originalist—interpretative norms of the period and hence was unreflectively originalist. As Jonathan O'Neill and Christopher Wolfe have demonstrated, originalism was simply *the* way to interpret legal texts.<sup>50</sup> Chief Justice Marshall's interpretation of the Contracts Clause in *Sturges v. Crowninshield* provides a good example.<sup>51</sup> To ascertain the "meaning of words in common use," he relied on the federal structure of the United States, he reviewed the history surrounding the Framing and Ratification of the Clause, and he noted past practices by both the states and the federal government.<sup>52</sup>

Precedents that opaquely articulate the original meaning are relatively rare today. This is the result of the movement toward originalism in response to the previous hegemony of nonoriginalist methodologies.<sup>53</sup> Consequently, originalism was and remains controversial on the Court.<sup>54</sup> Its use by its proponents is explicit as a way to show that the proponent's result is principled (in its proponent's eyes) and to contrast that principled result with the unprincipled result reached using nonoriginalist methods.

Second, in order to be an originalist precedent, it must accurately apply the original meaning to the facts presented in the case. Ascertaining whether a court properly applied the original meaning

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50. O'NEILL, *supra* note 2, at 12–18 (describing the Court's use of originalism); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 17–72 (1986) (same); *see also* McGinnis & Rappaport, *supra* note 42, at 765–72 (2009) (reviewing the historical evidence and concluding that the method of interpretation utilized by the Framers and Ratifiers to interpret the Constitution was originalist); Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1305 (2007) (reviewing the historical record and concluding that "[t]he Founders' hermeneutic—how they expected the Constitution to be construed—rested on the text, of course, but also on the subjective understanding of the ratifiers. Where subjective understanding was not retrievable, the preferred substitute was original public meaning.").

51. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 191–208 (1819).

52. *Id.*

53. *See* O'NEILL, *supra* note 2, at 67–160 (giving this history).

54. *See, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 117–32 (2005) (arguing against originalism); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005) (arguing that originalist "fundamentalist" judges are distorting constitutional law).

falls on a continuum, with clearly correct and incorrect applications on each end, and in-between many cases where reasonable disagreement exists.

The Constitution's original meaning takes the form of legal norms—rules, standards, and principles<sup>55</sup>—that are more abstract than the given facts of a case.<sup>56</sup> If the original meaning of a particular constitutional clause is a rule, for example, then that rule provides a norm more general than the class of fact situations to which it is potentially applicable. Consequently, a judge deciding whether and/or how to apply the rule must exercise judgment.

Generally, the more abstract the norm a judge is applying, the greater the burden on the judge's capacities to apply the norm correctly.<sup>57</sup> The relative ease of correctly applying the Presidential Age Clause,<sup>58</sup> compared with the relative difficulty of accurately applying the Fourth Amendment's prohibition on unreasonable searches and seizures,<sup>59</sup> exemplifies this.

This simple statement is complicated, however, by the existence of archetypal cases which, even within the context of an abstract originalist norm, can make application of such a norm easier.<sup>60</sup> For instance, even if the Equal Protection Clause's original meaning is a relatively abstract principle,<sup>61</sup> application of that principle to legal impediments to racial minorities purchasing property would remain an easy case. This is because one of the archetypal practices outlawed by the Clause's original norm was black codes which, among other

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55. See Lee J. Strang, *Originalism and the "Challenge of Change": Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 942–56 (2009) (describing this aspect of the Constitution's original meaning).

56. See BURTON, *supra* note 44, at 28, 68 (noting that reasons are of greater abstraction than the actions they govern).

57. See I-II, SAINT THOMAS AQUINAS, SUMMA THEOLOGICA Q. 94, Art. 4 (Benziger Bros. ed., Dominican Fathers trans. 1947) (“The practical reason . . . is busied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles [of natural law], the more we descend to matters of detail, the more frequently we encounter defects.”).

58. See U.S. CONST. art. II, § 1, cl. 4 (“neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years”).

59. U.S. CONST. amend. IV.

60. See Strang, *Originalism*, *supra* note 55, at 956 (describing archetypal cases); see also JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178–95 (2001) (describing the similar concept of paradigm cases).

61. As Ronald Dworkin has asserted is the case, see RONALD DWORIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 9–11 (1996).

things, prevented newly-freed black Americans from buying and selling property.<sup>62</sup>

*C. Ability and Limits of Ascertaining the Distinction: Originalism in Good Faith*

*1. Originalism in Good Faith as an objective standard*

Originalism in Good Faith is the standard interpreters should utilize to determine whether a precedent is originalist or nonoriginalist. A precedent meets this standard if it is an objectively good faith attempt to articulate and apply the Constitution's original meaning.

Originalism in Good Faith's core inquiry is: does the precedent in question show an objectively good faith attempt to articulate and apply the Constitution's original meaning?<sup>63</sup> The inquiry's focus is primarily on the precedent itself.<sup>64</sup> Therefore, a precedent is an originalist precedent even if later in the author's personal papers it came to light that the author deceitfully, though plausibly, used originalist arguments to reach what, in the author's mind, was a nonoriginalist result. The precedent remained an originalist precedent because it plausibly articulated and applied the original meaning.

The inquiry is focused on a precedent's meeting the objective standard of OGF, not on the subjective beliefs of the precedent's author. Continuing the previous example, a precedent whose author subjectively believed that the precedent did not accurately articulate or apply the original meaning, when in fact the precedent plausibly did so, is an originalist precedent.

This makes OGF different from prominent notions of good faith in other areas of law.<sup>65</sup> For example, the UCC requires that parties execute and perform contracts in good faith.<sup>66</sup> The UCC's definition

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62. RUBENFELD, *supra* note 60, at 182.

63. See Randy E. Barnett, *Constitutional Clichés*, 36 CAP. U. L. REV. 493, 508 (2008) (stating that when "prior decisions do not even purport to be based on original meaning," the decisions are erroneous).

64. Other data bearing on whether the precedent is an objectively good faith attempt to articulate and apply the original meaning is also pertinent. For example, if the precedent's author is a well known originalist or nonoriginalist, that is relevant data, though not necessarily of significant weight.

65. U.C.C. § 1-201(20) (1990).

66. *Id.*



of good faith requires both “honesty in fact” and commercially reasonable standards.<sup>67</sup> In other words, the UCC definition of good faith has both an objective and a subjective component.

Originalism in Good Faith, by contrast, does not delve into a precedent’s author’s (or authors’) subjective beliefs. Instead, OGF operates like qualified immunity. Qualified immunity protects government officials from liability if their discretionary actions were objectively reasonable.<sup>68</sup>

Originalism in Good Faith’s objective standard is more appropriate than a subjective standard for a number of reasons. Most importantly, courts rarely delve into the subjective views of judges who authored precedents, either in the context of vertical stare decisis or horizontal stare decisis. Instead, a precedent is taken at face value, as standing or falling on its own merits. Originalism in Good Faith fits this practice.

Originalism in Good Faith’s objective inquiry is relatively easy to perform because the main data—the precedent—is readily available. By contrast, a subjective inquiry would open the possibility of scholars and litigants delving into the nonjudicial utterances of judges to try to show subjective bad faith. This broadening of the inquiry would undermine Rule of Law values by undermining (what reasonably appear to be) originalist precedents based on a judge’s subjective views and by including in the data relevant to the law<sup>69</sup> materials that are less accessible than the originalist precedent itself.

Relatedly, inquiry into judges’ subjective views would prove disruptive to the judicial process because judges could be reversed and overruled based on claims of bad faith. It would also discourage qualified personnel from accepting judicial office because of the intrusive search into judges’ nonjudicial writings and statements. Judicial office itself would become more like the contentious and invasive confirmation process.

There is also little need for a subjective standard because the error rate of OGF will be low. An objective standard will “catch” many precedents motivated by subjective bad faith. At the same

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67. *Id.*

68. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

69. The judge’s personal papers, for example.

time, the objective standard is protective of precedents that evince a plausible attempt to articulate and apply the original meaning.

Originalism in Good Faith's objective standard is also one that judges can meet. Although the level of effort needed to meet the standard will vary based on the accessibility of the original meaning and the difficulty of applying the original meaning to the question of the case, judges have the resources to do so.

Lastly, an objective standard fulfills OGF's goal of providing a workable benchmark to differentiate originalist precedents from nonoriginalist precedents. For OGF to be practicable—to preserve the precedents' work—the effort required to differentiate originalist precedents from nonoriginalist precedents must be lower than that required to conduct a *de novo* review of the Constitution's original meaning. Otherwise, the Interpretative and Constructive Approaches would take just as much work as the “get rid of it all” conception of originalist precedent, and my conception of precedent would collapse into the “get rid of it all” conception. Originalism in Good Faith avoids this pitfall by adopting an objective good faith standard that permits participants in the legal practice to relatively easily identify originalist precedents.

## *2. Measuring the objective good faith of originalist precedent*

There is no set metric to ascertain whether a particular precedent is a good faith attempt to articulate and apply the Constitution's original meaning. Instead, one must look for indications that the judge acted in good faith. For example, did the judge plausibly review the pertinent data to articulate the Constitution's original meaning? If not, that is a significant warning that the judge was not in good faith articulating the original meaning. Or, did the judge plausibly respond to credible counter-arguments put forward by the dissent that the original meaning's application led to a contrary result? If not, that is a significant indication that the judge did not in good faith apply the original meaning.

The ability of later participants in our legal practice to label a precedent originalist will vary based on a number of factors. These factors include: the type of analysis used in the precedent; the interpretative commitments of the precedent's author, if known; the time period and interpretative milieu in which the precedent was written; whether the precedent is *prima facie* consistent with the text's known original meaning; whether the precedent plausibly

responds to then-available counter-arguments; and whether there are indications that the result is inconsistent with proper application of the articulated original meaning. In practice, the ease of determining whether a precedent is originalist will vary. For instance, if the precedent explicitly reviewed the text, structure, and history of the constitutional text in question, then that weighs strongly in favor of designating it an originalist precedent.

Originalism in Good Faith operates analogously to the administrative review standard labeled “hard look” review.<sup>70</sup> Hard look review is employed when federal courts review discretionary administrative agency determinations.<sup>71</sup> To receive enforcement of its action by a federal court, an administrative agency must show that its decision-making process was reasoned: the agency took into account all pertinent data, responded to reasonable counter-arguments, and explained why it reached its conclusion.<sup>72</sup> Similarly, for a precedent to merit the label “originalist,” it should take into account the data regarding the constitutional provision’s original meaning, explain what original meaning results from that data, then, apply that original meaning to the facts of the case, and in doing so, respond to plausible counterpoints.<sup>73</sup>

### *3. Originalism in Good Faith is the appropriate standard to distinguish between originalist and nonoriginalist precedent*

Originalism in Good Faith is, for a number of reasons, the appropriate standard to distinguish originalist from nonoriginalist precedents.<sup>74</sup> First, OGF meets the mandate of originalism because it accords the Constitution’s original meaning authoritative status. The

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70. See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (using hard look review).

71. See 3 CHARLES H. KOCH, JR., ADMIN. L. & PRAC. § 10.5 *Hard Look* (2d ed. 1997) (“Courts have developed an expression of a limited review function, called the ‘hard look’ doctrine. This word formula is related to the arbitrariness standard and is appropriate in several situations calling for arbitrariness type review.”).

72. *Id.*

73. I do not intend to suggest that the strictness of the scrutiny applied using Originalism in Good Faith is identical to that used during hard look review. Instead, the analogy is meant to draw out the aspects of decision-making.

74. For the reasons stated in the text, I conclude that Originalism in Good Faith is superior to a standard that looks only to the correctness or incorrectness of a precedent, which is commonly taken as the dividing line between originalist and nonoriginalist precedent. See Barnett, *Constitutional Clichés*, *supra* note 63, at 509 (using the standard demarcation line).

interpreter's final purpose<sup>75</sup> is the original meaning's accurate description and application. The interpreter tests pertinent precedents against the original meaning to ascertain whether the precedent is an originalist precedent.

In practice, judges who in good faith strive to articulate and apply the Constitution's original meaning will regularly succeed. For this reason, it is significantly more likely that opinions written by originalists, such as Justices Scalia<sup>76</sup> or Thomas,<sup>77</sup> in a self-consciously originalist manner, will respect the original meaning, than are opinions written in a self-consciously nonoriginalist manner by nonoriginalists, such as Justice Douglas.<sup>78</sup>

Second, OGF accepts that precedents which meet the good faith standard it embodies will sometimes be mistaken. Since the Interpretive and Constructive Approaches toward originalist precedent give originalist precedent only a presumption of bindingness—which can be overcome—good faith mistakes will be corrected. This prevents precedent from permanently displacing the authoritative original meaning.<sup>79</sup>

Third, OGF sets the standard at what we *should* expect of judges. If originalism is the correct method of interpreting the Constitution,

75. See ARISTOTLE, METAPHYSICS 1013a (Hugh Tredennick trans., 1975) (describing a subject's final cause as the "end" and the purpose for which something exists).

76. Perhaps the best example of Justice Scalia, in good faith, articulating and applying the Constitution's original meaning is his majority opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246 (2008) ("*District of Columbia v. Heller* is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.>").

77. A good example of Justice Thomas articulating and applying the Constitution's original meaning in good faith is in his concurrence in *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring), superseded by statute, Gun Free School Zones of 1990, Pub. L. No. 104-208, § 101(f) (1996) as recognized in *U.S. v. Danks*, 221 F.3d 1037, 1038 (8th Cir. 1999).

78. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."); see also James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1762 n.131 (2003) ("Justice William O. Douglas utilized a distinctly nonoriginalist methodology in numerous cases."); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1624 (1989) ("*Griswold v. Connecticut* [is] usually branded by originalists as a nonoriginalist opinion.>").

79. See Kermit Roosevelt, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) (describing "constitutional calcification," which occurs when judicial doctrine entirely displaces "constitutional values").

then judges must utilize it to fulfill their oaths.<sup>80</sup> And their good faith efforts to articulate and apply the original meaning are necessary to utilize originalist interpretation.

