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The Unimportance of Precedent in the Law of Federal Courts

Michael Wells

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INTRODUCTION

If we are fully to understand any area of the law, we must do more than master the rules and the policy considerations underpinning them. Quite apart from the content of the law, as manifested in holdings and policies, the process by which decisions are reached also deserves attention. For example, some bodies of law emphasize precise rules, while others are comprised mainly of broad standards. The jury makes many decisions in some areas of the law and few or none in others. Some areas remain far more stable over time than others. In particular, it seems to me that the law of federal courts appears more prone to rapid change than most doctrinal landscapes. In this Article, I offer some examples to support my intuition that precedent is a comparatively weak restraint in federal courts cases, and I argue that this feature of federal courts doctrine is a consequence of the interplay between certain fundamental features of stare decisis and the kinds of issues addressed by the law of federal courts.

Throughout this inquiry, it is essential to distinguish between two kinds of criticism of a judicial decision. One addresses its content and the other its form.[1] Someone may object to the wisdom of a ruling or the political values it implements, fearing that the court's approach will diminish liberty, encourage waste, or in some other way do more harm than good. In federal courts law, for example, critics may debate the proper scope of standing for generalized grievances, the best approach to Supreme Court review of ambiguous state judgments, or the extent of the states' eleventh amendment immunity from suit in federal court. Alternatively, a critic might focus on the methods by which the court reached its conclusion, questioning the court's allegiance to traditional formal restraints on the exercise of judicial power, such as submission to legislative will, decision according to rule, and respect for prior cases. Justices Brennan and Stevens advanced this kind of objection in their dissents in *Valley Forge Christian College v. Americans United for Separation of Church & State*[2] and *Pennhurst State School &*

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1. *See* Schauer, *Formalism,* 97 YALE L.J. 509, 510 (1988); Kennedy, *Legal Formality,* 2 J. LEG. STUD. 351, 355 (1973).

2. 454 U.S. 464, 491-515 (1982) (Brennan, J., dissenting).

Hospital v. Halderman,[3] when they took the Supreme Court to task for disregarding precedent.[4]

Because the content of the law is of more immediate practical importance than the courts' methodology, most scholarly commentary concentrates on the substantive merits of legal rules. The elaboration of concepts like stare decisis is left to legal philosophers. Quite naturally, the analysis of precedent proceeds in highly abstract terms, with little systematic attention to specific doctrinal contexts. In the process we may come to think of precedent as a monolithic concept, consistent in its force regardless of domain, and to overlook the possibility that the role of prior cases in adjudication may vary from one context to another. This Article sets aside concern with the content of federal courts law in order to examine stare decisis in this doctrinal category. My hope is that such an inquiry may advance our understanding of both the law of federal courts and the concept of precedent.

Part I of this Article asserts that the Supreme Court pays little attention to precedent in federal courts law. My examples in support of this claim are taken from important areas of federal courts doctrine, where two major upheavals have taken place in the past thirty years. First, the Warren Court rewrote the law to expand access to federal court. Then under Chief Justice Burger, the Court undid many of the changes wrought by its predecessor. The discussion in Part I of prominent departures from precedent is not offered as decisive proof that stare decisis is less important in federal courts cases than elsewhere. It is instead an account of the grounds for my intuition that this is so. I do not know how to go about empirically proving the point, short of developing a means of precisely measuring the importance of precedent in various areas, and then persuading the world to accept my methodology. I am not up to that task.

Part II examines the concept of precedent in general terms. Borrowing from the jurisprudential literature on stare decisis, I argue that precedent is best viewed as a means and not an end in itself. Adherence to prior cases is a way to pursue a number of goals, including predictability in the law, efficiency in decisionmaking, and fairness to litigants. These worthy goals come at a price, for a court that chooses precedent as its rule of decision necessarily foregoes the opportunity to improve the content of the law by reexamining the arguments on the merits of the legal question at hand.

Part III considers the implications of this cost-benefit approach to precedent for federal courts law. The values of predictability, efficiency, and fairness carry great weight in cases where the legal rules bear heavily on primary behavior and the substantive law of rights and obligations. But they are not particularly strong in the law of federal courts, where the issue is typically the distribution of decisionmaking power between federal and state courts and among courts and other governmental institutions. A court bent

3. 465 U.S. 89, 125-67 (1984) (Stevens, J., dissenting).
4. *Id.* at 159-62; 454 U.S. at 510-13.

on reforming the law will always find it comparatively easy to justify a departure from precedent in federal courts law. In addition, the costs of adhering to precedent here are substantial. Although federal courts doctrine rarely bears directly on the substantive law of rights and obligations, it does address important questions of governmental structure. It is concerned with the institutional role of the federal courts in our system of government. Fidelity to precedent would impose a high cost on Supreme Court Justices, for it would oblige them to pass up the opportunity to contribute to the development of law on these vital matters. As a result of this combination of factors, the Supreme Court will find, more often than courts do in other areas of the law, that the costs of following precedent are especially high and the benefits especially low in the adjudication of federal courts issues.

This argument is not offered in defense of the Supreme Court's low regard for precedent. Rather, it is an effort to describe and explain the Court's practice, and thereby enhance the understanding of federal courts doctrine. When I speak of the foregone opportunity to improve the law as a cost of fidelity to precedent, I do not mean that rejecting the prior case will necessarily improve the law, only that the court faced with the choice may perceive the issue in those terms. Whether the precedent or the proposed solution is the better rule in any given case will often depend on the political values one brings to this judgment. It is no accident that conservative Justices were the strongest supporters of strict adherence to precedent against the onslaught of the Warren Court in the 1960's, while the liberal majority of those years gave short shrift to stare decisis.[5] Nor is it surprising that contemporary conservatives tend to be partisans of a weak precedential constraint, while today's liberals complain about the Court's disrespect for prior cases.[6]

I. Chronic Instability In The Law Of Federal Courts

Supreme Court decisions on jurisdictional issues typically give short shrift to stare decisis. The Court seldom flatly overrules an earlier decision. Rather, it manifests disrespect for precedent by drawing untenable distinctions between its holding and the prior case. The upshot is a pattern of chronic

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5. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting). The *Mapp* Court overruled Wolf v. Colorado, 338 U.S. 25 (1949) ("In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, without due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled."). *See* Miranda v. Arizona, 384 U.S. 436, 525-26 (1966) (Harlan, J., dissenting); *Id.* at 531 (White, J., dissenting); Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting); Beacon Theaters v. Westover, 359 U.S. 500, 518 (1959) (Stewart, J., dissenting).

6. *See, e.g.*, Patterson v. McClean Credit Union, 108 S. Ct. 1419 (1988) (per curiam). The *Patterson* Court decided to rehear Runyon v. McCrary, 427 U.S. 160 (1976), without the request of the parties. In their dissent, Justices Blackmun, Brennan, Marshall and Stevens argued that the Court was acting in disregard of stare decisis in so deciding.

instability over a wide range of federal courts issues.[7] In support of this assertion the ensuing sections offer a number of illustrations from important areas of federal courts doctrine. In each instance, the analysis focuses not on the merit of the Court's ruling, but solely on its treatment of precedent.

A. Standing

Article III of the United States Constitution limits federal courts to hearing "cases."[8] The central inquiry in determining whether a particular dispute is a "case" is the parties' standing to raise the issues which they seek to litigate.[9] Only if the plaintiff has suffered a "distinct and palpable" injury as a result of the claimed illegality will he or she be permitted to litigate.[10] Many constitutional rights are held in common by the population as a whole, so that no one suffers any specific and distinct harm from a constitutional violation, while everyone can plausibly claim a violation of abstract constitutional rights. Examples include the first amendment right against an establishment of religion,[11] the directive in the accounts clause that government budgets be made public,[12] and the prohibition in the incompatibility clause on service in the armed forces by members of Congress.[13]

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7. *Cf.* Field, *The Uncertain Nature of Federal Jurisdiction,* 22 WM. & MARY L. REV. 683, 684 (1981) ("the more one studies federal jurisdiction, the more forcefully one must conclude that much uncertainty surrounds the decision of many jurisdictional issues. In many cases . . . federal jurisdictional rules are extraordinarily unclear. They are also extremely complex. And it is not obvious what policies the complexities fulfill.").

8. U.S. CONST. art. III, § 2.

> The judicial Power shall extend to all *Cases,* in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizen thereof, and foreign States, Citizens or Subjects.

Id. (emphasis added).

9. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982). Note that "[t]he term 'standing' subsumes a blend of constitutional requirements and prudential considerations" and the Court's opinions often leave unclear the pedigree of particular rules. *Id.*

10. Warth v. Seldin, 422 U.S. 490, 501 (1975) (the Court held that the plaintiffs did not have standing against the defendant town in a suit challenging the town's housing ordinances that prohibited persons of low or moderate income from living there).

11. Flast v. Cohen, 392 U.S. 83, 85-86 (1968) (the plaintiffs had standing because they could show that their tax money was being spent in religious schools).

12. United States v. Richardson, 418 U.S. 166, 167-68 (1974) (the plaintiff did not have standing because there was no logical nexus between his status as a taxpayer and the failure of Congress to require a detailed accounting of expenditures from the CIA).

13. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) (the plaintiff could not prove a logical nexus between being a member of the Armed Forces Reserve and the nonobservance of the incompatibility clause by members of Congress who were also Reserve members).