Relatedly, OGF sets the standard at what we *may*, as a practical matter, expect of judges. It is futile to require the unerring articulation of the Constitution's original meaning and the unerring application of that meaning, because that standard is unattainable. This is why Ronald Dworkin had to create the hypothetical judge, Hercules, to exemplify his theory of law.<sup>81</sup> As Dworkin concluded, regarding why the flesh-and-blood humans that populate the bench would make mistakes, "the . . . judges of the past did not all have Hercules' ability or insight."<sup>82</sup> By contrast, a good faith attempt by a judge to articulate and apply the original meaning is attainable. Indeed, our legal practice already demands good faith by judges.<sup>83</sup>

Of course, to meet the standard set by OGF, a precedent must evince a good faith effort to recover and apply the Constitution's original meaning. Consequently, the mantle of "originalist judge" will not, by itself, meet the standard. Instead, the authoring judge must "do the work" of explaining the Constitution's original meaning and of justifying how that original meaning leads to the judge's conclusion. There are cases where well-known originalist Justices have authored arguably nonoriginalist opinions. Randy Barnett, for instance, has argued that Justice Scalia's concurrence in *Gonzales v. Raich*<sup>84</sup> fits this description.<sup>85</sup>

Originalism in Good Faith hinges on judges exercising good faith judgment. Like any theory of precedent, the substantive content of precedents will hinge on the authors' judgment of what

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80. U.S. CONST. art. VI, cl. 3; 28 U.S.C. § 453 (2009); *see also* Nash E. Long, *The "Constitutional Remand": Judicial Review of Constitutionally Dubious Statutes*, 14 J.L. & POL. 667, 682–85 (1998) (reviewing the original meaning of the Clause).

81. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977) ("I have invented . . . a lawyer of superhuman skill, learning, patience, and acumen, whom I shall call Hercules.").

82. *Id.* at 119.

83. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A (2009) ("A judge should respect and comply with the law . . ."); *id.* at Canon 3A ("A judge should be faithful to . . . the law . . .").

84. *See* *Gonzales v. Raich*, 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring) (arguing that Congress has authority under the Necessary and Proper Clause to regulate noneconomic intrastate activities that substantially impact interstate commerce).

85. Randy E. Barnett, *The Choice Between Madison and FDR*, 31 HARV. J.L. & PUB. POL'Y 1005, 1014 (2008); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 14–15 (2006).

the original meaning required. For instance, in *District of Columbia v. Heller*, Justice Stevens' dissent<sup>86</sup> plausibly reviewed the Second Amendment's original meaning and plausibly applied that meaning to the facts of the case.<sup>87</sup> Thus, Justice Stevens' dissent meets OGF's requirements. If Justice Stevens could have garnered one more vote, his dissent, and not Justice Scalia's opinion, would have received the deference due under OGF.<sup>88</sup> This possibility is an unavoidable part of practical human institutions. It also afflicts all plausible interpretative methodologies that depend on fallible human judgment.<sup>89</sup>

#### *4. Originalism in Good Faith distinguished from other conceptions of originalist precedent*

Originalism in Good Faith is not the first possible conception of originalist precedent; it is not "get rid of it all."<sup>90</sup> Therefore, some precedent that meets the standard of OGF will, in fact, incorrectly articulate and/or apply the original meaning.<sup>91</sup> However, this error rate has minimal costs, and OGF is superior to the first position. As I argued above, OGF's error rate is low because it strives for and generally produces correct precedent.<sup>92</sup>

Originalism in Good Faith is also superior to the "get rid of it all" conception because it fits our legal practice which gives a significant role to stare decisis. Originalism in Good Faith also preserves the original meaning's authority by ensuring that later

86. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008) (Stevens, J., dissenting).

87. *Id.* at 2824 ("In this dissent I shall first explain why our decision in *Miller* was faithful to the text of the Second Amendment and the purposes revealed in its drafting history. I shall then comment on the postratification history of the Amendment . . .").

88. From my own reading of the history, Justice Stevens incorrectly articulated the Second Amendment's original meaning. If true, then the hypothetical majority Stevens opinion would be an incorrect—though still originalist—precedent.

89. For example, Dworkin's law-as-integrity methodology, which requires judges to articulate the morally best interpretation of the pertinent legal data, places tremendous burdens on a judge's judgment and hence is significantly open to error. This burden is one reason why Dworkin, like other scholars, spends a significant portion of his scholarship criticizing judicial judgment as erroneous. See, e.g., DWORKIN, *supra* note 81, at 147–48 (listing some erroneous decisions).

90. See *supra* note 34 and accompanying text.

91. See McGinnis & Rappaport, *supra* note 5, at 836 ("It would be wonderful if constitutional decision-makers never made any mistakes. But in the real world . . . such mistakes are not infrequent . . .").

92. See *supra* notes 75–79 and accompanying text (arguing that Originalism in Good Faith gives pride of place to the Constitution's original meaning).

courts may overrule incorrect originalist precedents. Finally, any uncorrected errors are likely relatively close to the correct original meaning because the precedent qualified as an originalist precedent, but criticism did not overcome the presumption in its favor.

Likewise, OGF is not the third possible conception of originalist precedent; it is not the “common law constitutionalism” conception. Consequently, OGF may—though there are significant arguments to the contrary<sup>93</sup>—result in more instability than this third alternative. However, OGF preserves much of the value advanced by the “common law constitutionalism” conception by protecting originalist precedent with a presumption. Unlike “common law constitutionalism,” however, OGF also protects values advanced by originalism.<sup>94</sup>

Adopting OGF means that I must revise my previous statements regarding the demarcation between originalist and nonoriginalist precedent. I previously argued that the distinction was synonymous with correct and incorrect precedents.<sup>95</sup> Under OGF, however, a precedent may be an originalist precedent—because it met the objective good faith standard—while at the same time being incorrect—because the precedent incorrectly articulated and/or incorrectly applied the original meaning. This should not be surprising. Any requirement that asks for good faith effort from fallible human actors, while disclaiming perfection, may result in substantively mistaken actions.<sup>96</sup>

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93. See Calabresi, *supra* note 5, at 326–31 (2005) (arguing that originalism provides more stability than common law constitutionalism). The argument that the common law constitutionalism conception is more normatively attractive because it more strongly supports stability is especially weak when contrasted with an originalism that preserves a place for some nonoriginalist precedent, as mine does. See Strang, *supra* note 5, at 442–47 (arguing that preserving some nonoriginalist precedent serves the common good by preserving rule-of-law values).

94. One practical import of Originalism in Good Faith and the presumption accorded originalist precedents is that research on the Constitution’s original meaning would receive greater prominence. See Calabresi, *supra* note 5, at 334 (arguing that if originalism were to become more prominent, judges, scholars, and attorneys would quickly develop the skill set necessary to operate effectively in that environment). The demand would be greater for research to both confirm and rebut the presumption favoring an originalist precedent. Further, attorneys litigating constitutional issues would focus more of their energies on originalist arguments.

95. Strang, *supra* note 5, at 430.

96. Adopting Originalism in Good Faith does not substantially modify my previous conclusions regarding nonoriginalist precedent. Previously, I argued that federal judges should overrule constitutional precedent when it incorrectly articulated or applied the original

*D. Presumptively Binding*

Originalist precedent that meets the OGF standard is protected by a rebuttable presumption. Litigants, scholars, and judges may rebut the presumption by showing that (1) there is not substantial evidence that the originalist precedent in question correctly articulated the original meaning and/or (2) there is not substantial evidence that the precedent correctly applied that meaning.<sup>97</sup>

The presumption in favor of originalist precedent is strong enough that it protects originalist precedents from destabilizing challenges and thereby prevents my conception of originalist precedent from collapsing into the “get rid of it all” conception. At the same time, the presumption is low enough that litigants, scholars, and judges can effectively challenge precedents.<sup>98</sup> This prevents my conception from sliding into the “common law constitutionalism” conception of precedent and, most importantly, preserves the primacy of the Constitution’s original meaning.

The presumption gives originalist precedent its privileged place in constitutional adjudication. It protects originalist precedent from subsequent scrutiny and challenge. It also ensures that originalist precedent receives the constitutionally mandated “significant respect,” described below.

*E. Summary*

Originalism in Good Faith, which asks judges to faithfully articulate and apply the Constitution’s original meaning, provides a practical means of distinguishing originalist precedent from

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meaning, unless doing so would significantly harm the common good. Originalism in Good Faith, by contrast, requires federal judges to overrule constitutional precedent when it does not evince an objectively good faith attempt to articulate or apply the original meaning, unless doing so would significantly harm the common good. Stated differently, Originalism in Good Faith somewhat reduces the class of constitutional precedents labeled nonoriginalist precedents.

97. Thomas Healy explained a similar level of respect for precedent. *See* Healy, *supra* note 34, at 1209 (explaining what he labels a “moderate presumption” in favor of precedent). Randy Barnett has suggested what appears to be a lower level of respect for precedent. *See* Barnett, *supra* note 63, at 508 (stating that “precedent can . . . play an epistemic role, placing some burden on a court to justify its departure from prior decisions”).

98. The presumption in favor of originalist precedent is not as powerful as that identified by Professor Caleb Nelson, “demonstrably wrong.” Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 53 (2001). My substantial-evidence standard permits more frequent rebuttal of the presumption.



nonoriginalist precedent. Originalism in Good Faith is also superior to the other plausible conceptions of originalist precedent.<sup>99</sup> Having established a framework by which to distinguish originalist from nonoriginalist precedent, I now explain how the Interpretative and Constructive Approaches toward precedent fit Article III's requirement that federal judges give constitutional precedent significant respect.

#### IV. THE INTERPRETATIVE AND CONSTRUCTIVE APPROACHES MEET ARTICLE III'S REQUIREMENT THAT FEDERAL JUDGES GIVE SIGNIFICANT RESPECT TO CONSTITUTIONAL PRECEDENT

An originalist theory of precedent does not warrant the appellation "originalist" if it does not comport with the Constitution's original meaning. In this Part, I briefly review the original meaning of "judicial Power" in Article III. Article III requires federal judges to give precedent significant respect. This is important because it will enable me to show how the Interpretative and Constructive Approaches toward originalist precedent meet the Constitution's command. Hence, my conception of originalist precedent merits the label originalist.

In a previous article, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*,<sup>100</sup> I conducted a broad-ranging and in-depth review of the original meaning of "judicial Power" in Article III. I started with English legal practice and then continued with early colonial practice, revolutionary American practice, American practice at the time of the Framing and Ratification, and post-Ratification practice until 1800.<sup>101</sup> While some times and places—such as early-American colonial practice<sup>102</sup>—were exceptional, the surprisingly consistent legal practice was to give precedent significant respect.<sup>103</sup>

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99. In Part VII, I will offer further reasons to believe that OGF is a superior conception of originalist precedent.

100. Strang, *supra* note 5.

101. *Id.* at 447–71.

102. *See id.* at 452–57 (describing how, because of contingent sociological circumstances, such as limited case reporters, the practice of precedent evolved from a weaker form of respect for precedent to a more robust conception, like that in England).

103. *See id.* at 452 ("Americans had an understanding and practice of precedent, which developed over time from the colonial era to the Ratification of the Constitution. By the time of the Ratification, the Framers and Ratifiers understood judicial power to include stare decisis;

I found that English legal practice was characterized by the declaratory or evidentiary theory of precedent.<sup>104</sup> Under this view, precedents are not themselves the law but are instead the best evidence of the underlying common law principles of which the precedents are a manifestation.<sup>105</sup> The declaratory theory of precedent required later judges to give precedent significant respect. Only if a precedent was “flatly absurd or unjust” could a later judge depart from it.<sup>106</sup>

American practice prior to the Revolution, after some initial hesitancy caused by the challenging circumstances presented by the colonial experience, adopted the declaratory theory of precedent.<sup>107</sup> Adherence to this traditional conception of stare decisis continued into the Framing and Ratification period.<sup>108</sup>

During the Framing and Ratification, all references to “judicial Power” I uncovered that referenced stare decisis or precedent, either explicitly stated or assumed as part of a larger argument, that federal judges would create and in turn be bound by constitutional precedent.<sup>109</sup> It is telling that both proponents and opponents of the proposed constitution relied on the assumption that federal judges would give significant respect to constitutional precedent in order to make other, controversial arguments.

For instance, Alexander Hamilton in *Federalist 78* argued for the controversial proposition that Article III’s protections for federal judges, most importantly tenure and salary protections, were appropriate.<sup>110</sup> To support this heavily contested portion of the Constitution, Hamilton relied on the uncontroversial claim that federal judges would create and, in turn, be bound by constitutional precedent. Hamilton argued that “the records of [federal] precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent

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judges must give significant respect to prior analogous cases and must give significant reasons for overruling precedents.”).

104. *Id.* at 447–52.

105. *Id.* This is, of course, an epistemic role for precedent.

106. 1 WILLIAM BLACKSTONE, COMMENTARIES \*70.

107. Strang, *supra* note 5, at 452–57.

108. *Id.* at 457–62.

109. *Id.* at 462–67.

110. THE FEDERALIST NO. 78, at 463–471 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

knowledge of them.”<sup>111</sup> To entice the best lawyers to serve on the federal bench, Hamilton contended, the Constitution properly granted tenure and salary protections. Otherwise, few successful attorneys would engage in the “long and laborious study” necessary to master precedent that was the core of a federal judge’s job.<sup>112</sup> Others made similar use of the assumption that federal judges would give significant respect to constitutional precedent.<sup>113</sup>

Following Ratification and the creation of the new federal judiciary, all participants in the legal practice gave precedent significant respect. Indeed, judges, litigants, and even the court reporters utilized precedent as one of the central tools in legal argument.<sup>114</sup> Alexander Dallas, for example, who was the Supreme Court’s first reporter, regularly commented on the parties’ precedent-based arguments in notes in his reports.<sup>115</sup>

Later scholarship on this point has not challenged, and instead, those scholarly efforts that reviewed the historical record have supported my basic conclusions.<sup>116</sup> For instance, Professors McGinnis and Rappaport, after reviewing the evidence surrounding the original meaning of judicial power, determined that “there is a strong case for concluding that the Constitution incorporates a minimal degree of precedent within the judicial power.”<sup>117</sup>

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111. *Id.*

112. *Id.*

113. *See* Strang, *supra* note 5, at 462–63 (describing Anti-Federalist arguments that relied on this assumption).