Who, if anyone, should be permitted to litigate such claims? In *Frothingham v. Mellon*[14] the Supreme Court held them nonjusticiable.[15] A federal taxpayer sought to strike down a federal statute appropriating funds to provide health care for mothers and their babies. She claimed that the statute was unconstitutional because Congress' spending power[16] did not extend to such matters. The alleged injury was the appropriation of the plaintiff's taxes for this illegal purpose. The Court found the injury too insubstantial to support the litigation, since the taxpayer's interest in the federal treasury "is shared with millions of others [and] is comparatively minute and indeterminate,"[17] and because the effect of a congressional expenditure on anyone's tax liability is "remote, fluctuating, and uncertain."[18] Since the federal taxpayer suffers no "direct injury,"[19] adjudicating her claim "would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department."[20]

Frothingham kept these generalized grievance cases out of the courts for almost fifty years, until the Warren Court's decision granting standing in *Flast v. Cohen.*[21] In *Flast,* a federal taxpayer challenged a congressional spending program that provided aid to parochial schools, claiming that the expenditure violated the establishment clause. Despite the decision in *Frothingham,* the Court allowed the lawsuit. At the same time, it denied any break with precedent. *Flast* differed from *Frothingham* in that the plaintiffs here based their challenge on a specific constitutional limitation on the spending power and not on the general strictures of article I.[22]

This distinction is a lame response to the argument from precedent. Stare decisis would be a toothless constraint if it only applied when a court could find no difference between the earlier cases and the later one, for "[n]o two events are exactly alike."[23] What matters is whether the two cases are alike

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14. 262 U.S. 447 (1923). For developments before *Frothingham,* see Nichol, *Standing on the Constitution: The Supreme Court and* Valley Forge, 61 N.C.L. REV. 798, 803-04 & nn. 47-48 (1983).

15. 262 U.S. at 480, 488.

16. U.S. CONST. art. 1, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . ." *Id.*

17. 262 U.S. at 487.

18. *Id.*

19. *Id.* at 488.

20. *Id.* at 489. *See also Ex parte* Levitt, 302 U.S. 633 (1977) (per curiam) (the plaintiff's motion claiming that the appointment of Mr. Justice Black to the Supreme Court was null and void because there was no vacancy when he was appointed was denied as the plaintiff did not suffer a direct injury).

21. 392 U.S. 83, 103-06 (1968). *Cf.* Everson v. Board of Education, 330 U.S. 1 (1947) (the Court reached the merits of an establishment clause claim without addressing the standing problem).

22. 392 U.S. at 101-06.

23. Schauer, *Precedent,* 39 STAN. L. REV. 571, 577 (1987).

in terms of the reasoning and scope of the prior ruling.[24] The Court, in *Flast,* draws a distinction where there is no real difference. Suppose a court holds that contributory negligence should be an absolute defense in tort cases.[25] The court makes this ruling in a case where the plaintiff drove his car too fast at night on a wet, curving road. A later court that prefers comparative negligence cannot legitimately distinguish the earlier decision by pointing out that here the plaintiff ran a red light.

In terms of the reasoning of *Frothingham* and the scope of the rule announced in that case, it makes no difference whether the constitutional claim is based on a general or specific constitutional standard. The focus is upon the insubstantial nature of the taxpayer's interest, and in this respect there is no discernible difference between *Frothingham* and *Flast.*[26] The Court's proffered distinction between the taxpayer's interest in rectifying violations of the establishment clause and his interest in challenging other kinds of government action "reduces constitutional standing to a word game played by secret rules."[27] Let me stress that this point about the Court's break with precedent is quite independent of the question whether *Flast* lays down a good rule.

Now consider the fate of *Flast* at the hands of the Burger Court. *Flast* justified its taxpayer standing rule by stressing the special nature of the establishment clause. "One of the specific evils" feared by the framers "was that the taxing and spending power would be used to favor one religion over another or to support religion in general."[28] Unlike the general limits on the spending power that the plaintiff in *Frothingham* sought to raise, the establishment clause "was designed as a specific bulwark against . . . potential abuses of governmental power," and the clause "operates as a specific constitutional limitation" upon Congress' article I taxing and spending power.[29]

In *Valley Forge Christian College,*[30] the Burger Court abandoned the special status accorded establishment clause claims under *Flast.*[31] The Court denied standing to taxpayers who sought to prevent the Secretary of Education from transferring government property to a religious college at no cost. *Valley Forge* resurrected the reasoning of *Frothingham*[32] and distin-

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24. *See* Goodhart, *Determining the Ratio Decidendi of a Case,* 40 YALE L.J. 161, 172-81 (1930); Goodhart, *The Ratio Decidendi of a Case,* 22 MOD. L. REV. 117, 119 (1959); Schauer, *supra* note 23, at 577-78. *Cf.* M. EISENBERG, THE NATURE OF THE COMMON LAW 136 (1988) (on the use of "inconsistent distinctions" as a means of undermining established doctrines).

25. The substantive basis for such a ruling may be that the absolute defense gives better incentives for safety than does comparative negligence.

26. *See Flast,* 392 U.S. at 121-30 (Harlan, J., dissenting).

27. *Id.* at 129 (Harlan, J., dissenting).

28. *Id.* at 103.

29. *Id.* at 104; *see also id.* at 115-16 (Fortas, J., concurring).

30. 454 U.S. 464 (1982).

31. *Id.* at 488-89.

32. *Id.* at 471, 477, 489-90.

guished *Flast* as a case where the plaintiffs challenged *congressional* action. Here, in contrast, an executive officer of the government made the transfer.[33] Moreover, Congress did not enact the authorizing legislation under its taxing and spending power. Rather, it "was an evident exercise of Congress' power under the Property Clause."[34]

Once again, the Court seized upon an insubstantial distinction. Under the reasoning of *Flast,* what counts is the special nature of the establishment clause as a bulwark against government aid to religion. It is irrelevant whether Congress or an executive officer takes the challenged action, or whether the statutory authority comes from article I or article IV of the Constitution. As Justice Stevens pointed out in his dissent, the Court's "tenuous distinction"[35] serves "only to trivialize the standing doctrine."[36]

B. Pennhurst *and the Scope of the Eleventh Amendment*

The eleventh amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."[37] Ever since *Ex parte Young*[38] was decided in 1908, the Court has permitted suits for injunctive relief against state officers who act unconstitutionally, on the ground that the state officer is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[39] Efforts to delineate the proper scope of the *Ex parte Young* exception have produced an unstable body of doctrine. This section discusses a recent and dramatic departure from precedent in the area.

In the wake of *Ex parte Young,* plaintiffs sought relief in federal court against state governments on both federal and state law grounds. In *Siler v. Louisville & Nashville Ry. Co.,*[40] which reached the Supreme Court just a year after *Ex parte Young,* the railroad attacked ceilings on freight rates as illegal under state law, as well as the federal due process clause.[41] A determination that the ceilings on freight rates violated state law would render it unnecessary to resolve the fourteenth amendment claim. Therefore, the Court

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33. *Id.* at 479.

34. *Id.* at 480 (citing U.S. CONST. art. IV, § 3, cl. 2.)

35. *Valley Forge,* 454 U.S. at 515 (Stevens, J., dissenting).

36. *Id.* at 514 (Stevens, J., dissenting). For another recent example of doctrinal instability in standing law, compare Norwood v. Harrison, 413 U.S. 455, 465-66 (1973) (granting standing to black parents seeking to challenge government aid to segregated private schools, even though it was uncertain whether the remedy sought would actually further integration) with Allen v. Wright, 418 U.S. 717 (1984) (denying standing in such a case). *See* Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 639-40 & n.26 (1985).

37. U.S. CONST. amend. XI.

38. 209 U.S. 123 (1908).

39. *Id.* at 160.

40. 213 U.S. 175 (1909).

41. *Id.* at 177.

directed the lower federal courts to first attempt to resolve such cases on state law grounds, so as to avoid the friction between courts and legislatures that accompanies the adjudication of constitutional issues.[42] In *Siler,* the Supreme Court itself relied on state law to give the railroad the relief it requested.[43]

Whether a federal court should enjoin state officers on *state* grounds may pose an eleventh amendment issue distinct from relief on federal grounds, for the decision in *Ex parte Young* is somewhat ambiguous. On its face, *Ex parte Young* holds that the officer who acts illegally is not a state actor and hence is not entitled to the state's immunity.[44] It follows that the exception to the eleventh amendment recognized in *Ex parte Young* embraces relief based on state, as well as federal law. But the case may also be read as a judicially created exception to the eleventh amendment, justified by the need to craft effective federal remedies for fourteenth amendment violations.

The Court in *Siler* evidently took the former view of *Ex parte Young,* for it did not address the potential immunity issue lurking in the background. Were this not the Court's commonly held understanding of *Ex parte Young,* then surely Justice Harlan, who dissented in the earlier case, would have raised the issue. Yet Justice Harlan joined a unanimous Court in *Siler.*[45]

In 1984, *Pennhurst State School & Hospital v. Halderman*[46] held that the eleventh amendment bars federal relief against state officers on state law grounds.[47] Here the Court chose to read *Ex parte Young*[48] as a tool for enforcing fourteenth amendment rights and disowned *Siler.*[49] The plaintiffs in *Pennhurst* were inmates at a state mental hospital who claimed they had received inadequate treatment in violation of the federal constitution, federal statutes, and state law.[50] Although the facts were different, the analytical structure of their suit was identical to *Siler.* At an early stage of the litigation the lower federal courts granted relief based on federal statutory provisions,[51] but the Supreme Court read the statutes differently and reversed on the merits. The Court remanded with instructions to consider whether state law would give the plaintiffs the relief they sought.[52] The terms of the remand were wholly unexceptional, typical of federal practice ever since *Siler.* Yet when the district court found a basis in state law for the plaintiffs' claim,

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42. *Id.* at 193.
43. *Id.* at 193-98.
44. *Ex parte* Young, 209 U.S. 123, 159-60 (1908).
45. 213 U.S. at 190.
46. 465 U.S. 89 (1984).
47. *Id.* at 124-25.
48. 209 U.S. 123 (1908).
49. 465 U.S. at 117-21.
50. *Id.* at 92.
51. *Id.* at 93. *See* Halderman v. Pennhurst State School & Hosp., 612 F.2d 884 (3d Cir. 1979) (en banc); Pennhurst State School & Hosp. v. Halderman, 446 F. Supp. 1295, 1314-24 (E.D. Pa. 1977).
52. 451 U.S. 1, 31 & n.24 (1981).

the Court abruptly announced that the relief violated the eleventh amendment.

The Court justified its departure from precedent by stressing that the *Siler* opinion failed to address the eleventh amendment issue presented by relief on state grounds.[53] There is merit in the precept that the precedential value of a case depends in part on the care with which the precedent-setting court addressed the matter in question. If the issue received little or no attention, a later court might well be justified in giving it a second look. But *Siler* is a singularly inappropriate case for such a reexamination. The likely reason the *Siler* Court did not explicitly address the eleventh amendment issue is that it thought it had already done so a year before in *Ex parte Young*. From the perspective of the unanimous *Siler* Court, the important feature of *Siler* was the opportunity it provided to try to minimize friction between the federal courts and state governments.