114. *Id.* at 467–71.

115. *See, e.g.*, Rice v. The Polly & Kitty, 20 F. Cas. 666, 667 n.2 (D.C.D. Pa. 1789) (No. 11,754).

116. Professor Thomas Healy recently reaffirmed his prior conclusion that “judicial Power” did not incorporate a conception of stare decisis. Healy, *supra* note 34, at 1180–81. Professor Healy concluded that he and I “simply interpret[ed] the facts differently.” *Id.* at 1181. This is true, as far as it goes, though my claim was that my description of the history was more accurate for many reasons, including my reconciliation of a previous scholarly divergence on the extent to which post-Revolutionary states followed stare decisis. Strang, *supra* note 5, at 458–62. (In doing so, I mistakenly stated that Healy cited only two instances of overruling domestic cases when he had cited seven such cases. *Id.* at 459.) I also reviewed *new* data to support my conclusion including my review of pre-1800 federal court practice. *Id.* at 467–71.

117. McGinnis & Rappaport, *supra* note 5, at 806; *see also* Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 633 (2009) (concluding that stare decisis has “constitutional status”). However, Professors McGinnis and Rappaport find that “[t]he constitutionally required precedent rule . . . is . . . narrow in scope.” McGinnis & Rappaport, *supra* note 5, at 825.

Having established that Article III requires judges to utilize constitutional precedent and a method by which to evaluate that precedent—OGF—I proceed below to describe the Interpretative and Constructive Approaches toward originalist precedent. I explain how they give significant respect to precedent and enable judges to meet Article III's requirement. They do this by according originalist precedent a presumption of correctness, in the case of the Interpretative and Constructive Approaches, and, additionally, by according defeasible bindingness in the case of the Constructive Approach.

#### V. THE INTERPRETATIVE AND CONSTRUCTIVE APPROACHES TOWARD ORIGINALIST PRECEDENT

##### *A. Introduction*

In this Part, I describe the characteristics of the Interpretative and Constructive Approaches toward originalist precedent. I tie this conception of originalist precedent to the distinction between constitutional interpretation and construction.<sup>118</sup> I also show that this conception is further supported by and derivative of the distinction between metaphysical and epistemic determinacy. Lastly, I tie all these points together to give a robust account of the Interpretative and Constructive Approaches.

##### *B. Preliminary Description of the Interpretative and Constructive Approaches*

The Interpretative Approach toward originalist precedent treats originalist precedent—that is, precedent that meets the OGF standard—as providing the presumptively correct articulation and application of the Constitution's original meaning. Judges should utilize the Interpretative Approach when the Constitution's original meaning is determinate,<sup>119</sup> and when its meaning is metaphysically determinate but epistemically indeterminate. Originalist precedent in this context does not create the Constitution's governing norms, and instead it is only an explication of the Constitution's determinate original meaning in a particular factual context.

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118. Though, this is a reasonably contested position. *See supra* note 14 (discussing originalist differences on the existence and extent of constitutional construction).

119. That is, when the meaning is both metaphysically and epistemically determinate.

Under the Interpretative Approach, originalist precedent governs later cases so long as the presumption in its favor remains unrebutted. If later judges, litigants, or scholars rebut the presumption, then the precedent loses its bindingness on later cases, and later judges should use their own good faith judgment to articulate and apply the Constitution's original meaning *de novo*.

The Constructive Approach toward originalist precedent treats originalist precedent as providing the defeasibly correct construction of the Constitution's meaning. Judges should utilize the Constructive Approach when the Constitution's original meaning is metaphysically indeterminate. Originalist precedent, in this context, creates—determines—the Constitution's governing norms. However, the precedent's determination of the Constitution's meaning is defeasible in light of a differing constitutional construction by the elected branches, for reasons I have explained elsewhere.<sup>120</sup>

As with the Interpretative Approach, originalist precedent that constructs constitutional meaning is protected by a rebuttable presumption. If later judges, litigants, or scholars show that the Constitution's original meaning—indeterminate though it is—excludes the precedent's construction, then the presumption is overcome. Similarly, if later arguments are offered showing that the precedent's application of the constructed meaning is wrong, then the presumption is overcome.

*C. Distinction Between Interpretation and Construction, and Why It Matters to Originalist Precedent*

The arguments I make in this Article regarding the Interpretative and Constructive Approaches toward originalist precedent assume the validity of the distinction between interpretation and construction. I draw this distinction primarily from Professors Whittington, Barnett, and Solum.<sup>121</sup> They argue that interpretation is

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120. See Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 70–72 (2005) (making these arguments); see also WHITTINGTON, *supra* note 25, at 7–13 (arguing that constitutional construction is a political act of creation).

121. See BARNETT, *supra* note 3, at 118–30 (explaining constitutional construction and how it differs from interpretation); WHITTINGTON, *supra* note 25, at 5–14 (same); SOLUM, *supra* note 11, at 67–87 (explaining constitutional construction and detailing the debate over it).

“a search for meaning already in the text,”<sup>122</sup> while construction is the creative “construction of meaning” to fill in gaps left after interpretation is completed.<sup>123</sup> I have argued elsewhere that federal judges must enforce interpretations of the Constitution against the contrary interpretations of the elected branches, but that they must defer to the elected branches regarding constitutional constructions.<sup>124</sup> This Article follows that approach.

The distinction between interpretation and construction flows from the distinction between determinate and indeterminate law.<sup>125</sup> The law is determinate when its application determines the outcome of a legal case—there is one right answer to a legal question<sup>126</sup>—while the law is indeterminate when it limits the outcomes of a legal case but does not mandate one outcome.<sup>127</sup> Likewise, interpretation is the articulation of the Constitution’s meaning, while construction is the choosing of a meaning that is limited by the Constitution, but not determined by it.

Originalist precedent that interprets the Constitution is binding on subsequent analogous cases. Precedent that involves constitutional constructions is also binding on subsequent analogous cases. However, as I will describe below, because it involves constructions and not interpretations, its bindingness is also defeasible through contrary constructions by the elected branches.

The role of constitutional construction is controversial within originalism, and many scholars have put forward thoughtful arguments. In this Article, I avoid taking sides in that debate. Instead, assuming that constitutional construction exists within a fully articulated originalism, I describe the role of originalist precedent within it.

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122. WHITTINGTON, *supra* note 25, at 6.

123. *Id.* at 7–8.

124. Strang, *supra* note 5, at 439–40.

125. *See id.* at 439–44 (discussing the relationship between determinacy and constitutional constructions in constitutional interpretation).

126. *See id.* at 426–29, 439.

127. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

*D. Distinction Between Epistemic and Metaphysical Legal  
Determinacy, and Its Support for the Interpretative and Constructive  
Approaches*

Building on the previous Section's distinction between constitutional interpretation and construction, in this Section I show that originalist precedent has an epistemic role in the context of interpretation, and that it plays a metaphysical role in the context of construction. First, however, I describe the distinction between epistemic and metaphysical determinacy upon which my argument is built.<sup>128</sup> I demonstrate that the Interpretative Approach toward originalist precedent is appropriate when the law is metaphysically and epistemically determinate. It is also applicable when the law is metaphysically determinate and epistemically indeterminate. The Constructive Approach, though, applies when the Constitution's original meaning is metaphysically and epistemically indeterminate.

The distinction between metaphysical and epistemic legal determinacy is, respectively, between whether the law is in fact determinate, and whether participants in our legal practice can ascertain whether the law is determinate.<sup>129</sup> The law is metaphysically determinate when there is one right answer to a case. This is true even if participants in our legal practice are unable to ascertain what the law is (that is, the law is epistemically indeterminate).

The law is epistemically determinate when the law is metaphysically determinate *and* participants in our legal practice can ascertain that the law is determinate.<sup>130</sup> Our legal practice, which aspires toward liberal legality and hence law-governed human activity,<sup>131</sup> aims toward epistemic determinacy.<sup>132</sup> There is a

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128. The best discussion in the law review literature on this distinction remains Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134 (1990).

129. I do not address the question of who or what is the relevant standard for determining epistemological determinacy and instead use the capacious phrase, "participants in our legal practice," to avoid the issue. I also elide the question of what level of consensus among participants is necessary to qualify for determinacy.

130. The law can also be epistemically determinate and metaphysically indeterminate. Stated differently, participants in our legal practice know that there is no right answer.

131. See BURTON, *supra* note 44, at 10 (arguing that if a judge's judgment is not law-bound then "it may seem[] judges must resolve indeterminacies on the basis of controversial political values—not the law.").

132. See *id.* at 10–11 (arguing that "stubborn legal indeterminacy need not be pervasive").

consensus, however, that it does not achieve that goal, at least not always.<sup>133</sup>

The effort and judgment that is required to accurately ascertain whether the law is determinate varies. In the vast majority of possible cases—especially in “easy cases”<sup>134</sup>—the effort is minimal. By contrast, in the subset of epistemically determinate cases where the burdens on legal reasoning are the highest—those cases that are close to the line of being epistemically indeterminate—the evidentiary function of precedent under the Interpretative Approach is most robust.<sup>135</sup>

The law is epistemically indeterminate when, despite its metaphysical determinacy, participants in our legal practice cannot ascertain the law’s content. Stated differently, in some cases, even though there is “one right answer,”<sup>136</sup> legal actors cannot discover that answer. Part of the reason for this inability to access the law’s determinate content are limitations imposed by the human condition.<sup>137</sup> Unlike Hercules, legal actors do not have—to pick just

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133. See Strang, *supra* note 120, at 49–54 (describing the scholarship on this point).

134. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985) (explaining the ubiquity of easy cases).

135. It is often the case that when the law is epistemically determinate it still takes significant work to ascertain the law’s determinate content. In my own practice experience, for instance, there was a considerable subset of cases where, to arrive at the conclusion that the law was determinate and to learn the law’s content, I had recourse to a significant body of legal materials. I labored over statutes, administrative regulations, cases interpreting and applying both, and background constitutional and common law norms. My experience—that the law can be epistemically determinate and yet that it may take great effort to arrive at that conclusion—is supported by the work of many scholars. Dworkin’s Hercules, though possessing greater time, research skill, and judgment than myself, utilized the same mode of inquiry to ascertain the law’s determinate content. DWORKIN, *supra* note 81, at 105–06.

136. *Id.* at 279–90 (defending the thesis that, even in hard cases, there can be “one right answer”).

137. This obstacle to legal determinacy is significantly lessened as access to historical materials has become easier and with the advent of computer assisted historical searches. The Commerce Clause’s original meaning provides a good example of this phenomenon. In 1937, access to the Clause’s original meaning was more limited, and the only means to synthesize the Clause’s original meaning was unaided human effort. Today, by contrast, there are numerous electronic resources that store the historical record, and computers assist in synthesizing original meaning. Randy Barnett’s research into the Clause exemplifies these advances. See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856 & n.32, 857 & n.35, 858–62 (2003) (describing his methodology of using computer assisted searches of electronically available historical sources). Consequently, the amount of epistemic indeterminacy is less today than in the past and is likely to decrease further.



one limitation—unlimited time to devote to ascertaining the law’s content.<sup>138</sup>

A second reason is that law is a practical endeavor. Unlike intellectual investigations that require theoretical reason, the goal of which is certainty, practical inquiries often do not offer certainty.<sup>139</sup> Instead, using practical reason, the goal is to determine which course of action is most likely correct. This is a consequence of the subject matter of practical reason: the thick, fact-laden, contingent occasions of human activity.<sup>140</sup>

These concrete situations of human activity pose at least two analytically distinct questions: (1) What ethical (or legal) norms are pertinent to—potentially govern—this case?; and (2) What course of conduct does the governing norm prescribe? Answering both questions can potentially, depending on the subject, place tremendous burdens on the judgment of the decision maker.

Analogizing to the realm of ethics, some questions are relatively simple: one who borrows a knife from one’s neighbor to cut vegetables must return it.<sup>141</sup> Determining the correct course of conduct presented by this case is relatively straight forward because both the governing ethical norm and the manner by which that norm governs this case are relatively clear. The governing norm is “one must return borrowed items to their owners,” and the hypothetical presented a paradigm example<sup>142</sup> of that norm.

However, the thicker one makes the hypothetical by adding new circumstances, the more difficult both analyses become, and quickly

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138. See DWORKIN, *supra* note 81, at 105 (describing Hercules’ lack of human limitations).

139. ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE, *supra* note 75, at bk. II, ch. 9, 1109b19–23 (“But up to what point and to what extent a man must deviate before he becomes blameworthy it is not easy to determine by reasoning, any more than anything else that is perceived by the senses; such things depend on particular facts, and the decision rests with perception.”).

140. See Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489 (1998) (describing and defending casuistry as a mechanism to answer practical questions).

141. See CATECHISM OF THE CATHOLIC CHURCH 2409 (1994) (“[A]ny form of . . . keeping the property of others is against the seventh commandment . . . [including] deliberate retention of goods lent . . . .”); I-II AQUINAS, *supra* note 57, Q. 66, art. 8 (stating that the unconcealed taking of another’s property without the owner’s consent is robbery, which is contrary to justice).

142. See ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY 251–52 (1988) (describing the concept of “paradigm cases” in the casuist tradition); Richard B. Miller, *Narrative and Casuistry: A Response to John Arras*, 69 IND. L.J. 1015, 1017 (1993) (same); see also RUBENFELD, *supra* note 60, at 178–95 (describing a similar concept).

so. Continuing the previous hypothetical, assume that the neighbor has a violent temper,<sup>143</sup> and that he has been arguing with another neighbor.<sup>144</sup> It is now unclear whether the norm of returning borrowed items governs, or whether another norm, such as “protect innocent human life,” applies.<sup>145</sup> Further, it is unclear the manner by which one or both of these norms applies to the case.