The longevity of *Siler* and the federal courts' repeated adherence to that decision should also count for something.[54] The lower courts, with the explicit approval of the Supreme Court, had followed *Siler* for seventy-five years. A large part of the value of precedent lies in the goal of maintaining stability in the law. Once the *Siler* rule was established, it became unimportant from the standpoint of stability that the Court had failed to address the eleventh amendment issue identified by the *Pennhurst* majority. Nothing is more disruptive of settled expectations than the sudden repudiation of a long-standing and well known rule, however shaky its doctrinal foundations may be.[55]

C. *Comity and Federalism*

Ex parte Young holds that constitutional challenges to state action may be brought in federal court, despite the eleventh amendment, provided that

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53. 465 U.S. at 118-19.

54. *See* South Carolina v. Gathers, 109 S. Ct. 2207, 2217-18 (1989) (Scalia, J., dissenting) ("the respect accorded prior decisions increases . . . with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity.").

55. In contrast, I do not regard Edelman v. Jordan, 415 U.S. 651 (1974), as a serious break with precedent, even though it overruled Shapiro v. Thompson, 394 U.S. 618 (1969), which, in turn, had ignored Ford Motor Co. v. Indiana Dep't of Treasury, 323 U.S. 459 (1945). *Ford Motor* refused, on eleventh amendment grounds, to allow a federal suit for a refund of illegally collected state taxes. *Id.* at 464. *Shapiro,* without citing either *Ford Motor* or the eleventh amendment, permitted the plaintiffs to recover from the state those illegally withheld welfare benefits. 394 U.S. at 621-42. *Edelman,* decided five years later, expressly overruled *Shapiro.* 415 U.S. at 670-71. In my view, *Shapiro* had little precedential weight as an eleventh amendment holding, not only because the Court failed to address the eleventh amendment issue, but also because it had not earned the respect of lower federal courts. *See* Rothstein v. Wyman, 467 F.2d 226, 239-41 (2d Cir. 1972), *cert. denied,* 411 U.S. 921 (1973).

Another recent repudiation of precedent in eleventh amendment law is Welch v. State Dep't of Highways and Transp., 483 U.S. 468 (1987) (overruling Parden v. Terminal R.R., 377 U.S. 184 (1964)).

the plaintiff seeks only prospective relief.[56] The Supreme Court has erected a number of other obstacles to federal relief, in the form of abstention, exhaustion, and default rules.[57] Two of these, abstention and procedural default in habeas corpus, provide good illustrations of the Court's characteristic willingness to break with precedent in adjudicating federal courts issues.

1. Abstention in Constitutional Cases

State criminal statutes sometimes penalize words and actions that are arguably protected by the first amendment or other constitutional provisions, such as statutes that forbid subversive advocacy[58] and statutes that set ceilings on railroad freight rates.[59] The first may violate freedom of speech, and the second may run afoul of the due process clause. Persons who object to these statutes or their application typically prefer to litigate the constitutional issue in a federal court suit modeled after *Ex parte Young*. State prosecutors prefer to try these constitutional questions in state criminal courts. The problem for the Supreme Court is to devise rules for allocating such cases between federal and state courts.

In *Douglas v. City of Jeannette*[60] a group of Jehovah's Witnesses wanted to distribute religious literature door-to-door without first obtaining a city license. When the city threatened to prosecute them in state court, they initiated a federal suit for injunctive relief, claiming the ordinance violated the establishment clause. The Supreme Court, writing in the post-New Deal heyday of deference to state courts, took a narrow view of the federal courts' role in such cases and denied a federal forum to these plaintiffs. "[T]he arrest by the federal courts of the processes of the criminal law within the states . . . [is] to be supported only on a showing of danger of irreparable

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56. 209 U.S. 123 (1908).

57. Another prerequisite to federal jurisdiction is that the case arise under federal law, within the meaning of 28 U.S.C. § 1331 (1982). While all of the cases discussed in this section meet this requirement, the Court's construction of the statute exhibits the instability that characterizes so much of federal courts doctrine. *Compare* American Wellworks Co. v. Layne Bowler Co., 241 U.S. 257 (1916) (a suit arises under the law that creates the cause of action, so that a defamation case based on defendants' impugning the plaintiff's patent must be heard in state court, even though a federal question (the validity of the patent) is presented on the face of the complaint) *with* Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (a suit arises under federal law if the complaint indicates a need to resolve a federal question).

The most recent case bearing on this issue is Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986), where the Court appeared to revert to *American Wellworks,* although it claimed not to overrule *Smith. See* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1020 (3d ed. 1988) [hereinafter HART & WESCHLER]. *See also* Field, *supra* note 7, at 687-90 (discussing the difficulty in identifying the proper test to determine federal question jurisdiction).

58. *See, e.g.*, LA. REV. STAT. ANN. § 14:358-14:378 (West Cum. Supp. 1962); LA. REV. STAT. ANN. § 14:396-14:3908 (West Cum. Supp. 1962).

59. 1900 Ky. McChord Act, ch. 2, p.5.

60. 319 U.S. 157 (1943).

injury 'both great and immediate.'"[61] The burdens of facing a state criminal prosecution were not sufficient to meet this standard. Federal relief would be appropriate only in extraordinary circumstances, as where the prosecution was brought in bad faith, for the purpose of harassing the federal plaintiff, and with no possibility of obtaining a valid conviction.[62]

In the 1960's civil rights workers found themselves threatened with prosecution under state statutes prohibiting subversive advocacy. They sought to challenge the validity of those statutes in federal court on first amendment grounds. In *Dombrowski v. Pfister,*[63] the Court relaxed the restrictions on access to federal courts so that more of these suits could be maintained in federal court. *Dombrowski* held that the "irreparable injury" requirement would be met if the federal plaintiff could prove that the state statute was overbroad in violation of the first amendment. In such a case, "[t]he assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded," since the broad sweep of the statute and the consequent fear of prosecution may dissuade people from ever exercising their rights in the first place.[64]

The effect of *Dombrowski* was to greatly increase the number of such suits filed in the federal courts.[65] Although this case was part of the Warren Court's expansion of constitutional remedies, it is not an example of the Court flouting precedent. Rather, *Dombrowski* accepts the authority of *Douglas v. City of Jeanette* for the proposition that federal injunctive relief is generally unavailable against a state criminal prosecution, absent some special circumstance such as bad faith.[66] *Douglas* made no ruling on the question of whether overbreadth could count as "irreparable injury." The overbreadth doctrine was still in its infancy at the time of *Douglas.*[67]

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61. *Id.* at 163-64 (citing Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935)).

62. *See, e.g.,* Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941) (the Court found danger of irreparable injury in the threat of multiple prosecutions and the risk that aggregate fines that might be imposed would be very large). *See generally* Younger v. Harris, 401 U.S. 37, 45-49 (1971) (single prosecution not brought in bad faith is incidental to criminal proceedings and individual is not entitled to equitable relief).

63. 380 U.S. 479 (1965).

64. *Id.* at 486.

65. *See* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of* Dombrowski, 48 TEX. L. REV. 535, 606 (1970).

66. This broad reading of *Douglas* may have ascribed more authority to the case than it deserved. A number of respected scholars maintain that *Douglas* itself "did not represent a settled view against the issuance of injunctions in this context and that in fact such injunctions had routinely been issued by lower courts and approved by the Supreme Court." P. Low & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 1162 (2d ed. 1989) [hereinafter P. Low & J. JEFFRIES] (citing Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot,* 46 U. CHI. L. REV. 636 (1979); Soifer & Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction,* 55 TEX. L. REV. 1141 (1977); Wechsler, *Federal Courts, State Criminal Law and the First Amendment,* 49 N.Y.U. L. REV. 740 (1974)).

67. According to Monaghan, *Overbreadth,* 1981 SUP. CT. REV. 1, 11, the "fountainhead" of the overbreadth doctrine is Thornhill v. Alabama, 310 U.S. 88 (1940) (where peaceful labor picketing was construed to be speech and thus protected by the first amendment).

Douglas and *Dombrowski* are important to our inquiry into precedent in federal courts cases because they provide background to *Younger v. Harris.*[68] Just six years after *Dombrowski,* a new majority on the Court repudiated the "overbreadth as irreparable injury" holding of that case. The *Younger* Court began its treatment of *Dombrowski* by suggesting that it was of minimal precedential value.[69] Justice Black, writing for the Court, pointed out that the overbreadth discussion in *Dombrowski* was "unnecessary to the decision" of the earlier case, because the plaintiffs had also alleged a bad faith prosecution and thus fell within "the long established standards."[70] This effort to weaken the precedential force of *Dombrowski* would be persuasive if the overbreadth holding in that case were an ill-considered afterthought that had produced unintended consequences. But the truth is to the contrary. The *Dombrowski* majority deliberately sought to broaden access to the federal courts by expanding the content of "irreparable injury."[71] Many litigants took advantage of the overbreadth exception created by *Dombrowski,* and before *Younger* the Supreme Court never murmured a word of protest.[72]

To his credit, Justice Black devoted more attention to a forthright rejection of *Dombrowski* on the merits. The chilling effect on protected speech alleged in *Younger* could not "be satisfactorily eliminated by federal injunctive relief."[73] In addition, "the existence of a 'chilling effect,' even in the area of first amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action."[74] Furthermore, facial review of state statutes "is fundamentally at odds with the function of the federal courts in our constitutional plan."[75] We need not pause to take sides in this debate over the merits of *Dombrowski.* The point is that *Younger* is a frank rejection of the earlier decision, based on the later Court's disagreement with its wisdom.

2. *Procedural Default in Habeas Corpus*

Younger denies access to federal court where a state action is pending at trial or on appeal. When a defendant has exhausted his appeals in the state courts, he may become a federal plaintiff in a habeas corpus action seeking release from custody. The statute granting federal habeas corpus to state prisoners dates from 1867. Over the years the Court has varied its treatment of virtually every aspect of habeas, including the grounds on which habeas

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68. 401 U.S. 37 (1971).
69. *Id.* at 50.
70. *Id.*
71. *See* Fiss, Dombrowski, 86 YALE L.J. 1103, 1112-13, 1163 (1977).
72. *See* P. LOW & J. JEFFRIES, *supra* note 66, at 1162.
73. 401 U.S. at 50.
74. *Id.* at 51.
75. *Id.* at 52.

may be sought,[76] the definition of "custody,"[77] and the extent to which the habeas petitioner must exhaust state remedies.[78] Perhaps the best illustration of the Court's treatment of precedent, is its changing doctrine on procedural default.

A state prisoner may not assert federal constitutional claims on habeas unless he has properly preserved them in state court or has a good excuse for not having done so.[79] If a valid state procedural rule requires a contemporaneous objection to the admission of evidence, the prisoner who neglects to object may be barred from raising the constitutional validity of the evidence on habeas.[80] And the prisoner who inexcusably fails to appeal a trial court's ruling on a constitutional defense in state court, within the state's deadlines, will not be permitted to raise the issue on habeas.[81]

The hard question here is determining what constitutes a good excuse. In the 1953 case *Daniels v. Allen,*[82] the Court reaffirmed a long-standing rule that virtually no excuse was good enough, unless the state itself was to blame for the problem.[83] In *Daniels,* for example, a state prisoner was convicted of murder and sentenced to death. The prisoner's lawyer served the appeal by hand in state court a day after the deadline for mailing it.[84] Although this violation of state procedure seems unimportant, the Supreme Court denied federal habeas consideration of his constitutional claims.[85]

Ten years later the Warren Court returned to this issue. The habeas petitioner in *Fay v. Noia*[86] had been convicted twenty years earlier and had failed to file an appeal in state court,[87] yet the Court granted him access to

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76. *Compare* Brown v. Allen, 344 U.S. 443 (1953) (generally permitting accused to habeas corpus for constitutional claims) *with* Stone v. Powell, 428 U.S. 465 (1976) (denying habeas for most fourth amendment claims). *See also* Teague v. Lane, 109 S. Ct. 1060, 1068 (1989) (following cause and prejudice test); Wainwright v. Sykes, 433 U.S. 72, 79 (1977) (habeas denied after application of cause and effect test).

77. *Compare* Weber v. Squier, 315 U.S. 810 (1942) (habeas unavailable to petitioner on parole) *with* Jones v. Cunningham, 371 U.S. 236, 241-44 (1963) (parole is sufficient restraint to constitute "custody" and authorize habeas). *See generally* HART & WESCHLER, *supra* note 57, at 1020.

78. *Compare* Rose v. Lundy, 455 U.S. 509 (1982) (requiring exhaustion of all claims presented in a habeas petition before a federal court should consider any of them) *with* Strickland v. Washington, 466 U.S. 684 (1984) (considering the merits of an exhausted claim even though the petitioner had also presented an unexhausted one). *See also* Wainwright v. Sykes, 433 U.S. 72, 80-81 (1977) (exception to contemporaneous objection rule exists upon showing cause for noncompliance and actual prejudice).

79. *See* Hill, *The Forfeiture of Rights in Criminal Cases,* 78 COLUM. L. REV. 1050 (1978).

80. Wainwright v. Sykes, 433 U.S. 72 (1977).

81. Murray v. Carrier, 477 U.S. 478 (1986).

82. 344 U.S. 443 (1953) (decided in the same opinion as *Brown v. Allen*).

83. *Id.* at 482-87.

84. *Id.* at 552-53.

85. *Id.*

86. 372 U.S. 391 (1963).

87. *Id.* at 394.

federal habeas.[88] Under the rule laid down in *Noia,* procedural default would preclude habeas only where the petitioner's conduct amounted to a "deliberate bypass" of state processes.[89] While the Court never identified the precise contours of this standard, it was clear that errors by the criminal defendant's lawyer would not bar access to habeas. In justifying the new rule, Justice Brennan's opinion for the Court sets forth an ambitious theory of habeas as a remedy that focuses on the basic justice of the incarceration, and makes extensive use of historical materials.[90] But the opinion barely mentions *Daniels* and does not explain why the case deserves no precedential weight.[91]

In the 1970's *Noia* went to the grave along with *Flast* and *Dombrowski.* In *Francis v. Henderson*[92] and *Wainwright v. Sykes,*[93] the Burger Court replaced the "deliberate bypass" standard with a "cause and prejudice" test for procedural default.[94] Under this new standard, a habeas petitioner may be barred not only by his counsel's deliberate choice to bypass state procedures, but also by the lawyer's unintentional errors.[95] Habeas is available only when the default is due to an inability to raise the federal issue, as where the constitutional right asserted was not established until after the trial, or where the state is to blame for the default.

In *Sykes* the Court gave *Noia* a somewhat more respectful burial than Justice Brennan had accorded *Daniels.* Justice Rehnquist began his discussion of *Noia* with a wholly unconvincing attempt to narrow its reach to the failure to appeal context in which it arose. According to the Court in *Sykes,* the application of the "deliberate bypass" standard outside that context to the contemporaneous objection rule at issue in *Sykes* can be traced not to the holding in *Noia* but merely to "dicta."[96] The problem raised by this effort to evade *Noia's* precedential force is that the reasoning of *Noia,* as

88. *Id.* at 441.

89. *Id.* at 438.

90. 372 U.S. at 399-435.

91. *Id.* at 424-25.

92. 425 U.S. 536 (1976).

93. 433 U.S. 72 (1977).

94. *See also* Murray v. Carrier, 477 U.S. 478, 496-97 (1986) ("The cause and prejudice test as interpreted . . . in our decision today is, we think, a sound and workable means of channelling the discretion of federal habeas courts."); Smith v. Murray, 477 U.S. 527, 537-38 (1986) ("application of the cause and prejudice test will not result in a 'fundamental miscarriage of justice.'" (citing Engle v. Issac, 456 U.S. 107, 135 (1982))); Reed v. Ross, 468 U.S. 1, 11 (1984) ("When . . . a defendant has failed to abide by a state's procedural rule requiring the exercise of legal expertise and judgment, the competing concerns implicated by the exercise of the federal court's habeas corpus power have come to be embodied in the cause and prejudice requirement."); United States v. Frady, 456 U.S. 152, 167 (1982) ("We believe the proper standard of review . . . is the 'cause and actual prejudice' standard."); Engle v. Issac, 456 U.S. 107, 135 (1982) ("we are confident that victims of the fundamental miscarriage of justice will meet the cause and prejudice standard.").

95. *See* Murray v. Carrier, 477 U.S. at 485-87.

96. *Sykes,* 433 U.S. at 87.

well as the "deliberate bypass" rule, were cast in broad terms in order to cover all procedural defaults. The Supreme Court, as well as lower courts, had so understood the case for over a decade.[97]

The *Sykes* opinion does not end with this clumsy effort to dodge *Noia.* As Justice Black did in *Younger,* Justice Rehnquist went on to confront the "deliberate bypass" test on its merits. He and the new majority deemed the state interests underlying state forfeiture rules worthy of "greater respect"[98] than *Noia* gave them. A contemporaneous objection rule "enables the record to be made . . . when the recollections of the witnesses are freshest."[99] Further, it "enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question," and, in general, it makes "a major contribution to finality in criminal litigation."[100]

D. Supreme Court Review of Ambiguous State Judgments

Since "[f]ederal law . . . rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states,"[101] many disputes present some issues of federal law and others that turn on state law. Consequently, state courts often must resolve both state and federal questions. Ever since the Judiciary Act of 1789,[102] Congress has authorized the Supreme Court to review at least some of these state cases. The Court decided long ago that it would hear only the federal issues decided by state courts, and not matters governed by state law.[103] It will refuse to consider even the federal issues if an adequate and independent state ground supports the judgment, so that resolution of the federal issue would not affect the outcome of the case.[104] Under this test, if a state court strikes down state legislation on both federal and state grounds, then the state ground is adequate and the loser cannot appeal to the Supreme Court. By contrast, the state ground is not adequate if the state court upholds the legislation against both challenges, for then a different resolution of the federal issue would change the outcome of the case.

Difficulties arise in the application of this test when the state court's opinion is ambiguous. This problem typically arises when the state consti-

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97. *See* Goodman & Sallett, Wainwright v. Sykes: *The Lower Federal Courts Respond,* 30 HASTINGS L.J. 1683, 1685 (1979); Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel,* 62 MINN. L. REV. 341, 344-50 (1978).

98. *Sykes,* 433 U.S. at 88.

99. *Id.*

100. *Id.* at 88-90. The Court later decided to abandon *Noia* in the context of failure to appeal as well. *See* Murray v. Carrier, 477 U.S. 478, 490-92 (1986).

101. HART & WESCHLER, *supra* note 57, at 533.

102. 1 Stat. 73, 85 (1789).

103. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

104. *E.g.,* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540-41 (1930).

tution contains provisions paralleling those of the Bill of Rights, such as the due process clause of the fifth and fourteenth amendments. Someone challenges state action in state court on both state and federal grounds and the state court cites both state and federal authority in disapproving the state's conduct. Whether the Supreme Court can review the state court judgment depends on whether the state court meant to ground its decision in state or federal law, yet it is not clear what the state court really meant to do.

There are just four ways of dealing with ambiguous state opinions, and at one time or another the Supreme Court has tried each of them. Early in its history the Court took the view that it was up to the appellant to demonstrate the Supreme Court's jurisdiction. Under this approach, the presumption was that the state court judgment rested on state grounds unless there were persuasive reasons to conclude otherwise.[105] If the state opinion was too ambiguous to provide such reasons, the Court denied review. As early as 1890, in *Johnson v. Risk,*[106] the Court adopted a second approach. Under this approach, the Supreme Court itself examined state law to determine whether a decision rested on state grounds. While the Court has continued to employ this method on occasion, it seems to carry no precedential force, for the Court also adopts a third approach, that of sending the case back to state court for clarification.[107]

Until the 1980's the Court "oscillated among . . . these alternatives."[108] Then in *Michigan v. Long,*[109] it declared that none of them were satisfactory. Presuming an adequate state ground would sometimes mean that decisions based on federal law go unreviewed.[110] The Court may err if it examines unfamiliar state law for itself.[111] And sending cases back to state court "places significant burdens on the state courts" and creates "delay and decrease in efficiency of judicial administration."[112] Hence, all three of these techniques were discarded. In their place, the Court erected a presumption that, absent a clear statement to the contrary by the state court, state opinions including both state and federal authorities are presumed to rest on federal grounds. In justifying the new rule, Justice O'Connor's opinion for the

105. *See, e.g.,* Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934); Eustis v. Bolles, 150 U.S. 361 (1893); Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1871).