Returning to the realm of law, and specifically to constitutional interpretation, a similar phenomenon obtains because of law’s practical orientation. Both the articulation of the Constitution’s original meaning and how it governs a particular case will be more or less difficult depending on the subject. As in ethics, it is sometimes clear what the governing original meaning norm is and how it governs a particular case. For example, the original meaning of the Commerce Clause is fairly clear,<sup>146</sup> and its prescription in the case of whether Congress can regulate the transportation by rail of commercial goods from New York to Illinois is also relatively clear.<sup>147</sup> In many other situations, however, things are less clear. And, of course, one of the processes—articulating the original meaning or applying that norm—may be clear while the other is less so.

The Interpretative Approach operates when the Constitution’s original meaning is metaphysically and epistemically determinate. In these cases, an originalist precedent will articulate the determinate original meaning that governs the legal questions raised by the case. The Interpretative Approach functions most importantly when the law is epistemically determinate and the case is difficult.

The Interpretative Approach operates as well when the Constitution’s original meaning is metaphysically determinate but epistemically indeterminate.<sup>148</sup> This is because the Constitution’s

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143. The neighbor lacks the virtue of temperance. See JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 145–206 (1966) (describing the virtue of temperance).

144. See JONSEN & TOULMIN, *supra* note 142, at 324–25 (giving this hypothetical).

145. *Id.* at 325 (“[T]he question is what relative weight one should allow the two relevant considerations—the obligation to return a borrowed gun, and the duty to avoid being a party to violence or homicide.”).

146. See BARNETT, *supra* note 3, at 313 (describing the original meaning as: “to specify how a rightful activity may be transacted . . . and the power to prohibit wrongful acts” in “the trade or exchange of goods[,] including the means of transporting them . . . between persons of one state and another”).

147. See *United States v. Lopez*, 514 U.S. 549, 558 (1995) (describing Congress’ power to regulate the instrumentalities and channels of interstate commerce).

148. See Barnett Response, *supra* note 5, at 1235 (stating that precedent “can provide epistemic guidance in the face of uncertain original meaning”).

meaning is determinate so that, in principle, there is a right answer. There are obstacles to accessing that right answer which may or may not be permanent. If or when those obstacles are removed—for example, new research techniques permit greater access to the original meaning—then the law would cease to be epistemically indeterminate.

A possible example of this phenomenon is the Second Amendment. The Amendment's original meaning is metaphysically determinate on the point of an individual right to keep and bear arms.<sup>149</sup> From the perspective of judges, prior to the early-1980s, there was little readily available evidence of the Second Amendment's original meaning. At this point, then, the Second Amendment's original meaning was metaphysically determinate and epistemically indeterminate. Then, beginning with Don Kates' famous 1983 article, *Handgun Prohibition and the Original Meaning of the Second Amendment*,<sup>150</sup> a wealth of scholarship explored the Amendment's original meaning. This opened the evidentiary door to the Amendment's original meaning and made what was once epistemically indeterminate, determinate.

By contrast, the Interpretative Approach does not operate when the Constitution's original meaning is metaphysically and epistemically indeterminate. Instead, the Constructive Approach applies, and later judges will give deference to originalist precedents that construct constitutional meaning. In these cases, the original meaning does not answer the question, and so the Court must create an answer. In doing so, the Court creates constitutional meaning.

#### *E. The Presumption in Favor of Originalist Precedent and Precedential Drift*

I noted above that originalist precedent under both the Interpretative and Constructive Approaches is protected by a rebuttable presumption. The presumption arises when a precedent meets the OGF standard. This presumption gives originalist

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149. See Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996) ("Research conducted through the 1980s has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment.").

150. Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

precedent its privileged place in constitutional adjudication. The presumption protects originalist precedent from subsequent scrutiny and challenge. Consequently, it ensures that originalist precedent receives the constitutionally mandated “significant respect.”

One possible challenge to my theory of originalist precedent is that it will result in what I call precedential drift. Precedential drift occurs when, over time, precedent builds upon itself, with the result that the operative legal meaning of the Constitution, as articulated by the precedent, diverges from the Constitution’s original meaning.

A possible instance of precedential drift occurred in the Supreme Court’s Commerce Clause case law in the late-nineteenth and early-twentieth centuries.<sup>151</sup> During this period, most Supreme Court Commerce Clause precedent met the standard of OGF. For example, in *United States v. E.C. Knight Co.*, the Court ruled that Congress’ Commerce Clause power did not extend to manufacturing.<sup>152</sup> The Supreme Court there applied the Clause’s original meaning.<sup>153</sup> Yet, as detailed by Professor Richard Epstein, the Court’s precedent slowly expanded the operative legal meaning of what Congress could regulate.<sup>154</sup>

The primary check on precedential drift is the rebuttability of the presumption protecting originalist precedent. Litigants, scholars, and judges may rebut the presumption by showing either that: (1) there is not substantial evidence that the originalist precedent in question correctly articulated the original meaning; and/or (2) there is not substantial evidence that the precedent correctly applied that meaning.<sup>155</sup> The presumption is low enough that litigants, scholars, or judges can effectively challenge precedents.<sup>156</sup> This prevents precedential drift and preserves the primacy of the Constitution’s original meaning.<sup>157</sup>

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151. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1408–42 (1987) (detailing this evolution).

152. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (arguing that “[c]ommerce succeeds to manufacture, and is not a part of it”).

153. Epstein, *supra* note 151, at 1408–42.

154. *Id.*

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

156. The presumption in favor of originalist precedent is not as powerful as that identified by Professor Caleb Nelson, “demonstrably erroneous.” Nelson, *supra* note 98. My substantial evidence standard permits more frequent rebuttal of the presumption than that proposed by Professor Nelson.

157. See *supra* note 25 and accompanying text.

*F. Summary of the Interpretative and Constructive Approaches*

The conception of originalist precedent put forward in this Article fits and draws support from the distinctions between constitutional interpretation and construction, and between metaphysical and epistemic determinacy.<sup>158</sup> Judges should utilize the Interpretative Approach toward originalist precedent when the precedent in question is interpreting the Constitution's original meaning. This occurs when the original meaning is metaphysically and epistemically determinate. Judges should also apply the Interpretative Approach when the original meaning is metaphysically determinate and epistemically indeterminate.

In both of these situations, originalist precedent is playing an epistemic role by articulating, in good faith, the Constitution's original meaning and, in good faith, applying that meaning to the facts presented by a case. It is not creating meaning. Rather, the precedent is putting into practice the original meaning.

As I describe concretely in Part VI, below, these precedents provide evidence of how the original meaning controls concrete situations. Originalist precedents subject to the Interpretative Approach show how the gap between the Constitution's authoritative meaning and the conduct it governs is bridged.

Judges should apply the Constructive Approach, by contrast, when the precedent in question is constructing constitutional meaning. This occurs when the Constitution's original meaning is metaphysically indeterminate. Here, originalist precedent is playing the metaphysical role of creating constitutional law and then applying those norms to the facts of the case.

Originalist precedent subject to the Interpretative Approach explains the Constitution's resolution of particular issues presented

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158. My Interpretative and Constructive Approaches to originalist precedent parallel the distinction articulated by Professor Paul Horwitz between epistemic and legal deference. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008). Epistemic deference, as described by Horwitz, is deference to another because of its greater insight into the truth of the matter. *Id.* at 1061. This fits my Interpretative Approach where a later Supreme Court will defer to an earlier Court's determination embodied in an originalist precedent. Horwitz describes legal deference as deference to another because of the authority's legal standing. *Id.* This fits my Constructive Approach where originalist precedent subject to the Constructive Approach receives deference, in part, simply because it is the *Supreme Court's* resolution of the case. Professor Gary Lawson has made a distinction similar to Horwitz's. Gary Lawson, *Everything I Need to Know About Presidents I Learned from Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y 381, 384-86 (2001).

in cases. It does so by specifying how the Constitution resolves discrete legal questions, by making implicit constitutional norms explicit, by resolving perceived tensions in the Constitution's meaning, and by embedding these resolutions in precedent. These resolutions, preserved in originalist precedent, embody the authoritative norms that govern social activity in the class of situations analogous to the originalist precedent. Giving originalist precedent significant respect preserves these accomplishments and avoids leaving all questions open to re-evaluation.

Originalist precedent subject to the Constructive Approach crafts legal norms that resolve particular issues presented in cases. These constructed constitutional norms coordinate social activity. Giving the constructions embodied in originalist precedent significant respect protects the work done by the prior court in constructing the norms, and it prevents continual attack on the precedential resolution of issues.

*G. The Interpretative and Constructive Approaches Meet Article III's Mandate*

My theory of originalist precedent is truly originalist because it comports with Article III's requirement that federal judges give precedent "significant respect." Here, I tie Article III's mandate to the Interpretative and Constructive Approaches. In doing so, I resolve the quandary of how judges can be faithful to the Constitution's original meaning and, at the same time, follow precedent.

First, utilizing the Interpretative and Constructive Approaches is faithful to the Constitution's determinate original meaning. These approaches give the original meaning pride-of-place by aspiring to accurately articulate and apply the original meaning. As a practical matter, judges who in good faith strive to articulate and apply the Constitution's original meaning will regularly succeed. Further, since originalist precedent receives only a presumption of bindingness, good faith mistakes will be corrected.

Second, the Interpretative and Constructive Approaches require judges to follow precedent and, consequently, Article III's requirement. I have argued that when federal judges give originalist precedent significant respect, they preserve the interpretative and constructive work done by those precedents. Regarding originalist precedent subject to the Interpretative Approach, giving those

precedents significant respect ensures that they perform their evidentiary work of articulating the Constitution's original meaning and explaining how that meaning governs particular fact patterns. For originalist precedent subject to the Constructive Approach, significant respect preserves their creative articulation and application of constitutional meaning.

Another way of looking at my resolution of the quandary is that my explanation of the Interpretative and Constructive Approaches shows why Article III's command that federal judges give precedent significant respect makes sense. One could argue that, in every case, the originalist judge should retire to the original meaning and skip any pertinent precedent; the critic could say that the originalist precedent is adding nothing to the judge's analysis.

In response, my conception of originalist precedent shows that originalist precedent has two important roles: evidentiary and creative. I have also argued that these roles are effectuated by according originalist precedent a presumption of correctness. Therefore, the originalist judge acts intelligently when he utilizes originalist precedent in constitutional adjudication.

#### *H. Conclusion*

Below, in Part VI, I explain the concrete ways my conception of originalist precedent operates. Then, in Part VII, I conclude that the Interpretative and Constructive Approaches are more normatively attractive than alternative conceptions of originalist precedent.

### VI. PUTTING INTO PRACTICE THE CONSTITUTION'S ORIGINAL MEANING

#### *A. Introduction*

In this Part, I explain the ways in which the Interpretative and Constructive Approaches operate in practice. Section B discusses the roles of originalist precedent in the context of constitutional interpretation. Here, originalist precedent does not alter the Constitution's meaning and the Interpretative Approach applies. Originalist precedent provides evidence of how the original meaning is connected to and governs the activity under its purview. It bridges the distance between the original meaning and the human activity subject to the Constitution's governance.

Section C covers constitutional construction. Originalist precedent in this context, in many cases, determines the Constitution's meaning, so the Constructive Approach governs. These originalist precedents create the governing constitutional norm. When the Constructive Approach applies, unlike when the Interpretative Approach applies, the originalist precedent does more than simply provide evidence of the Constitution's meaning: it constructs that meaning. In some other cases of constitutional construction, however, the Interpretative Approach continues to apply. I will explain when and why.

### *B. Constitutional Interpretation*

#### *1. Specifying the Constitution's original meaning*

By specification I mean answering a practical—here, legal—question in the context of a concrete—here, legal—case. Specification makes explicit how the Constitution's original meaning resolves a particular legal question. It identifies the relevant constitutional norms and determines how those norms order human actions. This is the primary practical role of originalist precedent. Most originalist precedent fulfills this function.

Originalists argue that judges should enforce the original meaning of the Constitution's text, but it is an exceedingly rare case, especially today, that turns on the simple application of the original meaning (or, more precisely, the principle, standard, or rule, embodied in the text's original meaning) to the facts presented in a case. Instead, federal courts have, from their inception, articulated legal norms that *specify*<sup>159</sup> the result in constitutional cases, thereby reducing or eliminating the need for direct appeals to constitutional text.

Specification is the process by which courts create constitutional law. The creation of constitutional law and doctrine through the process of specification is entirely legitimate—indeed, it is a necessary

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159. I use the term “specify” to distinguish the activity of courts when they create constitutional law or doctrine from what Professor Richard Fallon labels “implementing” the Constitution, which is a broader term that, in addition, covers the creative activity of courts when they put the Constitution into practical effect. See FALLON, *supra* note 7, at 5–7, 41–42 (describing implementation and distinguishing it from specification); see also Fallon, *supra* note 18, at 1283 (distinguishing specification from implementation).



component of constitutional adjudication.<sup>160</sup> A case before a court presents a set of factual circumstances that, if a constitutional case, implicates one or more provisions of the Constitution. The litigants in the constitutional case each argue that the purportedly applicable constitutional provision has a certain meaning, and they argue that application of that meaning to the factual circumstances of the case leads to them prevailing.

After entertaining these arguments, the court first determines the constitutional provision's original meaning. Second, the court applies that meaning to the case and determines which litigant's argument prevails. Through this two-step process the court specifies that in factual situations analogous to that presented by the case, a particular result obtains. In doing so, the court announces a rule, standard, or principle, thereby creating constitutional law. That rule, standard, or principle guides future courts' determinations of future, analogous, constitutional cases. The constitutional law thereby created can come in the form of constitutional law doctrines, tests, and formulas with which lawyers are familiar.<sup>161</sup>

By itself, the Constitution is a "sparse collection of general terms" that often lacks the specificity to govern a nation, especially a complex, dynamic nation such as our own.<sup>162</sup> Terms like "Commerce,"<sup>163</sup> are not self-applying, and much less are phrases like "executive Power"<sup>164</sup> or "impairing the Obligation of Contracts."<sup>165</sup> The process of specification takes the meaning of the Constitution's general terms and phrases and creates constitutional law capable of meeting society's need for coordination. The more particularized norms of constitutional law created through adjudication and found in cases have the specificity to connect the meaning of constitutional terms to practical situations.<sup>166</sup> And these norms have the determinacy to guide the conduct of society's members to a much

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160. See Fallon, *supra* note 18, at 1281 (arguing that the Constitution's meaning is frequently not an effective means of implementing the Constitution).

161. WHITTINGTON, *supra* note 25, at 6 (arguing that before the Constitution can "impose[] obligations on the judge that are reflected in the vindication of the legal entitlements of one party or another . . . it must be elaborated as a series of doctrines, formulas, or tests").

162. *Id.*

163. U.S. CONST. art. I, § 8, cl. 3.

164. U.S. CONST. art. II, § 1, cl. 1.

165. U.S. CONST. art. I, § 10, cl. 1.

166. WHITTINGTON, *supra* note 25, at 6.

greater degree than the constitutional text standing alone.<sup>167</sup> Many originalists have hinted at the need to articulate the process of specification,<sup>168</sup> but this is its first articulation.

The process of specification I have described is not unique to law. Philosophy, and in particular ethics, has grappled with an analogous situation since at least the time of Socrates.<sup>169</sup> The fact that most philosophical traditions in the field of ethics have articulated means to specify how ethical norms decide concrete cases suggests that specification in law is likewise possible.<sup>170</sup>

In the realm of practical ethics, philosophers have struggled to articulate how human conduct can be guided by norms—by reasons<sup>171</sup>—that are, by definition, more general than the specific conduct they are supposed to guide. For example, one commonly accepted norm of human conduct is “do not steal.”<sup>172</sup> The manner by which that norm guides specific human actions, however, is not always clear. In the property law context, there is a veritable cottage industry of philosophical arguments why—or why not—this norm applies to persons who use another’s property in cases of necessity.<sup>173</sup> Strong arguments have been advanced on both sides,<sup>174</sup> indicating

167. *Id.*

168. *See, e.g.,* Calabresi, *supra* note 5, at 327 (“[I]t is certainly the case that many parts of our constitutional text are worded at a high level of generality and the caselaw construing the text is thus of critical importance.”).

169. *See* JONSEN & TOULMIN, *supra* note 142 (describing the history of how the West has attempted to resolve concrete ethical dilemmas); *see also* Miller, *supra* note 142, at 1015 (describing some of the methods used by casuists to reduce ethical uncertainty).

170. My claims in this section, including my analogy to ethics and particularly to the Aristotelian tradition, show that I do not accept claims that the truth of constitutional meaning is only found in its operation. *See* Roderick M. Hills, Jr., *The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173 (2006) (giving a pragmatic view of precedent).

171. *See* ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 102–05 (1999) (describing human action as reason-governed).

172. *Exodus* 20:15 (“Thou shalt not steal.”).

173. The doctrine of necessity is where one is privileged to use another’s property because of the need to protect one’s or another’s person or property. RESTATEMENT (SECOND) OF TORTS § 195 (1965).

174. *See, e.g.,* II-II AQUINAS, *supra* note 57, Q. 66, art. 7 (“In cases of need, all things are common property, so that there would seem to be no sin in taking another’s property for need has made it common.”); HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, at XI.4 (Francis W. Kelsey trans., 1925) (following Aquinas’ position); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 113 (1978) (offering a law and economics justification for the doctrine of necessity).

that application of the general norm—do not steal—to some situations—those of necessity—is a challenging process.

Philosophers have articulated a number of means to apply practical norms to particularized instances of human conduct.<sup>175</sup> These include, for instance, creating a practical syllogism with the general norm as the major premise, the specific conduct in question as the minor premise, and the conclusion giving the appropriate course of ethical conduct.<sup>176</sup> Another method is balancing competing reasons for and against action to determine which are of greatest import, and acting accordingly.<sup>177</sup> There are other methods,<sup>178</sup> and the existence, scope, and distinctiveness of each of these methods is contested by philosophers.<sup>179</sup> Regardless of the method used, however, the philosophical consensus is that practical norms can and do guide concrete human action.<sup>180</sup>

In law, judges face the same issue: how norms that are more abstract than the facts presented by a case specify the correct—legal—course of conduct of the parties in the case. The fact that specification occurs in ethics is a powerful reason to believe that it also occurs in law. We should not be surprised, therefore, by the numerous aspects of our legal practice which indicate that specification occurs in law in manners similar to ethics.<sup>181</sup>

In fully developed systems of ethics, the appropriate methods of specification are identified, numerous intermediate norms are articulated,<sup>182</sup> and proper resolutions to frequent practical questions

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175. See John D. Arras, *Principles and Particularity: The Role of Cases in Bioethics*, 69 IND. L.J. 983, 985–88 (1994) (describing different mechanisms of ethical specification).

176. ARISTOTLE, *supra* note 139, at bk. VI, ch. 12, 1144a; ARISTOTLE, *De Anima*, in THE BASIC WORKS OF ARISTOTLE bk. III, ch. 11, at 434a16–22 (Richard McKeon ed., J.A. Smith trans., Random House 1941) (c. 384 B.C.).

177. W.D. ROSS, *THE RIGHT AND THE GOOD* (1930).

178. Reasoning by analogy is a commonly identified third method of specifying the correct course of conduct.

179. See Henry S. Richardson, *Specifying Norms as a Way to Resolve Concrete Ethical Problems*, 19 PHIL. & PUB. AFF. 279, 284–90 (1990) (describing the disputes). Richardson's piece is the classic article on specification. He defines specification on pages 295–96.

180. See David DeGrazia, *Moving Forward in Bioethical Theory: Theories, Cases, and Specified Principlism*, 17 J. MED. & PHIL. 511 (1992) (describing specification).

181. Tremblay, *supra* note 140, at 518.

182. See *id.* at 503–07 (describing “principlism” which is the use of generally agreed-upon ethical principles as starting points of ethical judgment).

are recognized.<sup>183</sup> For instance, in the Aristotelian philosophical tradition,<sup>184</sup> significant emphasis is placed on the faculty of the human mind known as practical reason, which enables one to specify how one should act in a given context.<sup>185</sup> In law, similarly, scholars across the ideological spectrum have recognized the faculty that enables some judges to achieve excellence in adjudication. Examples include the legal realist Karl Llewellyn's "situation sense,"<sup>186</sup> and natural lawyer Gerard Bradley's "legal reason[.]"<sup>187</sup>

Over the years, the Aristotelian tradition also has recognized a wide array of intermediate norms. Intermediate norms are lower-level, more concrete instantiations of higher-level, more general ethical principles.<sup>188</sup> Intermediate norms are one mechanism used in the Aristotelian tradition to bridge the decisional space between general ethical norms and particular practical situations.<sup>189</sup> Intermediate norms can themselves be relatively abstract, such as the prohibition on taking innocent human life,<sup>190</sup> which is derived from the more abstract natural law norm of doing good and avoiding evil, or relatively concrete such as the norm permitting killing uniformed

183. See Miller, *supra* note 142, at 1015 (stating that casuistry arose to overcome the ethical uncertainty occasioned by the "uncertainty about the meaning or applicability of a moral principle").

184. See ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY, AND TRADITION* 58–148 (1990) (describing the origin and emergence of the tradition); ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 19–35 (1993) (describing what he labels the "central tradition"); see also Strang, *supra* note 25, at 916–36 (describing the tenets of the Aristotelian tradition).

185. I-II AQUINAS, *supra* note 57, Q. 57, a. 4 ("[P]rudence is the right reason of things to be done."); see also Tremblay *supra* note 140, at 521–22 (describing practical reason); R. Jay Wallace, *Practical Reason*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, at <http://plato.stanford.edu/entries/practical-reason/> (2008) (same).

186. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 60 (1960).

187. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 *HOEFLER L. REV.* 245, 251 (1991).

188. See GEORGE, *supra* note 171, at 52 (describing "intermediate moral principles" that "occupy a place between the very abstract first principle and the most concrete and specific moral injunctions").

189. See Richardson, *supra* note 179, at 298 ("A mid-level norm that specifies a general one and thereby helps mediate the latter to a concrete case serves as a bridge.")

190. See *Exodus* 23: 7 ("The innocent and the just person thou shall not put to death."); see also I-II AQUINAS, *supra* note 57, Q. 100, a. 1 ("For there are certain things which the natural reason of every man, of its own accord and at once, judges to be done or not to be done: e.g., . . . Thou shalt not kill."); *id.* Q. 94, a. 2 ("[E]very substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life . . . belongs to the natural law.").

enemy soldiers in a just war, which is itself a further specification of the two more abstract norms just discussed.<sup>191</sup>

Through this articulation of intermediate norms, the tradition is better able to guide practical conduct. For instance, soldiers have the far easier task of judging whether the war in which they are fighting is just, using the criteria set forth in the Just War Tradition, and whether their opponents are uniformed enemy soldiers, than whether they are “doing good and avoiding evil.”

The same three phenomena of identifying the appropriate methods of specification, articulating numerous intermediate norms, and recognizing resolutions to frequently-raised questions, has occurred in our legal practice. Precedent has been the primary mechanism of doing so. It is through originalist precedent that the Supreme Court applies the general norms of the Constitution’s original meaning<sup>192</sup>. Through precedent, the Court specifies how the Constitution’s original meaning governs human conduct.

A commonly recognized facet of precedent is that the Court will frequently articulate an intermediate legal norm. Intermediate legal norms serve the same primary purpose as intermediate ethical norms. They bridge the space between the relatively abstract constitutional norms embodied in the Constitution’s original meaning and the practical legal questions presented in cases. Legal officials, such as lower court judges and executive officials, and citizens have less of a burden on their judgment—and are more likely to make the right legal judgment—if they have intermediate legal norms to guide their conduct. The Court’s criminal procedure case law, and more specifically the cases applying the Fourth Amendment’s prohibition on unreasonable searches and seizures, provides an important example of this.

Our legal practice has also resolved frequently-raised questions. These resolutions, because they are deeply embedded in precedent

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191. See CATECHISM, *supra* note 141, § 2309 (providing the “traditional elements” of the Just War Tradition). For a thorough review of the Tradition see GEORGE WEIGEL, *TRANQUILLITAS ORDINIS: THE PRESENT FAILURE AND FUTURE PROMISE OF AMERICAN CATHOLIC THOUGHT ON WAR AND PEACE* (1987).

192. I do not mean that the Constitution’s original meaning is always or even frequently abstract. Instead, I am claiming only that its original meaning is relatively more abstract than the cases it governs. From my own historical research into the original meaning of different constitutional provisions, my tentative conclusion is that the Constitution’s original meaning is rarely abstract and instead consists most often of relatively concrete rules and norms of intermediate generality.

and practice, put off-limits the resolutions to these questions. One such seminal resolution occurred during the Marshall Court. In two cases, the Court resolved the issue of whether, and to what extent, the Supreme Court could review state court judgments under Article III. In *Martin v. Hunter's Lessee*, the Court specified that its Article III "judicial Power" over "Cases" included appeals from state court civil suits.<sup>193</sup> Five years later, in *Cohens v. Virginia*, the Court specified that its "judicial Power" extended to state criminal appeals.<sup>194</sup> The Court's resolutions in *Martin* and *Cohens* are unchallengeable and have effectively specified the Constitution's meaning in this context.

In addition to ethics, everyday life also provides examples of specification at work. Imagine that you are the parent in a family with five children whose ages range from eleven to three. Assume further that in your household there have been no written statements regarding how you will treat your children. Instead, like in most families, the norms you follow in parenting your children are unwritten and rooted in religious, ethical, cultural, social, and traditional norms.

One of the frequent areas of dispute between you and your children is over the subject of going to their friends' houses. The sources of dispute are: (1) the times at which your children wish to play at their friends' houses; (2) the proximity (or lack thereof) of their friends' houses to your home; (3) the activities that will take place at their friends' houses; (4) the age and maturity of your child; (5) the suitability of the friend as a friend of *your* child; and (6) the suitability of the friend's home environment for your child. Your practice has been to balance these and other factors when one of your children makes a request to play at a friend's house. You balance these factors with the purpose of maximizing your child's growth toward virtue.

Unfortunately for you, your children have agitated for reform in your household for many reasons, including because they believe that you have arbitrarily applied the factors listed above. In particular, your children believe that you are too concerned with the time they visit friends, and are too hostile to them playing electronic games at their friends' houses.

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193. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

194. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

To restore household accord, you take the step of holding a family meeting.<sup>195</sup> You and your children agree to follow a norm governing their play at their friends' houses. The norm is short and uses non-technical language. It states: "Children may play at their friends' houses subject to reasonable regulation in the child's best interest."

After agreeing to the norm, the daily process of requests by your children to play at their friends' houses resumes. Your seven-year-old, Alexander, asks to play at Justin's house. You say yes, in part because your child is older than six. This process continues for some time. Children request to play at their friends' houses and you apply the norm. In each instance, you bridge the space between the norm and the specific facts that it governs in the form of your children's requests. In doing so, you specify how the norm determines these various requests.

Next, your nine-year-old, Lucy, asks to play at Felicity's house. As parents will attest, one of the sources of data upon which to decide whether to permit Lucy to play at Felicity's house is your prior decisions. Your prior applications of the norm provide evidence of how the norm governs the current request.

You say no to Lucy because the factors of time and proximity weigh heavily against playing at Felicity's even though Lucy is older than six. Lucy appeals to the norm. Even though the norm is formally the provision governing this situation, she does not focus on parsing its meaning. Instead, Lucy argues that she is older than your seven-year-old, Alexander, who you permitted to play at Justin's. Lucy also marshals other "cases" to show that, like her siblings in those cases, you should permit her to go to Felicity's house.