106. 137 U.S. 300, 307 (1890). *See also* Texas v. Brown, 460 U.S. 730, 732-33 n.1 (1983) (plurality opinion) (the decision below reversing defendant's narcotics conviction did not rest on an adequate and independent state ground but on a Supreme Court ruling and Texas cases interpreting that ruling); Oregon v. Kennedy, 456 U.S. 667, 670-71 (1982) (the opinion below reversing defendant's conviction on double jeopardy grounds rested solely on federal law).

107. California v. Krivda, 409 U.S. 33 (1972) (per curiam); Herb v. Pitcairn, 324 U.S. 117 (1945); Minnesota v. National Tea Co., 309 U.S. 551 (1940).

108. HART & WESCHLER, *supra* note 57, at 548.

109. 463 U.S. 1032 (1983).

110. *Id.* at 1040 ("there is an important need for uniformity in federal law, and this need goes unsatisfied when we fail to review an opinion that rests primarily upon federal grounds.").

111. *See id.* at 1039 ("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar . . . .").

112. *Id.* at 1039-40.

Court stressed the importance of achieving uniformity of federal law.[113] The *Long* rule, unlike the contrary presumption, would assure Supreme Court review of any state case that may turn on federal law.

Perhaps it is too late for me to offer the Court's treatment of ambiguous state grounds as an example of instability in the law of federal courts. The *Long* opinion deplores the "ad hoc method" of the earlier cases, which "is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[114] So the Court reexamines the problem and comes up with a new rule "in order to achieve the consistency that is necessary."[115] Permit me to be skeptical. *Long* may stand for a hundred years and prove me wrong, but the history of the Court's efforts in this area do not augur well for it. The Court has already (arguably) departed from it once. In *Capital Cities Media v. Toole,*[116] the state court did not write an opinion, and both federal and state grounds were available for disposition of the case. Rather than apply the *Long* presumption, the Court preferred to remand to the state court for guidance.[117]

II. The Role Of Precedent In The Legal System

Why is precedent such a weak constraint in federal courts law? To answer this question it is necessary to construct a model of the role of stare decisis in the legal system, and then to explore the implications of the model for precedent in the federal courts context. This part of the Article undertakes the first inquiry, and Part III the second.

A. Precedent and Judicial Decisionmaking

We may clarify the role of precedent in adjudication by distinguishing between two reasons why a court might cite to a prior decision. On the one hand, a judge might think the earlier opinion will reinforce his own arguments, either because the reasoning is highly persuasive, or because the judge who wrote the opinion is highly regarded, or because many cases have reached the same result on the issue at hand, so that the sheer weight of numbers falls on one side of the question. The deciding court does not in any of these instances advance the earlier opinion as a precedent for the resolution of the case before it. By hypothesis, the court has reasoned its way to an answer based on its conception of fairness or good social policy or some other norm, and now employs earlier cases to bolster its explanation of the result.

This is not to suggest, however, that such citations are mere window dressings. Perhaps the judges themselves made up their minds only after

113. *See id.* at 1040-41.
114. *Id.* at 1039.
115. *Id.*
116. 466 U.S. 378 (1984) (per curiam). *See* Hart & Weschler, *supra* note 57, at 552.
117. 466 U.S. at 379.

reading the earlier opinions and finding them to be persuasive. What must be underlined is that the primary source of the court's holding in such a case is the majority's conception of good law. The authorities are of secondary importance, valuable only because of the contribution they make to realizing the deciding court's own aims.[118] When cases are used in this way, their pedigree is less important than their substantive content. A dissenting opinion, a ruling from another jurisdiction, or from a lower court, may prove just as useful as the court's own cases.

Contrast this use of past decisions with the case where a court rules as it does *just because* of the existence of the prior case.[119] Now the cited case counts solely because it was decided by a court with ultimate authority over the matter at issue, and not at all because of the persuasiveness of the reasoning in the opinion or the number of cases from lower courts or other jurisdictions reaching the same result. Moreover, it is irrelevant whether the present court shares the conception of justice underlying the earlier opinion or endorses the earlier court's reasoning. Only if these conditions are met has the present court truly invoked the earlier case as a precedent.

The point of this distinction between two ways of using cases is that stare decisis is not a rhetorical or persuasive device. It is nothing less than a rule of decision. Precedent plays the same role in adjudication as do statutory and constitutional commands, the principle of utility, and various conceptions of justice and morality, all of which are standards upon which judges explicitly or implicitly rely in deciding cases. In a regime where precedent counts heavily, the prior case, by itself and unadorned with arguments from utility or fairness or statutory text, is a sufficient justification for a court's resolution of the current dispute.

Notice two corollaries of this reasoning. First, in such a system precedent governs even though the present court, left to its own devices, would rule otherwise. Second, like other rules of decision, nothing in the nature of stare decisis requires that a court must either follow precedent religiously or not at all. Like utility or fairness, precedent can influence outcomes more or less heavily even when it is not the decisive factor in all cases where precedents are available. A court may, in a given case, find that other considerations outrank precedent without abandoning its commitment to take precedent into account in reaching decisions.[120]

Whether courts in practice give much weight to precedent is a separate question. Precedent has had a checkered career in Western legal systems. Given the austerity required of a court that follows stare decisis, some commentators would banish precedent from the judicial arsenal altogether.[121]

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118. *See* Schauer, *supra* note 23, at 575.

119. *Id.* at 576; R. WASSERSTROM, THE JUDICIAL DECISION 54 (1961).

120. *See* Schauer, *supra* note 23, at 592.

121. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 167 (Anchor ed. 1963).

In the early common law precedent counted for little,[122] and in modern civil law countries with detailed codes, only the code is considered law. The decisions of courts are merely efforts to interpret and apply the code correctly. If a later court thinks an earlier tribunal erred, it is supposed to ignore the prior decision.[123]

At the other extreme, the British House of Lords announced, at the end of the nineteenth century, that it would consider itself absolutely bound to follow its precedents.[124] Only in this way, it was argued, could the law be certain and judges stopped from usurping the powers of the legislature.[125] Likewise, some American courts write as if precedent is rigidly binding upon them, especially when they are about to reject a plea for overturning a rule widely perceived as unjust.[126] Modern scholarly commentary supporting this approach to precedent is hard to come by.

Most courts adopt a third stance toward stare decisis, in between these two. They accord weight to precedent, but they sometimes overrule or undermine precedents they consider sufficiently unworthy. There is a wide spectrum of approaches within this group of courts. While all of them pay attention to precedent, some give it more respect than others. Variations aside, today this is the prevalent view, in practice if not in theory, in both common law and civil law countries.[127] In 1966, the House of Lords abandoned its rigid rule and joined this group.[128] Observers of practices in civil law systems report that lines of precedent, if not specific cases, receive respect in the decision of later cases, even where judicial decisions have no official status as law.[129]

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122. *See* J. DAWSON, ORACLES OF THE LAW 58 (1968).

123. *See* J. MERRYMAN, THE CIVIL LAW TRADITION 36 (2d ed. 1985).

124. *See* J. DAWSON, *supra* note 122, at 91; London Street Tramways Co. v. London County Council, 1898 App. Cas. 375, 380.

125. *See* J. DAWSON, *supra* note 122, at 92-93.

126. *See, e.g.*, Landgraver v. Emanuel Lutheran Charity Bd., 203 Or. 489, 493-94, 280 P.2d 301, 303 (1955). "Some courts of high repute . . . have [re-examined the question of tort liability as it applies to charitable institutions] and in many instances have, in light of changed conditions, overturned the rule of immunity, expressly overruling their prior decisions. . . . We also suggested a change in the rule. . . ." *Id.* at 302-03. Yet the court declined to overrule prior case law stating, "it seems clear that any change in the public policy of this state should be a matter solely for legislative determination." *Id.* at 302.

127. *See* R. CROSS, PRECEDENT IN ENGLISH LAW 4 (3d ed. 1977) (regarding common law countries); J. MERRYMAN, *supra* note 123, at 47 (regarding civil law countries). *See also* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 372 (1985) (discounting in general the two extremes accorded precedent, namely absolute weight or no weight for stare decisis).

128. *See* 3 All E.R. 77 (1966) (note by the House of Lords); R. CROSS, *supra* note 127, at 109.

129. *See, e.g.*, E. FARNSWORTH & V. MOZOLIN, CONTRACT LAW IN THE USSR AND THE UNITED STATES: HISTORY AND GENERAL CONCEPT 99-100 (1987); 1 F. LAWSON & B. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 186 (1982).

What accounts for the dominant position of this third approach? Two propositions should already be apparent. First, there must be powerful considerations operating in favor of following precedent, else it is quite impossible to understand why judges in so many times and places would follow previous cases instead of implementing their own notions about what rules are best. Second, absolute or even nearly absolute fidelity to precedent is hardly a requisite of a healthy legal system. While federal courts law seems especially unstable, all lawyers know that virtually no area of the law goes very long without some judicial modification. But we have not yet explored the reasons why courts move toward the middle and away from the two extreme positions on the role of precedent in adjudication.

B. The Costs and Benefits of Precedent as a Rule of Decision

Precedent is best understood in instrumental terms as a tool that produces a number of benefits and obliges us to bear significant costs. The disagreements among courts and commentators over whether stare decisis should count at all and how much weight it should receive reflect differences over the value of these benefits and costs. The general rejection of both extreme positions demonstrates that nearly everyone agrees there is something of value on either side of the cost-benefit equation.