Lucy is taking the tact of many children: use analogous prior applications of the norm to her siblings as evidence of the norm's meaning in her situation. She argues that, properly specified, the norm permits her to play at Felicity's house. The affinity of this hypothetical to reality shows that, in everyday family life, specification is used to resolve concrete disputes governed by previously established norms.

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195. See FRANK B. GILBRETH, JR., & ERNESTINE GILBRETH CAREY, CHEAPER BY THE DOZEN 37 (1949) (describing how the Gilbreth children agitated for reform of family governance which led to a family council).

The Interpretative Approach, to summarize, describes the evidentiary role that originalist precedent plays in a fully-developed originalism. Originalist precedent, as in ethics and everyday life, explicates how concrete cases are governed by the original meaning.<sup>196</sup> Originalist precedent is the “data” repository for later courts looking to decide analogous concrete cases. Preserving the work done by originalist precedent is why Article III requires federal judges to give significant respect to constitutional precedent.<sup>197</sup> Originalist constitutional precedent creates constitutional law that federal courts will use in future adjudications. If the constitutional law created through the process of specification is a faithful ascertainment and application of the Constitution’s original meaning, then later courts should work within that constitutional law to decide future cases.

With some constitutional texts, the need for constitutional law is clearer than in others.<sup>198</sup> For instance, the Fourth Amendment prohibits “unreasonable” searches and seizures.<sup>199</sup> Assuming that the Search and Seizure Clause is a prohibition on unreasonable government action, the Court must create constitutional law to specify how the Clause’s original meaning applies to different concrete circumstances. The constitutional doctrines the Court articulates will be applications of the Clause’s principle of reasonableness to these concrete circumstances.

For instance, the Court announced, in the context of passenger automobile stops for traffic violations, that a police officer “may order passengers to get out of the car pending completion of the

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196. See Richardson, *supra* note 179, at 297 (describing how specified norms are true specifications of the more general norms).

197. I defend this proposition in Part V.G *supra*; see also Strang, *supra* note 5 (providing an extended defense of this proposition).

198. The Search and Seizure Clause was drawn from Article XIV of the Massachusetts’ Declaration of Rights, drafted by John Adams, who in turn drew from the Pennsylvania constitution. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 170–71, 176–77 (1999). The Fourth Amendment’s Search and Seizure Clause was relatively novel—and hence its original meaning is relatively hard to discern—because the Fourth Amendment was primarily the culmination of American efforts to eliminate general warrants. *Id.* at 150–79. There are, broadly speaking, two views on the original meaning of the Search and Seizure Clause: (1) the Clause is an independent prohibition on unreasonable government action; and (2) the Clause was a “statement of political moral principle . . . an explanation or justification for the Warrant Clause.” THE HERITAGE GUIDE TO THE CONSTITUTION 324 (Edwin Meese, III et al., eds., 2005).

199. U.S. CONST. amend. IV.



[traffic] stop.”<sup>200</sup> In *Maryland v. Wilson*, the Court applied the principle of reasonableness to the facts of the case and created a *per se* rule that would govern future analogous cases. In so doing, the *Wilson* Court relied on the earlier case of *Pennsylvania v. Mimms*, which had ruled that police officers may order drivers of passenger cars to exit their vehicles on routine traffic stops.<sup>201</sup>

Thus, the *Mimms-Wilson* line of cases has, through application of the Search and Seizure Clause’s reasonableness principle, created a rule of constitutional law. The *Mimms-Wilson* rule specifies how the principle of reasonableness applies in a given context, and the Court’s specification is authoritative in future cases with analogous factual circumstances. Litigants in such future cases will not, absent exceptional circumstances, make appeals directly to the Search and Seizure Clause and instead will craft arguments based on the Court’s precedent.

However, with other constitutional texts, the necessity of the creation of constitutional law is less clear, but it remains nonetheless. The Article II, § 1, cl. 4 requirement that the President “shall . . . have attained to the age of thirty five years,” possibly the most concrete phrase in the Constitution, provides an example.<sup>202</sup> The age requirement is often used by scholars as the most prominent counter to claims by critical legal scholars that the law is indeterminate.<sup>203</sup> The rule-ness of the age requirement itself precludes many questions that would otherwise result in litigation and consequently precludes the significant need for constitutional law that exists with other, less rule-like constitutional provisions.

However, situations may still arise that call for specification of the Presidential Age Clause and the creation of constitutional law.<sup>204</sup> For instance, an underage plaintiff could advance the argument that

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200. *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

201. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

202. U.S. CONST. art. II, § 1, cl. 4. There are a couple of possible, compatible reasons for the age requirement: (1) to prevent the development of dynasties where the son of an illustrious father achieves the presidency on the father’s merits, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 159–64 (2005); and (2) to help ensure sufficient maturity of presidents, *see* JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 758, at 540 (Boston, Hilliard, Gray, & Co. 1833) (“That, which has been selected, is the middle age of life, by which period the character and talents of individuals are generally known, and fully developed.”).

203. *See, e.g.*, Schauer, *supra* note 134, at 414, 420 (using this provision).

204. *See* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 265–66 (1990) (listing potential variations in the meaning of the age requirement).

the age requirement is more properly interpreted as a maturity requirement, and that he is sufficiently mature.<sup>205</sup> An originalist judge faced with that argument would ascertain the original meaning of the age requirement and then apply that meaning to the facts presented by the case. In doing so, he could find that while Article II, § 1, cl. 4 has, as one of its goals, the maturity of the President, it uses the rule of thirty-five years of age instead of the standard of maturity to define the requirement for the office.<sup>206</sup> The court would then announce a rule that the age requirement requires that the President be thirty-five years old. In doing so, the precedent would specify the Clause's meaning.

Alternatively, if the hypothetical plaintiff is correct and the original meaning of Article II, § 1, cl. 4 is a standard of maturity, then the court would issue a decision that would guide future courts in ascertaining whether a particular person meets the maturity standard in Article II, § 1, cl. 4. The decision would explain why the constitutional text prohibited or permitted the plaintiff to be President. Either way, the court would create constitutional law that specified the constitution's original meaning and which would govern future adjudications.

Today, of course, it is exceedingly rare for the Supreme Court to face an entirely new issue of constitutional law and hence the Court's decisions are frequently decided on the basis of the Court's constitutional law. This results from the process of specification that began with the first constitutional cases and the Court's interpreting and applying the original meaning, thereby creating constitutional law. For example, in *Marbury v. Madison*, Chief Justice Marshall relied on the nature of the judicial process to argue that, when faced with a statute that conflicts with the Constitution, a court must follow the Constitution.<sup>207</sup> Marshall characterized the judicial process as "apply[ing] the rule to particular cases" which requires a judge to

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205. See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985) (making this argument); Girardeau Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 532-33 (1984) (same).

Or, he could advance the claim that the age requirement in Article II was subsequently altered by the Fifth Amendment, which prohibits irrational age discrimination. See Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250, 255-56 (1989) (making this argument).

206. There is little scholarship on the original meaning of the age requirement, but what there is indicates that the age requirement is not susceptible of the maturity interpretation.

207. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

“expound and interpret that rule.”<sup>208</sup> The judicial process described by Marshall is one of specification. Judges determine the meaning of the Constitution, apply that meaning to the case at hand, and in doing so create constitutional law.

The Interpretative Approach directs judges to give presumptive deference to originalist precedent that specifies constitutional meaning. This respects the originalist precedent’s good faith articulation and application of the original meaning, thereby preserving the epistemic work performed by the precedent.

## 2. *Bringing to light implicit constitutional norms*

Much of the Constitution’s original meaning is relatively patent; many of its norms are fairly obvious. To ascertain the original meaning in such cases does not require significant research or judgment. An example of such a patent originalist norm is the Coinage Clause, which authorizes Congress to “coin money.”<sup>209</sup> It is clear that this provision’s original meaning grants Congress at least the authority to issue legal tender in the form of “metallic tokens.”<sup>210</sup>

However, even when the Constitution’s original meaning is metaphysically and epistemically determinate, it often requires significant research and judgment to articulate that meaning. In these cases, the Constitution’s original meaning is implicit and originalist precedent makes explicit—brings to light—that original meaning.

The Second Amendment’s protection of an individual right to keep and bear arms is an instance of this.<sup>211</sup> It is not manifest that the Second Amendment’s original meaning protects an individual rather

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208. *Id.*

209. U.S. CONST. art. I, § 8, cl. 5.

210. See Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1061 (2008) (“The more common meaning of ‘coin’ in the eighteenth century, as now, referred to metallic tokens.”). For discussions on the original meaning of the Coinage Clause, see *id.* (arguing that the Clause’s original meaning included congressional authority to print paper money); Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 (“[I]t is difficult to escape the conclusion that the Framers intended to prohibit [the] use [of paper money].”); Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1398 n.358 (2001) (“It is uncontroversial that the Framers did not view the Constitution as giving Congress the power to issue paper money to be invested with the status of legal tender.”); Strang, *supra* note 5, at 475 (“There is a strong scholarly consensus that Congress was not authorized by this provision to issue paper money.”).

211. U.S. CONST. amend. II.

than collective right. Indeed, it was not until the early-1980s that significant support for the individual right interpretation of the Amendment—labeled the Standard Model—arose.<sup>212</sup> By the mid-1990s, however, the Standard Model had become, as the label suggests, the consensus interpretation.<sup>213</sup> Thereafter, the Supreme Court, in *District of Columbia v. Heller*, in an originalist opinion,<sup>214</sup> made explicit the implicit original meaning of the Second Amendment by ruling that it protected an individual right.<sup>215</sup>

This same phenomenon occurs in ethics. Returning again to the Aristotelian tradition, some ethical propositions are patent, while others are implicit.<sup>216</sup> According to Aquinas, for instance, the first principle of natural law—do good and avoid evil<sup>217</sup>—is *per se nota*, or self-evident.<sup>218</sup> There are a host of other natural law norms that are also manifest.<sup>219</sup>

However, there are many implicit norms. These are norms the full explication of which took thought, argumentation, and time. For example, the Aristotelian tradition articulated the norm that it is “just to charge interest on a loan”<sup>220</sup> after centuries of discussion.<sup>221</sup>

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212. It is likely that the first modern scholarship to strongly support the Standard Model was Kates, *supra* note 149.

213. See Barnett & Kates, *supra* note 149, at 1141 (“Research conducted through the 1980s has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment.”).

214. See Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (“Justice Scalia’s opinion is the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”).

215. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

216. See I-II AQUINAS, *supra* note 57, Q. 94, art. 4 (“[T]he natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge.”).

217. *Id.*, Q. 94, art. 2 (“Hence this is the first precept of law, that *good is to be done and pursued, and evil is to be avoided.*”).

218. See *id.* (“[T]he precepts of the natural law are . . . self-evident principles.”); JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 126–29 (1998) (explaining another self-evident proposition of natural law, that “one should love one’s neighbor as oneself”); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 29–32 (1980) (explaining the concept of self-evident propositions of natural law).

219. See I-II AQUINAS, *supra* note 57, Q. 94, art. 2 (giving self-preservation, procreation, and practical reason as examples of self-evidently good goods).

220. 2 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE* 833 (1993).

221. For a review of the history surrounding what constitutes usury see JOHN T. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1957); JONSEN & TOULMIN, *supra* note 142, at 181–94.

This norm was implicit in the tradition's broader philosophical commitments.<sup>222</sup> After significant thought, argumentation, and time, this ethical norm was made explicit in the tradition.<sup>223</sup>

The Constitution's original meaning will frequently not be apparent for a number of reasons. First, the data upon which to make a determination of what the original meaning is may be difficult to access or, if accessible, may present other obstacles such as an unmanageably large amount of data.<sup>224</sup> Second, the factual situations that would provide an opportunity to make explicit the implicit norm may not have arisen or been presented. Third, the cultural, political, and economic environment may make the search for or articulation of implicit constitutional norms imprudent or not well received.<sup>225</sup>

The Interpretative Approach directs judges to give originalist precedent that brings to light implicit constitutional norms presumptive respect. This respects the originalist precedent's good faith articulation of the implicit original meaning norm, thereby preserving the precedent's epistemic work.

### *3. Resolving perceived tensions in the original meaning*

Originalist precedent resolves perceived tensions between constitutional norms by identifying, in a particular case, which of a stable of possibly governing norms in fact governs the outcome of the case.

The norms embodied in the Constitution's original meaning have focal cases.<sup>226</sup> Given the care with which the Framers drafted

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222. See FINNIS, AQUINAS, *supra* note 218, at 207 (stating that two principles supported charging reasonable interest: the cost to the lender of sharing the borrower's risk, and the harm to the lender in the form of expenses and losses, including opportunity costs).

223. See JONSEN & TOULMIN, *supra* note 142, at 193 ("Over five centuries there emerges a moral doctrine of precise definitions and distinctions, of narrowly limited solutions and well-reasoned arguments.").

224. Although, as mentioned earlier, today's more-readily accessible historical materials and computer assisted research tools have diminished these obstacles.

225. For example, for many years, and to a lesser though still significant degree today, the legal academy dismissed originalist arguments. Therefore, a scholar would lose standing in the academy if the scholar took originalist arguments seriously and sought to articulate the Constitution's original meaning.

226. See FINNIS, NATURAL LAW, *supra* note 218, at 9–11 (describing the concept of focal cases). The focal case is the mechanism used to distinguish "the mature from the undeveloped in human affairs, the sophisticated from the primitive, the flourishing from the corrupt, the fine specimen from the deviate case, the 'straightforwardly', 'simply speaking'

the Constitution, it is unlikely that the focal cases of original meaning norms conflict. However, as one extends out from the focal case, it becomes more difficult to ascertain whether the norm governs a particular case. When aspects of two or more of the Constitution's norms beyond their respective focal cases plausibly apply to the same matter, a perceived tension between the norms exists. Originalist precedent resolves that perceived tension.