1. The Value of Precedent

a. Stability

Precedent promotes stability in the law.[130] The link between precedent and stability is straightforward: the law will change less over time to the extent judges feel a strong obligation to adhere to prior cases even when their own preference is to replace the old rule. But why is a stable body of law a goal worth pursuing? We must consider this question in abstract terms, apart from specific rules or proposals for reform. Otherwise, we may be distracted by the merits of particular rules and lose sight of the question of whether stability deserves respect for its own sake in judicial decisionmaking.

Quite apart from the content of any given rule, the value of stability in the law is rooted in two distinct considerations, one psychological and the other economic. On the level of human psychology, "[o]ne of the most fundamental of all human needs is to feel in control of one's environment."[131] This urge "can be best satisfied . . . in an environment in which change—if it occurs at all—is regular and therefore can be anticipated."[132] Since legal rules have important effects on human welfare, they must remain reasonably stable if people are to feel at ease. Absent a major alteration in human

130. *See* R. WASSERSTROM, *supra* note 119, at 60-62; Schauer, *supra* note 23, at 597.
131. R. WASSERSTROM, *supra* note 119, at 62.
132. *Id.*

nature, legal systems will always respond to this desire for control by giving weight to prior cases.

Even if human beings felt no strong psychological need for stability, a powerful argument can be made for stability in the law on economic grounds. People cannot be induced to voluntarily give up the maximization of current satisfactions, and instead invest in the future, unless they can be reasonably confident that they or their heirs will gain from the increase in wealth produced by the investment. Unless legal rules in areas such as contracts and property remain stable, no one can have any confidence that he will be able to capture the fruits of his investment. In the long run, we will be poorer.[133] Take the simple case of a woman thinking about planting a garden. If the law regarding property rights were unstable, she would fear that by the time the vegetables were ready to pick, the law of property may allow her neighbors to take them. As a result, she would have far less incentive to plant and nurture the garden, foregoing the chance to create more wealth for herself and for society as a whole.

b. Reliance

Once a court has established stare decisis as a rule of decision, people may come to rely on predictions that the court will abide by precedent. Indeed, the point of the economic ground for stability in law is to induce such reliance. In turn, reliance generates another reason for continued adherence to precedent. Putting aside the psychological need for control and the utilitarian goal of stimulating investment for the future, basic notions of fairness counsel against betraying people who are induced to arrange their affairs in a certain way by assurances that the court follows precedent.[134] Suppose a telegraph company, knowing of the rule that limits contractual liability for consequential damages, and knowing the courts' practice of following precedent, takes no precautions to ensure that its messages are accurately transmitted. Though doubting the substantive merits of this rule on consequential damages, the court in *Kerr Steamship Co. v. Radio Corp. of America*[135] thought that reliance upon it was a compelling justification for adhering to precedent.

Notice that reliance, unlike stability, is not a justification for instituting a practice of following precedent.[136] Reliance does not come into play until the courts have established stare decisis as a rule of decision, and people have observed it in operation long enough to draw the inference that prec-

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133. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970); M. EISENBERG, *supra* note 24, at 10-11, 48, 63, 96; R. POSNER, ECONOMIC ANALYSIS OF LAW 30-33 (3d ed. 1986); R. WASSERSTROM, *supra* note 119, at 61-62.

134. *See* M. EISENBERG, *supra* note 24, at 48-49; R. WASSERSTROM, *supra* note 119, at 66-69.

135. 245 N.Y. 284, 291, 157 N.E. 140, 142 (1927).

136. *See* M. EISENBERG, *supra* note 24, at 48-49; R. WASSERSTROM, *supra* note 119, at 68-69.

edent will count heavily in adjudication. In this respect, reliance is dependent on the stability argument. It seems appropriate to treat it separately, however, since precedent is now well established in our legal system. As the system has evolved over time, fairness has emerged as a distinct factor counseling fidelity to precedent, even if stability were not important for its contribution to psychological ease and investment in the future.

c. Efficiency

Judges never have enough time to examine every issue as thoroughly as they would like. Given the amount of work they must do, and the importance of having cases decided within a reasonable period of time, it is wise for them to husband their scarce resources and devote them to the matters that most demand careful attention, such as important questions that the court has not yet addressed. It makes sense from the standpoint of the efficient use of judicial resources to count the court's prior consideration and decision on an issue as a good reason to follow that earlier case instead of looking once again at the merits of the competing arguments.[137]

This mundane maxim of good judicial housekeeping may seem insignificant, and it likely counts for little when the precedent at hand concerns a question of vital importance, as is the case with many constitutional issues. However, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[138] Often the gains from directing more judicial resources to an issue will not be worth the benefits.

2. The Opportunity Cost of Precedent

If following precedent efficiently utilizes scarce judicial resources, promotes needed stability in the law, and treats fairly those who rely on that stability, then why not regard precedent as the primary rule of decision, absolutely binding on the courts, as the British House of Lords did between 1898 and 1966? The reason is that these benefits must be purchased at a significant price, and the cost may be more than a court is willing to pay. The whole point of precedent is to remove from the deciding court the chance to reconsider the merits of the issue at hand, in the hope of arriving at a better resolution from the perspective of morality, or utility, or some other standard. The cost of adherence to precedent, then, is the foregone opportunity to try to make the law better by reexamining the reasoning of the earlier cases.[139]

The worth of this lost opportunity may vary depending on a host of circumstances. One variable is how important the question is. On crucial matters of public law, the lost opportunity may be worth more than on

137. *See* R. POSNER, *supra* note 133, at 515; Schauer, *supra* note 23, at 599; R. WASSERSTROM, *supra* note 119, at 72-73.

138. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

139. *See* Schauer, *supra* note 23, at 588-91.

ordinary issues.[140] Another variable is just how bad the earlier decision was. The more harm it does, in the view of the deciding court, the greater is the cost of refusing to reexamine it.[141] Another important factor is the strength of the court's commitment to judicial activism. A judge who perceives his role primarily in terms of adjudicating disputes under the standing law will be less inclined to depart from precedent than one who views legal reform as a major part of the judicial role.[142] The distinction here is not between political liberals and conservatives. Many conservative judges seem to be as committed to legal reform as the members of the liberal Warren Court.[143]

Finally, "reliance on precedent is inherently risk averse."[144] This factor goes not to the merit of the old rule or to the judicial philosophy of judges, but to the judges' personalities. Judges who are confident of their ability to make the law better will more often prove willing to spurn precedent than pessimists who fear that, however bad the old rule, the proposed new one may be even worse.

III. PRECEDENT IN CONTEXT: FEDERAL COURTS LAW REVISITED

Discussions of precedent typically go no further than identifying the costs and benefits of stare decisis in general terms. They may point out that the costs and benefits of stare decisis can vary according to context, so that precedent may be a stronger constraint in some contexts than others.[145] But they do not address specific contexts in any detail. For example, Professor Schauer's recent and insightful article[146] demonstrates that "no argument from invariable principle supports either the argument from predictability or the argument from enhanced decisionmaking."[147] Consequently, "the

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140. *See* United States v. Scott, 437 U.S. 82, 101 (1978) (the issue was important enough to the public interest that the Court overruled precedent and held government appeals from midtrial dismissals requested by the defendant did not violate the double jeopardy rule).

141. *See* M. EISENBERG, *supra* note 24, at 104-05, 122.

142. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1923 (1989) (Stevens, J., dissenting). *See also* Armstrong, *Mr. Justice Douglas on Stare Decisis: A Condensation of the Eighth Cardozo Lecture,* 35 A.B.A. J. 541, 543 (1949) ("Justices who in their private practice had to advise clients with large property interests have been the strongest adherents to *stare decisis* and former legislators and schoolmen are least influenced by it" (footnote omitted)); Monaghan, *Stare Decisis and Constitutional Adjudication,* 88 COLUM. L. REV. 723, 741 n.108 (1988) ("some writers have thought that the background of members of the Court has contributed importantly to attitudes towards precedent").

143. *See, e.g.,* Welch v. State Dep't of Highways & Transp., 483 U.S. 468, 495-96 (1987) (Scalia, J., concurring) (questioning the authority of Hans v. Louisiana, 134 U.S. 1 (1890)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (calling for a future majority to overrule the Court's decision); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 453-59 (1983) (O'Connor, J., dissenting) (questioning the authority of some aspects of Roe v. Wade, 410 U.S. 113 (1973)).

144. Schauer, *supra* note 23, at 590. *See also* Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1923 (1989) (Stevens, J., dissenting).

145. *See, e.g.,* M. EISENBERG, *supra* note 24, at 12, 121-22; Schauer, *supra* note 23, at 598.

146. Schauer, *supra* note 23, at 600.

147. *Id.*

evaluation of these alternatives turns into a weighing of costs and benefits that varies with different decisionmaking settings," and "[f]urther elaboration must be relegated to discussions of the goals to be served and the characteristics of decisionmaking in various decisionmaking settings."[148]

This part of the Article is a response to Professor Schauer's call for more attention to context.[149] It focuses on the law of federal courts and argues that precedent is a relatively weak constraint here because the benefits of adhering to precedent are comparatively low and the costs are high. A distinctive feature of the law of federal courts is that it addresses questions pertaining to the distribution of power among governmental institutions and not, as in most areas of doctrine, the substantive rights and obligations of persons toward one another and the government. These matters are as important to the character and vitality of our polity as they are irrelevant to the practical affairs of life. Because people typically do not count on stability in jurisdictional rules as they go about managing their lives and businesses, the value of precedent is low here. At the same time, the issues raised by these cases present the Court with occasions to realize a number of policy objectives. The Justices find it difficult to forego these opportunities for the sake of respecting precedent.

A. The Low Value of Precedent in Federal Courts Law

Just as stare decisis serves as a tool for maintaining a stable body of law, so also stability in the law is a means toward three more basic ends: 1) satisfying the psychological need for control over one's environment; 2) encouraging investment in the future; and, 3) efficiently allocating scarce judicial resources. Once the practice of following precedent is established, fairness to persons who act in reliance upon it also demands adherence to prior cases. While efficiency would be served by adherence to precedent in all doctrinal contexts, the other justifications for precedent vary in strength from one area of the law to another. The psychological, economic, and fairness considerations that give stability its value are less important in some contexts than others. Where stability is less vital, the benefits from fidelity to precedent are lower, and the cost-benefit calculus is more likely to come out against following the earlier case.

In order to measure the value of stare decisis in federal courts law, it is necessary to distinguish between primary rules, which "are concerned with the actions that individuals must or must not do,"[150] and secondary rules which "specify the ways in which the primary rules may be ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[151] All of the bodies of law governing activity in daily life—

148. *Id.* at 600-01.
149. *Id.* at 603-05.
150. H.L.A. HART, THE CONCEPT OF LAW 92 (1961).
151. *Id.*

contracts, torts, property, crime, and the like—are groups of primary rules. Federal courts cases like *Younger,*[152] *Pennhurst,*[153] *Valley Forge,*[154] and *Long*[155] are of an entirely different order. These jurisdictional norms allocating cases between federal and state courts, identifying who is an appropriate party to litigate an issue, and specifying the circumstances under which the Supreme Court may review a state court judgment are all secondary rules.

Stability counts heavily in the law governing primary activity,[156] and much less in the rules distributing cases among courts, determining who has standing, and setting standards for Supreme Court review. The Court's assertion in *Long* that "doctrinal consistency . . . is required when sensitive issues of federal-state relations are involved"[157] does not withstand scrutiny. The psychological need for control over one's environment and the importance of predictability in planning for the future are both strong with respect to the legal standards governing events of daily life in the world. It is important to our well-being, that the rules on keeping to the right on the highway and on property rights in one's house or car remain stable. No one would loan money or otherwise invest in the future without some assurance that current law protecting the investment would not change drastically. And, once people have been induced to act in reliance upon precedent in ordering their primary activity, it is unfair to betray their reliance by breaking with precedent.

In contrast, most people pay little if any attention to jurisdictional rules in deciding how to comport themselves and deploy their resources in the world of primary activity.[158] They do not decide how much care to take, or whether to sign a contract, or whether to exercise their putative first amendment rights, based on whether any litigation that might arise will go to federal or state court,[159] or whether the Supreme Court will be able to review

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152. 401 U.S. 37 (1971).

153. 465 U.S. 89 (1984).

154. 454 U.S. 464 (1982).

155. 463 U.S. 1032 (1983).

156. Even here, stability may be more important in some doctrinal contexts than others. *See* M. EISENBERG, *supra* note 24, at 122 (for example, areas "in which planning on the basis of law is common," like property law).

157. *Long,* 463 U.S. at 1039.

158. *Cf.* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) ("The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity. . . . However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior."). *See also* Hanna v. Plumer, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring) ("The choice of the Federal Rule would have no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort.").

159. Under the regime of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), federal courts were not obliged to follow state common law rules, and the choice of forum could indeed determine the rights of the parties. *Id.* at 6-7. *See, e.g.,* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 529-31 (1928) (Holmes, J., dissenting). The

an ambiguous state judgment. These jurisdictional rules come into play only after a dispute has arisen and threatens to give rise to litigation.

The point here is not that jurisdictional rules have absolutely no impact on the outcomes of cases. On the contrary, it seems to me quite evident that federal courts' rulings have significant, if indirect, effects on the results of litigation, and hence on the content of primary rules establishing the substantive rights and duties of the parties.[160] For example, litigants asserting first amendment rights are more likely to succeed if their cases are heard in federal court because federal courts are, on the whole, more sympathetic to constitutional claims than state courts.[161] But few people do look ahead to the jurisdictional issues that might arise in hypothetical future litigation, as they engage in their daily affairs in the world of primary activity.[162]

Recall the psychological, economic, and moral underpinnings of basing decisions on precedent. The effort to diminish instability is worth pursuing only to the extent people actually perceive that forces outside their control have important consequences for them. For all we know the planet may be in imminent danger of colliding with an undiscovered asteroid, but so long as no one knows about the hazard, no one is much troubled by the instability it introduces into our lives. Rules delineating the jurisdiction of federal and state courts may well affect the outcomes of cases. Government officials and individuals who engage in much constitutional litigation, and who appreciate the substantive consequences of jurisdictional rules, may well incur some of the harms that accompany unstable rules. This group, however, constitutes only a small part of the population. So long as few of us perceive the connection or think about the jurisdictional aspects of potential future lawsuits when deciding how to act in the world of primary behavior, the instability of federal courts rules will not engender significant amounts of

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manifest unfairness engendered by this state of affairs was a major factor leading to the downfall of *Swift*. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 74-78 (1938).

160. *See* Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 516-18 (1989) (outlining courts' reasoning underlying federal jurisdictional rules).

161. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-28 (1977) (evaluating relative institutional capacity in terms of technical competence, psychological set and political processes); Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 611-17 (1985) (viewing article III as creating specially empowered decisionmakers). *See also* Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1353-64 (lawyers believe federal courts are more sympathetic to constitutional claims); Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1324, 1349-51 (finding a 44% success rate in reported cases over a fifteen year period for habeas petitioners seeking to overturn state court convictions by raising first amendment grounds).

162. I cannot prove the truth of this intuition. It is based on my observation of human behavior. For example, laymen sometimes ask me what I do. When I describe my work as a torts teacher, they take a lively interest, ask questions, and venture opinions. On the other hand, when I talk about federal courts, their attention begins to wander and I get the feeling they are sorry they asked.

psychological unease, or unduly hinder efforts to plan ahead, or seriously disappoint reliance interests.[163]

The situation is sharply different once a dispute arises and someone contemplates litigation. Lawyers certainly do rely on jurisdictional rules in deciding whether a given dispute is justiciable, whether Supreme Court review is available, and whether to file suit in state or federal court. Yet the lawyer's interest in stable jurisdictional rules differs significantly from our common desire for stable rules governing primary behavior. Although changing the jurisdictional rules in the course of a lawsuit would be disruptive and unfair, the lawyer's need for predictability and stability is substantially satisfied when he knows at the outset of a given piece of litigation what to expect. It is critical that the rules governing this case remain stable, but not so vital that jurisdictional rules stay the same from one case to the next.[164] Accordingly, the lawyer's legitimate demand for stability can be met by prospective application of any new jurisdictional rule, without incurring the substantial costs in terms of inflexibility that accompany heavy reliance on stare decisis.[165]

B. The High Opportunity Cost of Precedent in the Federal Courts Context

For the purpose of identifying the disadvantages of fidelity to precedent, it is helpful to borrow from economics the concept of "opportunity cost."[166] We can conceive of the cost of precedent in terms of the court's perception of the value of the lost opportunity to change the law, or put another way, the potential benefits of rethinking the issue at hand. Recall that the benefits of rethinking an issue may vary from one case to another depending on such factors as the importance of the issues at stake, the court's commitment to law reform, and the judge's confidence in his ability to improve the law.

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163. Moreover, since the law in this area has been unstable for some time, it is unlikely that many governmental or private actors are induced to rely on precedent.

164. Efficiency argues for stability here as it does everywhere. But stability in federal courts rules from one case to another is not necessary for psychological repose, or for investment in the future, or to respect reliance.

165. An example may be helpful here. At one point in the development of the *Pullman* abstention doctrine, the Court seemed to hold that litigants must present their federal claims to the state court. Government & Civic Employees v. Windsor, 353 U.S. 364, 365-66 (1957). When the plaintiff in England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964), followed this directive, and then tried to relitigate the federal issue in federal court, the Supreme Court held that litigants were bound by state court determinations, unless they reserved their rights to a federal court decision. This the plaintiff in *England* failed to do. Yet the Court declined to apply its new rule to the plaintiff, since he had no way of knowing that a reservation of rights was required. *Id.* at 422. *Cf.* O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54, 64 (7th Cir. 1979) (dismissal of pendent state claims was abuse of discretion because the statute of limitations, as amended, would render involuntary dismissals vulnerable to motions to dismiss).

166. "Economic cost is described as 'opportunity cost' because the cost arises from the foregone opportunities of the resources in question." M.J. BRENNAN, THEORY OF ECONOMIC STATISTICS 139 (2d ed. 1970).

These benefits are greater in some doctrinal contexts than others, and they are especially high in the law of federal courts.

One reason is that the law of federal courts addresses fundamental questions of separation of powers and federalism. It deals with the role of courts in our system of government, their relations with the other branches, and the distribution of power between federal and state courts. If on mundane matters of private law it is often more important that an issue be settled, than that it be settled correctly, the opposite is true with respect to basic matters of governmental structure. Here it is often "more important that things be settled correctly than that they be settled for the sake of settlement."[167]

The most prominent application of this principle is the Supreme Court's practice of according precedent comparatively little weight in constitutional adjudication,[168] partly because the issues are especially important and partly because the Court's decisions on constitutional issues cannot easily be changed by the other branches. Although some federal courts issues are themselves of constitutional dimension,[169] the Court's special rule for constitutional matters is hardly adequate by itself to account for the weakness of stare decisis in federal courts law. Most federal courts questions are matters of statutory interpretation[170] or common law rules,[171] and yet precedent counts for little throughout the area. One of the insights that may be gleaned from

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167. Schauer, *supra* note 23, at 598. My claim is not that federal courts law is an especially important area of the law from the perspective of the Supreme Court. The Supreme Court possesses severely limited resources and an overwhelming demand for their use. Almost every case the Court chooses to review is highly significant, and the critical nature of the issues may count against stare decisis in virtually all of them. The relevant comparison here is between federal courts law and the whole range of state and federal law.

168. *See, e.g.*, United States v. Scott, 437 U.S. 82, 101 (1978) ("in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting))). In *Scott*, the Court overruled United States v. Jenkins, 420 U.S. 358 (1974), which held that the government had no right to an appeal, whether or not a dismissal of an indictment after jeopardy had attached amounted to an acquittal on the merits, because further procedure devoted to resolution of factual issues would be required and that would offend the double jeopardy clause. *Scott*, 437 U.S. at 100-01. The *Scott* Court held that an appeal by the government from a defendant's successful effort to terminate his trial without any submission as to guilt or innocence does not offend the double jeopardy clause. *Id.*

169. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (the eleventh amendment bars state law suits against state officials).