A famous instance of resolving perceived tensions was between the Bankruptcy Clause<sup>227</sup> and the Contracts Clause,<sup>228</sup> and the long-standing state practice of bankruptcy and insolvency laws. On the one hand, the Bankruptcy Clause authorized Congress to establish "uniform Laws on the subject of Bankruptcies,"<sup>229</sup> and the Contracts Clause prohibited states from passing laws "impairing the Obligation of Contracts."<sup>230</sup> On the other hand, following adoption of the Constitution, states continued to pass bankruptcy and insolvency laws that applied to pre-existing debts.<sup>231</sup> Many Americans before, during, and following Ratification of the Constitution, plausibly argued that the Bankruptcy and Contracts Clauses prohibited states from passing such legislation.

The Supreme Court resolved the perceived tension in two cases: *Sturges v. Crowninshield*<sup>232</sup> and *Ogden v. Saunders*.<sup>233</sup> First, in an opinion by Chief Justice Marshall, the *Sturges* Court ruled that states could not pass bankruptcy and insolvency laws that discharged pre-existing debts.<sup>234</sup> Later, in *Ogden*, the Court ruled that state bankruptcy and insolvency laws that discharged debts incurred after passage of the laws were constitutional.<sup>235</sup>

The Court in both cases reviewed the text and history of the Clauses in a good faith articulation and application of the original

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(*simpliciter*), and 'without qualification' from the 'in a sense', 'in a manner of speaking', and 'in a way' (*secundum quid*)." *Id.* at 10–11. For a description of the similar concept of paradigm cases see RUBENFELD, *supra* note 60, at 178–95.

227. U.S. CONST. art. I, § 8, cl. 4.

228. U.S. CONST. art. I, § 10, cl. 1.

229. U.S. CONST. art. I, § 8, cl. 4.

230. U.S. CONST. art. I, § 10, cl. 1.

231. PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 31–36 (1974).

232. 17 U.S. (4 Wheat.) 122 (1819).

233. 25 U.S. (12 Wheat.) 213 (1827).

234. *Sturges*, 17 U.S. (4 Wheat.) at 197–208.

235. *Ogden*, 25 U.S. (12 Wheat.) at 213.

meaning.<sup>236</sup> *Sturges* and *Ogden* receive significant respect under the Interpretative Approach because they are evidence of how the Constitution's original meaning is not in tension. This preserves the interpretative work performed by the Supreme Court.

This same phenomenon of perceived tension occurs in ethics with ethical norms.<sup>237</sup> In fact, one of the most powerful challenges to ethical theories is describing how to either avoid or resolve prima facie conflicts between ethical norms.<sup>238</sup> Different philosophical traditions have arrived at different mechanisms to resolve perceived tensions between ethical norms. In the Aristotelian tradition, for instance, many perceived tensions that arise between natural law norms directing an individual toward integral human fulfillment are usually viewed as just that, perceived but not true conflicts. In other words, there is frequently a right answer to the ethical question.<sup>239</sup>

Over time, the tradition has addressed many perceived tensions. One of the most profound tensions, one that has received sustained attention in the Aristotelian tradition, is that between the obligation to tell the truth and the obligation to avoid harming others that arises, for example, when one is asked to disclose information that will lead to the unjust treatment of another.<sup>240</sup> More specifically, this occurs when an agent from an unjust regime asks a homeowner to disclose whether a fugitive is in the homeowner's house. The homeowner knows that the fugitive is in the house and that, if that fact is disclosed, the regime will treat the fugitive unjustly.

Members of the Aristotelian tradition, over centuries, focused on this perceived tension. Today, the tradition has concluded that the homeowner must not disclose the location of the fugitive.<sup>241</sup> It thereby resolved the perceived tension. Members of that tradition give this conclusion—this resolution of the perceived tension—significant respect.

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236. *Sturges*, 17 U.S. (4 Wheat.) at 197–207; *Ogden*, 25 U.S. (12 Wheat.) at 215.

237. See Miller, *supra* note 142, at 1015–16 (describing conflict between ethical norms).

238. See Arras, *supra* note 175, at 995–96 (describing the challenge to ethics posed by conflicting ethical principles); Richardson, *supra* note 179, at 284–90 (describing and criticizing the dominant methods of resolving concrete ethical problems).

239. See 1 GERMAIN GRISEZ, *THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES* 98 (reprint ed., 1997) (“[T]he created order of things embodies meanings and values placed there by a wise and loving creator.”).

240. See JONSEN & TOULMIN, *supra* note 142, at 195–215 (describing the tradition's grappling with the perceived conflict).

241. *Id.* at 213.

The Interpretative Approach directs judges to give presumptive respect to originalist precedent that resolves perceived tensions in the original meaning. This presumption respects the originalist precedent's good faith articulation and application of the original meaning, and thereby preserves the precedent's epistemic work.

#### *4. Embedding the Constitution's original meaning*

Originalist precedent embeds the Constitution's original meaning in the Supreme Court's constitutional law. The process of embodying the original meaning in case law protects and defends that meaning.

It does so in a number of ways. First, case law puts the Court's institutional prestige behind the original meaning. The Court's originalist precedent carries with it both the respect for the Constitution's original meaning and the Court's own, independent weight. Second, the original meaning is protected by the Court's reasoned explanation of the reasons behind it.<sup>242</sup> Frequently, in explaining itself in its opinion, the Court provides reasons why the result reached by the Court—in accordance with the original meaning—is substantively good.<sup>243</sup> Articulating why the original meaning is good ensures wider support for it. The Court has also argued, on occasion, why, even though the original meaning is not ideal, it is better to follow that meaning rather than create a different meaning.<sup>244</sup>

Embedding the Constitution's original meaning in originalist precedent protects that meaning from alteration. This is valuable because the original meaning itself is valuable: it generally resolves coordination problems in a manner superior to judicial coordination, the most commonly proposed alternative.<sup>245</sup> Embedding the original

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242. See Strauss, *Common Law Constitutional Interpretation*, *supra* note 17, at 882 (noting the common practice by the Court of giving normative arguments in favor of its conclusion).

243. See *Crawford v. Washington*, 541 U.S. 36, 63–69 (2004) (arguing that the Confrontation Clause's original meaning is superior to nonoriginalist interpretations); *U.S. v. Lopez*, 514 U.S. 549, 564–68 (1995) (arguing that limiting Congress to a Commerce Clause power more in line with the Clause's original meaning would have the good effects of maintaining our federal system and preventing overcentralization).

244. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202–03 (1989).

245. See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1737–51 (2010) (arguing that “judicial updating” of the



meaning also advances Rule of Law values such as stability of the law.

Embedding the Constitution's original meaning is an important aspect of the Interpretative Approach. The embedded original meaning permits it to better perform its function of preserving the epistemic work accomplished by the precedent.

### *C. Constitutional Construction*

#### *1. Introduction*

This section describes how originalist precedent in the context of constitutional construction receives respect via both the Constructive and Interpretative Approaches. Originalist precedent in the context of constitutional construction plays the same roles as precedent in the context of constitutional interpretation. In addition, it also creates constitutional meaning which has gravitational effect on other areas of constructed constitutional law.

#### *2. Creating defeasible constitutional meaning*

The roles played by originalist precedent in the context of constitutional interpretation are also played by originalist precedent in constitutional construction: specifying constitutional meaning, bringing to light implicit constitutional norms, resolving perceived tensions in the original meaning, and embedding the Constitution's original meaning. There are three significant differences, however. First, originalist precedent in the context of construction resolves original indeterminacy. Second, the constructed constitutional meaning is defeasible by the elected branches. Third, originalist precedent that constructs constitutional law has a gravitational effect on other areas of (constructed) constitutional law. I will address each difference, in turn.

Constitutional construction occurs when the outcome of a case is indeterminate. It occurs in two fashions: first, when the Constitution's original meaning is metaphysically determinate but epistemically indeterminate; and second, when the Constitution's

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Constitution leads to worse results than following the Constitution's original meaning); *see also* Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 105 (1989) (describing the deepest flaw of nonoriginalist methodologies as "mak[ing] law the product not of mind, but of accident").

original meaning is both metaphysically and epistemically indeterminate. In the former category, the Interpretative Approach applies; in the latter category, the Constructive Approach applies. I first explain why this is the case, and then I describe in more detail the unique aspects of the Constructive Approach.

The Interpretative Approach applies to metaphysically determinate but epistemically indeterminate cases because, as I described more fully above,<sup>246</sup> the Constitution's original meaning is determinate. There is an obstacle—perhaps permanent, perhaps temporary—to the interpreter's access to that determinate original meaning. Until such time as the metaphysically determinate original meaning is accessible, the originalist precedent will play the epistemic role of providing evidence of the original meaning and will receive significant respect for that reason.

Originalist precedent governed by the Constructive Approach, by contrast, in addition to providing evidence of the Constitution's (indeterminate) original meaning, also creates determinate—though defeasible—original meaning.<sup>247</sup> These precedents are entitled to significant respect because they create the legal norm that coordinates social activity. Until a later Court determines that the originalist precedent should be overruled, it is the governing constitutional law.

Second, the originalist precedent's construction of constitutional law is, as I just suggested, defeasible. Though there is significant disagreement on this point,<sup>248</sup> my tentative conclusion is that originalist precedent that constructs constitutional law is subject to defeasance by the elected branches.<sup>249</sup> Therefore, if the Court at Time X constructed Meaning 1, and Congress passed a statute that is constitutional only under Meaning not-1, then Congress has *reconstructed* the Constitution's meaning. So, in a case at Time Y

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246. See *supra* Part IV.D.

247. See Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, *supra* note 5, at 1235 (acknowledging that precedent can “fix[]” the Constitution's meaning, at least in the case of ambiguity).

248. See *id.* (stating that precedent that “resolve[s] latent ambiguities in the text by ‘fixing’ its meaning” is not defeasible and instead is subject to change only via constitutional amendment).

249. I have elsewhere defended this position. See Strang, *supra* note 120, at 70–72 (supporting this claim). I followed Keith Whittington on this point. See Whittington, *supra* note 25, at 11 (“The judiciary should not prop up old constructions that are no longer politically authoritative.”).

involving the constitutionality of the statute, the Court should adopt Meaning not-1 (so long as it is consistent with what is known about the original meaning).

The third difference is the gravitational force of precedent subject to the Constructive Approach. Gravitational force is the power of cases and the legal principles they instantiate to influence the law around them, including later cases.<sup>250</sup> Originalist precedent that constructs constitutional meaning is analogous to common law adjudication because, in both, the courts are creatively articulating law. In both, the law is that body of legal rules and principles that best fits and justifies the legal practice.<sup>251</sup> The legal principles in both influence the law—exert gravitational force.

Originalist precedents that do not construct constitutional law do not have gravitational force because they do not create the governing legal principles. Instead, the Constitution's determinate original meaning provides those legal principles, and originalist precedent instantiates them.

#### *D. Preliminary Response to the "New Doctrinalists"*

I intend the conception of originalist precedent I offer here to be a partial<sup>252</sup> response to the claims made by scholars known as the New Doctrinalists.<sup>253</sup> The New Doctrinalists are a group of scholars who have revived focus on the Supreme Court's legal doctrine.

Two key points advanced by the New Doctrinalists are: (1) there is a distinction between propositions about the Constitution's meaning and propositions implementing or putting into effect the Constitution's meaning<sup>254</sup>; and (2) there is a permissible disparity

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250. See DWORKIN, *supra* note 81, at 111–17 (describing gravitational force).

251. See RONALD DWORKIN, *LAW'S EMPIRE* 230–31, 254–58 (1986) (explaining his fit and justification conception of law).

252. In a future article, I hope to more directly address the New Doctrinalists' claims.

253. The most prominent New Doctrinalists are Professors Mitchell Berman, Richard Fallon, and Kermit Roosevelt. Brannon Denning has taken the New Doctrinalists' suggestions and applied them to the Dormant Commerce Clause in an insightful article. Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008). For a critique of the New Doctrinalists see Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. 173 (2006).

254. See, e.g., Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1652 (2005) (“[T]here is a distinction between the Constitution itself and the rules that courts apply in deciding cases.”).

between these two sorts of propositions.<sup>255</sup> New Doctrinalist scholars argue that these two key points are not only an accurate description of our practice<sup>256</sup>; they claim that these points are necessary to any plausible theory of constitutional interpretation.<sup>257</sup>

In this Article, I showed that originalism, with the Interpretative and Constructive Approaches toward originalist precedent, preserves a significant place for constitutional doctrine. First, constitutional doctrine is expressed in originalist precedents, and then this doctrine, so long as the presumption in its favor remains unrebutted, governs later cases. In this way, originalism fits the descriptive claim of the New Doctrinalists that constitutional doctrine is a central facet of our legal practice.

I also established that, at least in the context of constitutional interpretation, there is no disparity between the constitutional doctrine thus created and the Constitution's governing original meaning. Instead, doctrine is the method of making express the Constitution's meaning in particular contexts. There is a trivial disparity in the sense that the doctrine does not simply repeat the canonical form of the Constitution's meaning. But that is true any time a practical norm is applied to concrete activity. The doctrine states that when such-and-such is the case, the governing constitutional meaning requires such-and-such an outcome. At least with issues of constitutional interpretation, therefore, the New Doctrinalists' claim that a disparity between meaning and doctrine is necessary, is overblown.

However, in the context of constitutional construction, the New Doctrinalists' arguments have real traction. I showed that the Supreme Court is genuinely creative when it constructs constitutional meaning. This leads to a gap between the determinate constitutional meaning and constitutional doctrine constructed by

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255. See, e.g., Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1317 (2006) (proposing the "permissible disparity thesis").

256. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 35 (2004) (arguing that "the single most conspicuous" aspect of constitutional judicial review is the "judge-made tests of constitutional law that are not most fairly understood as themselves products of judicial constitutional interpretation"); see also Strauss, *Common Law Constitutional Interpretation*, *supra* note 17, at 883 ("[I]n practice constitutional law generally has little to do with the text. Most of the time, in deciding a constitutional issue, the text plays only a nominal role.").

257. FALLON, *supra* note 7, at 37–42.

the Court. The disparity between constitutional meaning and doctrine in the context of construction is necessary: in a situation where the Constitution's meaning alone would not resolve a case, the Court must construct meaning that is substantively different from the Constitution's meaning.