170. Relevant statutes include, among others, 28 U.S.C. § 1257 (1982) (Supreme Court review of state judgments); 28 U.S.C. § 1331 (1982) (federal question jurisdiction); 28 U.S.C. § 1332 (1982) (diversity jurisdiction); 28 U.S.C. § 1441 (1982) (federal question removal); 28 U.S.C. § 1443 (1982) (civil rights removal); 28 U.S.C. § 1738 (1982) (full faith and credit to state judgments); 28 U.S.C. § 2201 (1982) (declaratory judgments); 28 U.S.C. § 2241-55 (1982) (post-conviction relief); 28 U.S.C. § 2283 (1982) (anti-injunction); 42 U.S.C. § 1983 (1982) (civil rights).

171. *See* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 570-74 (1985).

a study of precedent in the federal courts context is that the importance of the issues may be enough standing alone to weaken the force of stare decisis without the special problem of rigidity posed by constitutional rules.

Besides the importance of federal courts issues, other circumstances also contribute to the high opportunity cost of precedent. If most members of the Supreme Court were apolitical and skeptical of their ability to improve the law, precedent might weigh heavily even on important federal courts and constitutional issues. But neither of these conditions is met. Supreme Court Justices have never been known for modesty or lack of self-confidence. A lifetime of ambition and achievement is a virtual prerequisite for someone seeking appointment to the Court. A candidate "must have proven himself to have discernment in matters of complexity, steadiness in matters of difficulty, and coolness in matters of controversy."[172] The sort of person who meets these criteria is not likely to shrink from repudiating or ignoring cases he thinks are wrong.

Perhaps even the most self-assured Supreme Court Justice would shy away from rethinking highly specialized areas of the law with which he is unfamiliar, like constitutional limits on state taxation, state boundary disputes, and admiralty law. In contrast, the policy issues raised by federal courts cases bear on the institutional role of the federal courts, and in particular the Supreme Court, in our system of government. This is a topic to which virtually every Supreme Court Justice, whatever his politics, will feel he brings some expertise. From the perspective of judicial psychology, it must be especially difficult for the members of the Court to let matters stand as they are in the law of federal courts.[173]

Politics may be the most critical factor of all in explaining the doctrinal instability in federal courts law. Over the past thirty years we have witnessed two quite different majorities on the Court, both of them highly ideological in character. The rise of the liberal Warren Court, soon followed by a more conservative majority under Warren Burger, probably accounts for much of the recent turmoil in federal courts doctrine. The ensemble of changes brought about by the Court of the 1960's are not an ad hoc collection of improvements in jurisdictional rules. They reflect a common ideological theme, in which state sovereignty interests are weak and the federal courts have a special mission to hold other branches of the government within constitutional limits, and a far more prominent part than state courts in enforcing constitutional rights against state governments.[174]

In keeping with this expansive view of federal judicial power, the Warren Court's departures from precedent, as well as its rulings on open questions,

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172. Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 21 (1978).

173. *Cf.* Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 846 (1988) ("I predict a careful study would show that judges who know more about a particular field of law are less deferential toward precedent than . . . judges who know less about the same field").

174. *See* Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1146-47, 1158-64 (1988).

helped to broaden access to the federal courts for persons with constitutional claims. For instance, *Flast*[175] broke down the *Frothingham*[176] barrier to litigating generalized grievances where an establishment clause violation is at issue. The "deliberate bypass" test of *Noia*[177] relaxed the earlier rigorous rule precluding federal habeas corpus when the petitioner's lawyer had committed a procedural default in state court. *Dombrowski*[178] opened the federal courts to many suits seeking to enjoin state proceedings on constitutional grounds.

Presidents Nixon and Reagan campaigned against the judicial activism of the Warren Court. Most of their appointments, joined by Justice White, combined in the 1970's and 1980's to form a majority for cutting back the role of federal courts in adjudicating constitutional claims. The ideological premises of the new majority are diametrically opposed to those of the Warren Court. State sovereignty is considered a fundamental value, deserving respect even when it conflicts with the effective enforcement of constitutional rights, and the state courts should play at least as important a role as the federal courts in adjudicating constitutional challenges to state action.[179]

Proceeding from these ideas about the role of the federal courts, the Supreme Court in *Valley Forge*[180] undercut *Flast*.[181] *Sykes*[182] destroyed *Noia*[183] and *Younger*[184] shut the door opened by *Dombrowski*.[185] To be sure, *Long*[186]

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175. 392 U.S. 83 (1968). *See also* Baker v. Carr, 369 U.S. 186 (1962) (permitting voters to challenge legislative apportionment decisions).

176. 262 U.S. 447 (1923).

177. 372 U.S. 391 (1963). *See also* Henry v. Mississippi, 379 U.S. 443 (1965) (relaxing procedural default barriers to direct review by the Supreme Court of state judgments); Jones v. Cunningham, 371 U.S. 236 (1963) (relaxing custody requirement for federal habeas corpus).

178. 380 U.S. 479 (1965).

179. *See* Fallon, *supra* note 174, at 1146-47, 1151-57.

180. 454 U.S. 464 (1982).

181. 392 U.S. 83 (1968).

182. 433 U.S. 72 (1977). *See also* Murray v. Carrier, 477 U.S. 478 (1986) (federal habeas corpus petitioner cannot show cause for procedural default by establishing that counsel's failure to raise a claim of action was inadvertent); Smith v. Murray, 477 U.S. 527 (1986) (petitioner defaulted his underlying constitutional claim by failure to raise a claim of error on appeal).

183. 372 U.S. 391 (1963).

184. 401 U.S. 37 (1971) (federal courts will not enjoin pending state criminal prosecutions except to prevent great and immediate irreparable injury). *See also* Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 628-29 (1986) (Court refused to enjoin Commission from exercising its jurisdiction to investigate sex discrimination); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 113 (1981) (principal of comity bars taxpayer's damage action brought in federal court); Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975) (federal judicial interference principles apply in civil cases). *But see* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (municipal governments have no immunity to section 1983 suits); Monell v. Dep't of Social Servs., 436 U.S. 658, 688-89 (1978) (municipal governments are "persons" who may be sued under section 1983, overruling Monroe v. Pape, 361 U.S. 167 (1961), on this issue).

185. 380 U.S. 479 (1965).

186. 463 U.S. 1032 (1983).

broadened Supreme Court review, but the expansion helps the state far more than the individual with a constitutional claim, since it applies mainly to cases where the constitutional claimant won in state court. In such circumstances the primary beneficiary of Supreme Court review is the state, for only the loser typically stands to gain much from appellate review.[187]

This description of political conflict in federal courts decisionmaking borrows heavily from the work of Richard Fallon.[188] Fallon demonstrates convincingly that this area of the law is "wracked by internal contradictions"[189] and traces the problem to a conflict between competing views of proper governmental structure, which he labels "Nationalist" and "Federalist."[190] The work of the Warren Court, with its emphasis on the predominance of national law and federal courts, manifests "Nationalist" premises, while the Burger Court's stress on state sovereignty and a big role for state courts in constitutional decisionmaking reflects "Federalist" thought. According to Fallon, "the acceptance within federal courts law of antithetical starting points for analysis gives rise to substantial doctrinal instability."[191]

Consider the import of Fallon's analysis for stare decisis. The doctrinal schism Fallon describes cannot be due *merely* to disagreements between judges about the best theoretical starting point for making jurisdictional rules. In a regime where precedent mattered a great deal, the prior resolution of an issue would itself be enough to overcome a judge's doubts about its wisdom. The doctrinal instability Fallon elaborates in his article, and the ideological divide he identifies between two sets of cases, strongly suggest that the Justices place a low value on precedent in federal courts law, and do so in part because reforming the content of the law, in pursuit of a variety of political goals, is a more important agenda for them than furthering the values of stability and efficiency that are served by adherence to precedent.

CONCLUSION

My aim has been to describe and explain the instability that permeates federal courts doctrine. Let me briefly address the normative issue. Does the Court deserve criticism for its disregard of precedent? To what extent can the explanations offered here serve to justify the Court's practice? Some of the reasons identified in the foregoing discussion are less compelling than others. In particular, the normative force of the considerations bearing on the costs associated with adherence to precedent is problematic. If Supreme Court Justices are unlikely to be humble, tend to think they can improve

187. *See* Wells, *supra* note 160, at 508-09.

188. *See* Fallon, *supra* note 174.

189. *Id.* at 1142.

190. For his descriptions of these two groups of premises, see Fallon, *supra* note 174, at 1151-64.

191. *Id.* at 1164.

areas of the law with which they are familiar, and put ideological goals above stability in the law, then we might be better off with a less assertive and political Court. On the other hand, I am persuaded that the need for stability is comparatively weak in doctrinal contexts where the rules do not bear directly on primary activity. This feature of jurisdictional rules fatally undercuts the case for more respect for precedent in federal courts law.

Bear in mind the difference between the justification of a practice and the motivations of the actors who implement it. Supreme Court Justices who accord precedent little weight may well be motivated primarily by their own self-confidence or an ideological agenda or both. For them, there may be nothing distinctive about the law of federal courts. Their practice in federal courts cases may be merely one aspect of a general inclination against precedent as a rule of decision. But the viability of a weak doctrine of precedent does not rest solely on the motivations of judges. Even if we reject judicial activism and the pursuit of ideological goals as persuasive justifications for the Court's practice, weak regard for precedent in federal courts cases may still be defended in terms of the comparative unimportance of stability in this doctrinal context.

Accordingly, it is useful to distinguish between the Court's lax doctrine of precedent in constitutional cases and its disregard for stare decisis in adjudicating federal courts matters. Whatever may be the proper general approach to the former class of cases, the Court's treatment of the latter can be defended by reference to peculiarities of the federal courts context. A subordinate role for stare decisis is neither uncharacteristic of the history of federal courts doctrine nor out of keeping with the role of precedent in the legal order.

Note the implications of this conclusion for the future of federal courts law. One day the composition of the Court will change, and with it the Court's substantive agenda. A Court committed to expanding federal jurisdiction in order to better vindicate federal rights will have to deal with the precedents left by the majorities of the 1970's and 1980's. If I am right about the proper approach to precedent in federal courts cases, this hypothetical future majority should feel few qualms about overruling or eviscerating the current doctrine.