*E. Preliminary Note on the Scope of Originalist Precedent*<sup>258</sup>

Most originalist scholars agree that federal court *judgments* are binding on all three branches of the federal government<sup>259</sup> (in addition to state actors).<sup>260</sup> There is a vigorous originalist debate over whether federal judicial power also makes federal court *opinions* explaining judgments binding on the legislative and executive branches.<sup>261</sup> At this point in my research, however, I have not determined whether my conception of originalist precedent includes only case judgments or whether it also includes explanatory opinions.<sup>262</sup>

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258. I also do not address the extent to which Congress may revise constitutional precedent. See McGinnis & Rappaport, *supra* note 12, at 804 (arguing that Congress does have that power).

259. See Saikrishna Prakash & John Yoo, *Against Interpretative Supremacy*, 103 MICH. L. REV. 1539, 1561 (2005) (stating that "the majority of scholars support judicial supremacy").

260. The notable exception is Michael Stokes Paulsen, who has powerfully argued that each branch of the federal government has independent interpretative authority. Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

261. See John Harrison, *Judicial Interpretative Finality and the Constitutional Text*, 23 CONST. COMMENT. 33, 37 (2006) (finding that federal court judgments are binding, but not opinions); Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981-89 (1987) (arguing that federal court interpretations were not binding on the executive branch); Prakash & Yoo, *supra* note 259 at 1561-62 (arguing that only federal court judgments are binding precedent); see also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (defending the supremacy of judicial opinions on nonoriginalist grounds); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgment*, 15 CARDOZO L. REV. 43, 44 (1993) (arguing, based on nonoriginalist considerations, that only federal court judgments are binding).

262. See Solum, *supra* note 5, at 186-89 (distinguishing between realist and formalist views of stare decisis).

VII. THE INTERPRETATIVE AND CONSTRUCTIVE APPROACHES ARE  
MORE NORMATIVELY ATTRACTIVE THAN ALTERNATIVE  
CONCEPTIONS OF ORIGINALIST PRECEDENT

*A. Introduction*

All else being equal, a more normatively attractive originalism is preferable to a less attractive conception of originalism. For this reason, the most prominent originalists have offered originalist theories of interpretation that are, from the perspective of those committed to their respective philosophical traditions, normatively attractive. Randy Barnett provides an example of this because he argues that his originalism, with its libertarian reading of the Constitution's original meaning and its presumption of liberty, leads to the greatest protection of natural rights.<sup>263</sup> Similarly, the Interpretative and Constructive Approaches increase originalism's normative attractiveness and are preferable to other conceptions of originalist precedent.

*B. The Interpretative and Constructive Approaches to Originalist Precedent are more Normatively Attractive than other Conceptions*

As I noted above, broadly speaking there are three plausible conceptions on the role of originalist precedent: (1) "get rid of it all"; (2) the Interpretative and Constructive Approaches; and (3) "common law constitutionalism." The "get rid of it all"<sup>264</sup> conception is unattractive for a number of reasons.<sup>265</sup> First, it diverges significantly from current practice: it fails to fit our legal practice.<sup>266</sup> In law, fit is itself a powerful normative criterion.<sup>267</sup> This conception's failure to fit therefore strongly counts against it.

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263. BARNETT, *supra* note 3, at 109; *see also* WHITTINGTON, *supra* note 25, at 110–59 (grounding originalism in popular sovereignty); McGinnis & Rappaport, *supra* note 25, at 802–05 (arguing that originalism is justified because it protects the good consequences that arise from the Constitution's supermajority requirements); Strang, *supra* note 25, at 983–97 (2005) (using the Aristotelian tradition's concept of human flourishing to justify originalism). Lawrence Solum has also argued that a version of originalism, what he calls Semantic Originalism, is compatible with most normative justifications for originalism. *See* Solum, *supra* note 11, at 128–34.

264. *See supra* note 34 and accompanying text.

265. *See* McGinnis & Rappaport, *supra* note 5, at 848–49 (arguing against the "get rid of it all" conception).

266. *See* Strauss, *supra* note 17, at 883–84 (noting that precedent and constitutional doctrine make up a significant portion of argument in constitutional cases).

Second, under the “get rid of it all” conception, originalist precedent does not serve the epistemic and constructive roles I outlined above when describing the Interpretative and Constructive Approaches toward originalist precedent.<sup>268</sup> The “get rid of it all” conception, therefore, cannot claim the benefits that come with the Interpretative and Constructive Approaches. It cannot, for instance, take advantage of the efficiency that derives from the presumption that originalist precedent controls later cases.

Third, there is harm to Rule of Law values caused by the “get rid of it all” conception. Many critics of originalism have argued that adoption of the “get rid of it all” conception would lead to legal instability as the law has an increased chance of change and in fact does change more frequently, both of which undermine stability in and reliance on the law.<sup>269</sup> While I think that these criticisms are overstated,<sup>270</sup> often as a way of trying generally to discredit originalism,<sup>271</sup> it is true that the “get rid of it all” conception will protect Rule of Law values less well than the Interpretative and Constructive Approaches.

For instance, the presumption of correctness under the Interpretative Approach makes it less likely that originalist precedent will be challenged and, consequently, less likely to be overruled (or modified in some other way, such as narrowed). The “get rid of it all” conception, by comparison, without the presumption, invites litigants and judges to reevaluate both a precedent’s articulation of the Constitution’s original meaning and its application. I argued above that both of these operations frequently place heavy burdens on human judgment and that, therefore, reasonable judges (and litigants) could and would plausibly come to different conclusions.

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267. See Lee J. Strang, *Damages as the Appropriate Remedy for “Abuse” of an Easement: Moving Toward Consistency, Efficiency, and Fairness in Property Law*, 15 GEO. MASON L. REV. 933, 947–50 (2008) (explaining why fit is a powerful normative argument in law).

268. See McGinnis & Rappaport, *supra* note 5, at 848–49.

269. See Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1177–80 (2006) (listing the Rule of Law values served by stare decisis for the purpose of criticizing originalism); Strauss, *supra* note 17, at 925–28 (arguing that common law constitutionalism constrains judges more than originalism).

270. See Calabresi, *supra* note 36, at 956–57 (arguing that the Rule of Law criticism of originalism is weak).

271. See Barnett, *supra* note 5, at 1232 (arguing that originalism’s critics, who use stare decisis to condemn originalism, do so to protect cases whose substantive results the critics prefer).

The pragmatic result is a higher likelihood of change in the law and harm to Rule of Law values.

To make the costs of the “get rid of it all” conception more concrete, it is helpful to hypothesize how it would adversely impact a federal appellate court judge’s job. Imagine an originalist federal appellate court judge presiding over a case in which the judge must decide a question on the Constitution’s meaning. To avoid issues of vertical stare decisis,<sup>272</sup> assume further that the question is not one that the Supreme Court’s precedent answers.<sup>273</sup> There is, however, applicable originalist circuit court precedent.<sup>274</sup>

Appellate court judges—and all federal judges, to a greater or lesser extent—are under tremendous pressure to efficiently adjudicate their crushing case load.<sup>275</sup> The “get rid of it all” conception would make federal appellate judges’ jobs unmanageable. Judges and litigants would have to reevaluate every possible constitutional issue, regardless of how settled the issue.<sup>276</sup> Daniel Farber explained how this would play out in the context of the First Amendment:

It is simply unworkable to leave everything up for grabs all of the time. Imagine if, in every First Amendment case, the lawyers had to reargue basic questions such as whether the First Amendment applies to the states or whether it covers nonpolitical speech (both of which have been debated by scholars). Every brief would have to be a treatise, arguing every point of First Amendment doctrine from scratch. Moreover, different judges could adopt completely different First Amendment theories, so a lawyer in a case before the Supreme Court might have to write nine different briefs based on inconsistent theories of the Constitution. Similarly, dialogue between the Justices themselves would be stymied because they

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272. Vertical stare decisis is the bindingness of precedent by a higher court on a lower court.

273. A possible example of this is the legal question of whether the Second Amendment protected an individual right to keep and bear arms prior to the Supreme Court’s *District of Columbia v. Heller* decision.

274. Continuing with the Second Amendment example, prior to *Heller*, a number of circuits had ruled on the Second Amendment’s meaning vis-à-vis an individual right.

275. ADMIN. OFFICE OF THE U.S. COURTS, FED. JUDICIAL CASELOAD: MAR. 31, 2009 (2009), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/front/IndicatorsMar09.pdf>.

276. See Strauss, *supra* note 17, at 892 (explaining the “common-sense notion that one reason for following precedent is that it is simply too time consuming and difficult to reexamine everything from the ground up”).



would be operating within different conceptual frameworks. Unless most issues can be regarded as settled most of the time, coherent discussion is simply impossible. Surely “it would overtax the Court and the country alike to insist . . . that everything always must be up for grabs at once.”<sup>277</sup>

In each case that raises a constitutional issue, the judge would be obliged to take up the often time-consuming task of first, uncovering the Constitution’s applicable original meaning and second, engaging in that often just-as-difficult task of applying the original meaning to the questions presented in the case. Judges simply do not have the time to do this.

More fundamentally though, as I argued above, the correct application of the Constitution’s original meaning is one that we may expect, in many cases—and despite diligent, good faith effort—will coexist with reasonable disagreement. Consequently, the “get rid of it all” conception of originalist precedent would result in a significant amount of inconsistent precedent.

The Interpretative and Constructive Approaches, by contrast, avoid these costs while preserving originalism as a viable theory of interpretation. The originalist judge following the Interpretative and Constructive Approaches toward originalist precedent will give precedent significant respect, which accords with our legal practice. The judge’s—and litigants’—work will therefore be more efficient because they need not revisit all possible questions of constitutional meaning and application. The Interpretative and Constructive Approaches’ significant respect for originalist precedent protects the Rule of Law values *stare decisis* serves.

The “common law constitutionalism” conception avoids the costs of the “get rid of it all” conception, but it does so at the expense of originalism itself. The “common law constitutionalism” conception fully embraces *stare decisis* and the Rule of Law values it advances. Binding legal norms, embodied in the Supreme Court’s precedent, will remain authoritative, and hence the interests of reliance built up around those norms are protected. Proponents of this position also argue that it increases stability of the law,<sup>278</sup> and achieves greater fairness.<sup>279</sup> Advocates of this position therefore avoid

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277. Farber, *supra* note 269, at 1177–78 (citations omitted).

278. See Strauss, *supra* note 17, at 926–27 (arguing that, unlike precedent, originalism is relatively unconstraining on judges).

279. Healy, *supra* note 34, at 1214.

the pitfalls of the “get rid of it all” conception. This is a significant accomplishment.

Unfortunately, it comes at an unacceptable cost, especially if, as I have shown, the Interpretative and Constructive Approaches can preserve most of what makes the “common law constitutionalism” conception attractive.<sup>280</sup> The cost of the “common law constitutionalism” conception is the near-total, and in many cases total, abandonment of originalism.<sup>281</sup> According to the “common law constitutionalism” conception, originalist precedent is protected by a near-irrebuttable presumption. Thus, a precedent that, for instance, later research strongly suggests incorrectly articulated the original meaning, would remain viable. Over time, constitutional adjudication would ever more deviate from the Constitution’s original meaning, leaving it a relic, unimportant to legal questions which are settled on the basis of precedent.<sup>282</sup>

This eventuality is tellingly parallel to our current legal practice where nearly all areas of constitutional law are significantly influenced by or, in many instances, dominated by precedent at odds with the Constitution’s original meaning.<sup>283</sup> It is not controversial that our current practice is largely nonoriginalist.<sup>284</sup> Only in the event of historical accident, such as that which occurred in *District of Columbia v. Heller*, does the Constitution’s original meaning play a significant role.

The Interpretative and Constructive Approaches toward originalist precedent offer a better option. They preserve much of our current practice including, most importantly, a robust doctrine of stare decisis. At the same time, they ensure that the Constitution’s original meaning remains meaningful. Originalist precedent has weight in later courts’ analyses only if it meets the requirements of

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280. See McGinnis & Rappaport, *supra* note 5, at 849–50 (explaining why the “common law constitutionalism conception” is less attractive than a middle-of-the-road approach like mine).

281. See Strauss, *supra* note 17, at 899, 906 (concluding that while common law constitutionalism cannot “[e]xplicitly” overrule the text, it can produce “creative” interpretations).

282. *Id.* at 883.

283. See *id.* at 884 (stating that legal change has been largely not text-based).

284. See Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 674–75 (1995) (finding that, because of the “Supreme Court’s present style of constitutional discourse,” the Constitution has been rendered “very nearly unintelligible” to the People).

OGF—only so long as the presumption that protects it remains unrebutted. The precedent therefore remains open to challenge and the Constitution’s original meaning remains the governing body of norms in our legal practice. This means that originalism retains viability in a way that it does not under the “common law constitutionalism” conception.

#### VIII. CONCLUSION

In this Article, I have shown that originalism preserves a substantial role for originalist precedent using the Interpretative and Constructive Approaches. Precedent that meets the test of OGF—that is an objectively good faith attempt to articulate and apply the Constitution’s original meaning—is originalist precedent. I have illustrated how judges would use originalist precedent in constitutional interpretation and construction. I have also shown that originalist precedent receives significant respect under the Interpretative Approach because it provides evidence of the Constitution’s original meaning by specifying that meaning in concrete cases, bringing to light implicit constitutional norms, and resolving perceived tensions in the original meaning. Further, originalist precedent receives significant respect under the Constructive Approach because it constructs constitutional law, again by specifying that meaning in concrete cases, bringing to light implicit constitutional norms, and resolving perceived tensions in the original meaning. It also exerts gravitational force on other areas of law.

The Interpretative and Constructive Approaches enable judges to meet their Article III obligation to give precedent significant respect, and do so in a more normatively attractive way than other conceptions of originalist precedent by avoiding the temptation to reject precedent altogether, which is incompatible with our legal tradition, and by avoiding the dangers of giving too strong a presumption to originalist precedent that has drifted too far from original constitutional meaning.